Constitutional Law

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§ 1 Overview

1.1 Separation of Powers, Federalism, and Reconstruction

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   (b) Does the Bill of Rights apply to the states? How?
   (c) What rights does the Fourteenth Amendment protect? Does it create new rights?
   (d) How would the Court today answer the butchers' due process and equal protection claims in *Slaughter-House*?
   (e) Does "separate but equal" violate due process? Equal protection?
   (f) Would "separate but equal" violate due process or equal protection if the Court had found that it *does* stamp a "badge of inferiority"?
2. *Ware v. Hylton* (1796, Iredell): the Court assumed the power to review state legislation under the Supremacy Clause.
3. *Marbury v. Madison* (1803, Marshall): the court held the Judiciary Act of 1789 to be unconstitutional because in granting the Court original jurisdiction in acts by government officials, Congress exceeded its constitutional power.
   (a) **Judicial review**: the Court has the final say in constitutional interpretation. "It is emphatically the province and duty of the judicial department to say what the law is."[1]
4. *Dred Scott v. Sandford* (1857, Taney): Congress cannot ban slavery in the states.
5. *The Slaughter-House Cases* (1873, Miller): the Privileges and Immunities Clause forbade state infringement of the rights of *national* citizenship, but not the rights of state citizenship. A broader interpretation would "fetter and degrade" the states.[2] The Bill of Rights does not apply to the states—at least not through Privileges and Immunities.
   (a) Field, dissenting: the Fourteenth Amendment *does* protect U.S. citizens against violations by state legislatures of "common rights" (i.e., inalienable natural rights, like the right to property and to pursue happiness)[3]
   (b) The Fourteenth Amendment prevents states from infringing on the liberty of *all* people, not just blacks.

[1] Casebook p. 116.
[2] Casebook p. 325.
[3] Casebook p. 327.

   (c) The Fourteenth Amendment granted the federal government power to protect citizens' fundamental rights against oppression by the states.

   (d) Bradley, dissenting: the Fourteenth Amendment guaranteed the butchers the liberty of employment—an early version of substantive due process.

6. *Bradwell v. Illinois* (1873, Miller): the Fourteenth Amendment did not transfer the power to regulate professional licenses to the federal government. It remains with the states.

   (a) Bradley, concurring: women belong in the domestic sphere. Women lack rights because of their "obligations to home and hearth."[4]

7. *Minor v. Happersett* (1875, Waite): citizenship does not confer suffrage. The Fourteenth Amendment did not create new privileges or immunities. It only furnished additional protections for existing rights.

8. *Plessy v. Ferguson* (1896, Brown): the Fourteenth Amendment abolished *legal* but not *social* distinctions between races. "Separate but equal" does not impose a "badge of inferiority."[5]

   (a) Harlan, dissenting: "Our Constitution is color-blind, and neither knows nor tolerates classes among the citizens."[6]

1.2 *Lochner* and Substantive Due Process

1. Questions:

   (a) Is there a principled way to reconcile the *Lochner*-era opinions that appear inconsistent (e.g., upholding regulations protecting coal miners but not bakers)?

   (b) Should the Court avoid endorsing an economic theory? Or was the problem with *Lochner* that it endorsed the wrong theory?

   (c) How does Lochnerism relate to classic liberalism?

   (d) Why did the Court find that lottery tickets are harmful and thus within Congress's power to regulate under the Commerce Clause (*Champion*), but goods produced with child labor are not (*Hammer*)?

   (e) Should Congress's Commerce Clause authority depend on whether the regulated activity is "harmful"? Who should decide what's "harmful"?

   (f) How did the *Lochner*-era court define "liberty"?

[4] Casebook p. 339.
[5] Casebook p. 361.
[6] Casebook p. 363.

2. *Lochner v. New York* (1905, Peckham): New York cannot limit the number of hours a baker can work because the regulation violates the Due Process Clause's protection of liberty.

   (a) Harlan, dissenting: when states pass legislation aimed at protecting public health and safety, the Court should strike it down only if it "has **no real substantial relation** to those objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[7] This was an early version of rational review—see *Carolene* below.

   (b) Holmes, dissenting:

      i. The majority's opinion rests on an economic theory (presumably, laissez faire and social Darwinism). "[A] constitution is not intended to embody a particular economic theory . . . "[8]

      ii. "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion [as expressed through the legislature], unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles . . . "[9]

   (c) **Lochnerism**: the Court strikes down regulation as infringing on economic liberty, endorsing laissez-faire economics and limiting states' power to enact social welfare legislation.

   (d) Problems with Lochnerism:

      i. Is the freedom to contract a fundamental right?

      ii. The *Lochner*-era Court was inconsistent—e.g., upholding regulations for coal miners but not for bakers.

      iii. The Court substituted its own values for those of legislatures.

3. *Champion v. Ames* (1903, Harlan): Congress can regulate interstate mailing of lottery tickets. Congress can use its Commerce Clause powers to protect commerce as well as promote public policy goals.

   (a) Fuller, dissenting: lottery tickets are not "articles of commerce." Congress should not exercise police powers via the Commerce Clause.

4. *Hammer v. Dagenhart* (1918): Congress can use its Commerce Clause power only to regulate harmful activity. Lottery tickets are harmful, but child labor is not.

   (a) Congress has the power to regulate (and therefore prohibit) interstate commerce. Whether its regulations indirectly affect economic activity within the states is irrelevant to the exercise of its authority.

[7] Casebook p. 420.
[8] Casebook p. 422.
[9] Casebook p. 422.

1.3 Economic Due Process

1. Questions:
   (a) What is economic due process? How does it differ from substantive and procedural due process?
   (b) Was Roosevelt's court packing scheme legitimate?
   (c) What was the *Carolene* Court's justification for substituting rational review for *Lochner*'s heightened review?
   (d) Doesn't a minimum wage law (upheld in *West Coast Hotel*) restrict liberty in the same way as a maximum hours-per-week law (struck down in *Lochner*)? How did the Court's understanding of liberty change from *Lochner* to *Carolene*? Did the *Carolene* court disagree with *Lochner*'s reasoning or its political outcome (or both)?
   (e) Is Footnote Four dictum?
   (f) In *Lee Optical*, why didn't the Court consider opticians a discrete and insular minority?
2. After the Civil War, the Bill of Rights increasingly applied to the states via the Fourteenth Amendment.
3. *West Coast Hotel v. Parrish* (1937, Hughes): upholding a state minimum wage law, the Court held that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[10]
4. *United States v. Carolene Products* (1938, Stone): the Court upheld a prohibition on interstate commerce in filled milk. The Court should presume the constitutionality of regulation unless it does not "rest upon some **rational basis**."[11]
   (a) **Footnote four**: the Court should apply heightened scrutiny to provisions that (1) facially violate constitutional provisions, (2) distorts political processes, or (3) affects discrete and insular minorities.[12]
5. *Williamson v. Lee Optical* (1955): the Court upheld regulations requiring licenses to do optical work. The Court will uphold regulation if it can imagine a rational purpose, regardless of legislative intent.

1.4 Expansion of the Commerce Clause

1. Questions:
   (a) How does the rationale in *Wickard* differ from the rationale in *NFIB v. Sebelius*?

[10] Casebook p. 516.
[11] Casebook p. 515.
[12] Casebook p. 515.

(b) Is it possible to reconcile *Hammer* with the post-1937 Commerce Clause cases?

(c) Does *Darby* mean that Congress is free to regulate interstate commerce for noneconomic reasons? Or does it mean that courts should not try to discern Congress's motives as long as the regulation is a valid exercise of its commerce clause power?[13]

(d) Does the Commerce Clause give Congress general police powers? Is that legitimate?

(e) How do the theories of Ackerman ("constitutional moments") and Levinson and Balkin ("partisan entrenchment") explain the New Deal shifts in the Court's application of the Commerce Clause and the Due Process Clause?

2. *NLRB v. Jones & Laughlin* (1937, Hughes): companies affect interstate commerce when they interfere with organizing and collective bargaining. "Although activities may be intrastate in character when separately considered, if they have such a **close and substantial relation** to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[14]

3. *United States v. Darby* (1941, Stone): Congress's freedom to exercise its Commerce Clause powers do not depend whether "its exercise is attended by the same incidents which attend the exercise of the police power of the states."[15] Congress can also act as a central coordinator to prevent unfair competition between states.

4. *Wickard v. Filburn* (1942, Jackson): " . . . even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a **substantial economic effect on interstate commerce** . . . "[16]

1.5 Race

1. Questions:

(a) To prove an equal protection violation, should you have to prove discriminatory intent, disparate impact, or both? Can a strong enough showing of discriminatory impact establish a prima facie case of discriminatory intent (*Yick Wo)*? Do people always intend the "natural consequences" of their actions (Stevens concurring in *Davis*)?

(b) Should the evidentiary standard for establishing discriminatory intent depend on the context, e.g., education vs. employment?

[13] Casebook pp. 554–55.
[14] Casebook p. 550.
[15] Casebook p. 551.
[16] Casebook pp. 553–54.

(c) What was *Brown*'s rationale? Is the holding legitimate if the rationale is unclear (or missing)?

(d) If "separate but equal" facilities were truly equal, would they still violate equal protection? Before *Brown*, the NAACP pushed to improve the quality of separate facilities. Is Warren right that "[s]eparate educational facilities are inherently unequal"?

(e) If the Southern Manifesto is right that the authors of the Fourteenth Amendment did not intend it to affect segregation in schools, would *Brown* be wrong? Could *Brown*'s positive consequences (e.g., stigmatizing arguments in favor of segregation) redeem it even if it contradicts the framers' intent?

(f) How does *Brown* use social science? Does *Brown*'s use of social science contradict legal precedent?

(g) To what forms of racial segregation did *Brown* apply? Did its holding extend beyond education? "*Brown* did not proscribe racial classification or declare it suspect. Rather, it addressed the harmful consequences of separating school children in a particular institutional context."[17]

(h) Should the Court intervene to remedy resegregation resulting from private action, like white flight (*Milliken*)?

(i) Could the Court have decided *Brown* on due process grounds?

(j) What's the relationship between equal protection and due process in *Loving*?

(k) Should we require legislators to confront the racial impact of their policies (like environmental impact statements, which we already require)?[18]

(l) Why do racial quotas violate the Fourteenth Amendment?

(m) Does the *Feeney* standard account for cognitive bias and unconscious racism? Should it?

(n) When is statistical evidence of discriminatory impact strong enough to show discriminatory purpose? Compare *Yick Wo* (finding a discriminatory purpose from statistical evidence showing that Chinese laundromat operators were regularly denied permits) and *McCleskey* (finding no discriminatory purpose despite statistical evidence that in Georgia, blacks were significantly more likely than whites to receive the death penalty, especially when killing whites).

(o) Under the current doctrine, could public universities implement affirmative action programs based on gender? Or wealth, or alienage?

(p) Why not extend the goal of enhancing cross-racial understanding to civil service jobs, or all jobs (Scalia in *Grutter*)?

[17] Casebook p. 958.
[18] Casebook p. 1034.

2. Three types of race cases:
   (a) **Jim Crow**: formal, overt racial distinctions.
   (b) **Disproportionate impact**: no overt discrimination, but the decision impacts certain groups more than their size warrants. How should the law respond? Do you need to prove intent?
   (c) **Affirmative action**: racial classification for remedial purposes.
3. *Chae Chan Ping vs. United States* (1889, Field): there are no limits on Congress's power to regulate immigration by discriminating on the basis of race or national origin (though today, administrative agencies cannot discriminate).
4. *Korematsu v. United States* (1944, Black): **strict scrutiny** will invalidate a government's violation of the rights of a **suspect class** unless a necessary government interest justifies the violation.
5. *Brown v. Board of Education* (1954, Warren): " . . . in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[19]
   (a) *Brown II* (1955, Warren): local courts are responsible for implementing *Brown*. Desegregation need not be immediate.
   (b) The "Southern Manifesto": the framers of the Fourteenth Amendment did not intend it to affect education. Indeed, the Amendment's authors were the same men who voted to segregate Washington, D.C.'s schools.
6. *Milliken v. Bradley*, (1974, Burger): for the first time since *Brown*, the Court found that a district court had gone too far in remedying segregation. The lower court found that only one district had intentionally discriminated, so the Supreme Court was unwilling to grant an interdistrict remedy.
   (a) Justice White, dissenting: an interdistrict remedy would be more effective under the circumstances than an intracity remedy.
   (b) Justice Marshall, dissenting: the school board was acting as an agent of the state. Since the state was responsible, an interdistrict remedy should have been available.
   (c) The Court later held that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications."[20] Constitutional remedies are limited when white flight effects resegregation.

[19] Casebook p. 902.
[20] Casebook p. 945.

7. *Hernandez v. Texas* (1954, Warren): the Court developed a two-part test for identifying race-based equal protection violations. First, is there a distinct class? Second, is there systematic discrimination against that class?

   (a) This is similar to the rationale for *Brown*, but here the reasoning is explicit.

8. *Loving v. Virginia* (1967, Warren): when race is involved in any way, the Court moves from rational review ("any legitimate state interest") to strict scrutiny ("compelling government interest"). Race is intimately tied to group subordination.

   (a) *Loving* also struck down the last pillar of Jim Crow—antimiscegenation laws—and held that racial discrimination implicates both equal protection (i.e., equality) and due process (i.e., liberty).

9. When should courts inquire into whether a decision was race-dependent?

   (a) *Yick Wo v. Hopkins*—Discriminatory Administration of an Otherwise "Neutral" Statute: the San Francisco Board of Supervisors granted laundromat permits to nearly all of 80 Caucasion applicants and none of 200 Chinese applicants. The Court held that there was no reason for it except to express hostility to a group.

   (b) "Queue Ordinance Case": *Ho Ah Kow v. Nunan*—The Race-Dependent Decision to Adopt a Nonracially Specific Regulation or Law: every male prisoner's hair had to be cut to within one inch. The practical effect was to coerce Chinese people into paying fines, because they dreaded the cutting of the queue (a braid they held sacred).

      i. **Gomillion v. Lightfoot**): the Alabama legislature changed the boundaries of Tuskegee from a square to "an uncouth twenty-eight-sided figure."[21] The sole purpose was to segregate voters by race.

   (c) *Gaston County v. United States*—Transferred De Jure Discrimination: a voting literacy test disproportionately disenfranchised blacks. The Court held that years of inferior education meant that blacks were less equipped to pass the test, so the test was discriminatory.

10. *Griggs v. Duke Power* (1971, Burger): Title VII prohibits employers from requiring job applicants to have high school diplomas and pass a general intelligence test without showing that those criteria predict job performance. The Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but **discriminatory in operation**."

[21] Casebook p. 1023.

11. *Washington v. Davis* (1976, White): the Court declined to read the *Griggs* "disparate impact" standard into the Fourteenth Amendment. A law is not unconstitutional "*solely* because it has a racially disproportionate impact."[22]

12. *Arlington Heights v. Metropolitan Housing Corp.* established factors that courts can use to determine when government decisions are racially motivated:

    (a) The impact of the action, including patterns that emerge.

    (b) The decision's historical background.

    (c) The sequence events leading up to the decision.

    (d) "Departures from the normal procedural sequence."[23]

    (e) Substantive departures from normal procedure.

    (f) Legislative or administrative history.

13. *United Jewish Organizations of Williamsburg v. Carey* (1977, White): states can base decisions on race as long as stigma is not involved.

    (a) Stewart, concurring: racial awareness is not unconstitutional per se. If there is no disparate impact (*Davis*) and no discriminatory intent, there is no constitutional violation.

    (b) Brennan, concurring: benign racial classifications can have invidious results—for instance, they can "serve to stimulate our society's latent race consciousness."[24]

14. *University of California v. Bakke* (1978, Powell): *all* racial classifications are suspect, even if benign. The Davis program had four goals: (1) reduce the historic deficit of minorities in medical school and the medical profession, (2) counter the effects of societal discrimination, (3) increase the number of physicians who will work in underserved communities, and (4) obtain the educational benefits that flow from a **diverse student body**. The Court invalidated all but the last.

    (a) Blackmun, concurring and dissenting: race-neutral affirmative action is impossible. "[I]n order to treat some persons equally, we must treat them differently."[25]

    (b) Marshall, concurring and dissenting: our long history of racial inequality created a range of present inequalities. The Fourteenth Amendment does not prohibit remedies for past discrimination.

[22] Casebook p. 1027.
[23] Casebook p. 1040.
[24] Handout p. 3.
[25] Handout p. 8.

15. *Richmond v. Croson* (1989, O'Connor): race-based classifications are subject to strict scrutiny. Race-based affirmative action programs must be related to a compelling government interest—the same standard as programs that intentionally discriminate *against* racial groups.

16. *Adarand v. Pena* (1995, O'Connor): the *Croson* rule—that any racial classification is subject to strict scrutiny—applies to Congressional actions as well as state and local actions.

17. *Personnel Administrator of Massachusetts v. Feeney* (1979, Stewart): the Court elaborated the *Davis* discriminatory purpose requirement, holding that foreseeable impact "was not sufficient to prove discriminatory purpose under the Equal Protection Clause":

    (a) "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part **'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.**"[26]

18. *McCleskey v. Kemp* (1987, Powell): statistical evidence of discriminatory impact (at least in this case) is insufficient to prove discriminatory intent.

    (a) Brennan, dissenting: race was a major factor in McCleskey's death sentence. Racism remains.

    (b) Blackmun, dissenting: the statistical evidence showed that McCleskey was a member of a distinct class singled out for different treatment. The burden should have shifted to the sttae to rebut evidence of discriminatory intent.

19. *Grutter v. Bolinger* (2003, O'Connor): following *Bakke*, the court held that any use of race warrants strict scrutiny, which requires a compelling governmental interest. Student body diversity is such an interest. The affirmative action program must also be narrowly tailored.

    (a) Rehnquist, dissenting: this program was not narrowly tailored, and it operated like a quota system.

    (b) Kennedy, dissenting: the school has not shown that individual assessment was safeguarded throughout the process. The Court is too deferential.

    (c) Scalia, dissenting: why not extend the goal of enhancing cross-racial understanding to civil service jobs, or all jobs?

    (d) Thomas, dissenting: racial diversity is not a compelling government interest.

[26] Casebook p. 1031.

20. *Gratz v. Bollinger* (2003, Rehnquist): universities using point systems for admissions cannot grant automatic bonuses to minority applicants because of their race.

21. *Parents Involved in Community Schools v. Seattle School District No. 1* (2007, Roberts): schools cannot consider race when assigning students to schools, even if racial imbalances exist between schools.

22. *Ricci v. DeStefano* (2009, Kennedy):

1.6 Gender

1. Questions:

   (a) How would *Bradwell* be decided today?

   (b) *Reed* was an equal protection case. *Frontiero* was a due process case. How do the Court's analyses differ?

   (c) Catherine MacKinnon: "Socially, one tells a woman from a man by their difference from each other, but a woman is legally recognized to be discriminated against on the basis of sex only when she can first be said to be the same as a man."[27] How does this apply to *Frontiero*?

   (d) Why does the Court apply different standards of review for race and gender classifications?

   (e) What was wrong with Brennan's rationale in *Frontiero* for applying heightened scrutiny to gender classifications?

   (f) Why do we allow "separate but equal" facilities for different genders but not different races?

   (g) Does Ginsburg's "exceedingly persuasive justification" standard of review in *VMI* differ from the standards for gender classifications in earlier cases?

2. *Bradwell v. Illinois* (1873, Bradley, concurring): the Court rejected an early attempt to apply the Fourteenth Amendment to sex discrimination. Similarly, the right to vote is not a privilege or immunity.[28]

3. *Adkins v. Children's Hospital* (1923, Sutherland): a minimum wage law for women violated freedom of contract. Overruled in *West Coast Hotel* (1937).

4. *Reed v. Reed* (Burger, 1971): while purportedly applying rational review, the Court struck down an Idaho law that preferred men over women as estate administrators as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[29]

[27] Casebook p. 1211.
[28] Casebook p. 1180.
[29] Casebook p. 1183.

5. *Frontiero v. Richardson* (1973, Brennan): gender-based classifications require heightened scrutiny. Intermediate scrutiny as the standard won a plurality, not a majority. The majority adopted it in *Craig*.

6. Race-gender analogies involve two strategies: (1) asking whether the rationales for declaring race a suspect class also apply to gender, and (2) identifying the features of race that make it special and asking whether gender shares those features.

7. There are important differences between race and gender—e.g., race has a history of disdain and overt subordination, while gender has a history of paternalism and less overt subordination.[30] See § 4.3.2.1.

8. *Craig v. Boren* (1976, Brennan): the Court adopted intermediate scrutiny for gender classifications, adopting the plurality view from *Frontiero*. "To regulate in a sex-discriminatory fashion, the government must demonstrate that its use of sex-based criteria is "substantially related" to the achievement of "important government objectives"." It never explained why it employed different standards for race and gender.[31]

9. *Baker v. State* (1999): the Vermont Supreme Court held that sex-based marriage restrictions violated the state's constitution by enforcing sex stereotypes without any legitimate reason.[32]

10. *J.E.B. v. Alabama* (1994, Blackmun): gender-based peremptory challenges are not allowed.

11. *Personnel Administrator of Massachusetts v. Feeney* (1979, Stewart): if a statute has a disparate impact on one gender, it is invalid only if the legislature passed it *because of* a desire to discriminate, not merely *in spite of* knowledge that a disparate impact would result.

12. *Geduldig v. Aviello* (1974, Stewart): legislation that differentiates between sexes based on biological factors is not necessarily discriminatory. Applying the *Feeney* principle, the Court held that pregnancy was not a pretext for the legislature to invidiously discriminate against women.

13. *Michael M. v. Superior Court of Sonoma* (1981, Rehnquist): although they involve gender discrimination, statutory rape laws are substantially related to the important government objective of preventing teenage pregnancies.

14. *The VMI Cases: United States v. Virginia* (1996, Ginsburg): single-gender education is permissible as long there are separate but equal facilities for both males and females. Any gender-based state action requires an "exceedingly persuasive justification."

[30] Casebook pp. 1206–07.
[31] Casebook p. 1214.
[32] Casebook pp. 1221–22.

(a) Rehnquist, concurring: Ginsburg's standard of review departs from earlier standards, introducing uncertainty. Also, "it is not the 'exclusion of women' that violates the Equal Protection Clause, but the maintenance of an all-men's school without providing any—much less a comparable—institution for women."[33]

(b) Scalia, concurring: single-sex education can carry substantial benefits, so it is "substantially related" to a state's educational interests.[34]

1.7 Modern Substantive Due Process

1. Questions:

   (a) Douglas rejected Lochnerism in *Griswold* ("[w]e do not sit as a superlegislature . . . "[35]). But is his analysis actually different from *Lochner*?

   (b) Why was *Griswold* a due process case while *Eisenstadt* was based on equal protection?

   (c) Is Ginsburg right that the Court should have waited to decide on abortion because of *Roe*'s political backlash?

   (d) Could *Roe* have been decided on equal protection grounds? Should it have been?

   (e) Why did the court decide *Bowers* on due process grounds but *Lawrence* on equal protection grounds?

   (f) Should sexual orientation be a suspect classification?

   (g) Why is wealth not a suspect classification while alienage is? Why do we recognize legal aliens as a suspect class (*Graham*) but not undocumented aliens (*Plyler*)?

2. *Griswold v. Connecticut* (1965, Douglas): the Court invalidated a Connecticut statute outlawing contraceptive use. The the Bill of Rights casts a "penumbra" that creates a "zone of privacy."[36] The Fourteenth Amendment protects this liberty from state infringement.

   (a) Goldberg, concurring: marital privacy is implied in the Ninth Amendment as a "fundamental and basic" right.

   (b) Harlan, concurring: the liberty guaranteed by the Due Process Clause is not limited to the precise terms of the rest of the Constitution. It protects **"basic values 'implicit in the concept of ordered liberty.'"**

[33] Casebook p. 1241.
[34] Casebook pp. 1243–44.
[35] Casebook p. 1343
[36] Casebook p. 1343.

   (c) White, concurring: the statute *could* withstand strict scrutiny if it were substantially related to the stated goal (to deter illicit relationships)—but it's not.

   (d) Black, dissenting: there is no fundamental constitutional right to privacy. The Court cannot reliably discern "fundamental principles of liberty and justice."[37]

3. *Eisenstadt v. Baird* (1972, Brennan): a statute banning contraceptives for (among other things) preventing pregnancy for unmarried couples violated the Equal Protection Clause because of its distinction between married and unmarried couples. But the court avoided the question of whether access to contraception is a fundamental right.

4. *Roe v. Wade* (1973, Blackmun): "This right of privacy, whether it be founded in the Fourteenth Amendment's conception of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservations of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." Forcing a woman to continue a pregnancy imposes physical and psychological burdens. Because abortion is a fundamental right, the standard is strict scrutiny. The state has a compelling interest in protecting the mother's health after the first trimester, and in protecting prenatal life after the second trimester. But the first trimester can only be regulated like any other medical procedure.

5. *Planned Parenthood v. Casey* (1992, O'Connor): the Court upheld the right to abortion but also upheld notice requirements.

6. *Gonzalez v. Carhart* (2007, Kennedy): the Court upheld the Partial-Birth Abortion Ban Act, holding that the state had a substantial interest in protecting fetal life.

7. Sexual orientation and due process:

   (a) *Bowers v. Hardwick* (1986, White): the right to privacy (under due process) does not protect the right to engage in private homosexual activity.

8. Sexual orientation and equal protection:

   (a) *Romer v. Evans* (1996, Kennedy): there is no rational basis for discriminating against homosexuals solely because of animosity towards homosexuality.

   (b) *Lawrence v. Texas* (2003, Kennedy): states cannot prohibit private sexual activity between consenting adults of the same sex.

9. Same-sex marriage:

[37] Casebook p. 1351.

10. **Other suspect classifications and fundamental rights**:

    (a) *San Antonio Independent School District v. Rodriguez* (1973, Powell): wealth (or poverty) is not a suspect classification because it is large and amorphous. Education is an important right, but not a constitutionally guaranteed right. "Some inequality" among school districts is insufficient to warrant heightened review. The Texas system passed rational review.

    (b) *Graham v. Richardson*, (1971, Blackmun): legal aliens are a suspect class, calling for heightened scrutiny. The Court invalidated an Arizona law that required citizenship or 15 years of residence to receive welfare benefits.

    (c) *Bernal v. Fainter* (1984, Marshall): a Texas law required notary publics to be US citizens. Alienage classifications warrant suspect classifications. The **"political function" exception** allowed alienage discrimination for "positions intimately related to the process of democratic self-governance." The Court held that notary publics did not qualify for the political function exception, so it struck down the Texas law.

    (d) *Plyler v. Doe* (1982, Brennan): intermediate scrutiny applies to laws affecting children because of their immigration status.

1.8 Modern Commerce Clause

1. Questions:

    (a) Why did Congress enact civil rights legislation on the authority of the Commerce Clause rather than the § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment?

    (b) Is Rehnquist in *Lopez* correct that if the Court accepted the government's arguments, then the federal government could regulate all areas of criminal law?

    (c) Does the modern definition of "commerce" go beyond the framers' definition? Did the framers intend to bind later generations to the same definition of commerce?

    (d) Could the federal government tax people who don't buy broccoli?

    (e) Is Scalia correct that abstention from commerce isn't commerce?[38] If so, how can the federal government argue that it has the power to create commerce where it doesn't exist?

2. *Heart of Atlanta Motel v. McClung* (1964, Clark): the Court unanimously upheld Title II as a valid exercise of Congress's Commerce Clause power, holding that the motel "stood readily accessible to interstate highways,

[38] *NFIB v. Sebelius*, handout p. 18.

advertised in various national media, and served a clientele 75 percent of which came from out of state."[39]

3. *Katzenbach v. McClung* (1964, Clark): the Court held that racial discrimination affects interstate commerce. It also held that rational review is the appropriate standard for Commerce Clause cases.

4. *United States v. Lopez* (Rehnquist, 1995): early Commerce Clause cases recognized Congress's authority to to (1) regulate activity that uses the *channels* of interstate commerce, (2) protect the *instrumentalities* of interstate commerce, and (3) regulate activities with a *substantial relation* to interstate commerce.[40] The government argued that guns have a substantial relation to interstate commerce. The Court disagreed, holding that if the government's theories were correct, the federal government could regulate all areas of criminal law under the Commerce Clause.

   (a) Thomas, concurring: we should eliminate the "substantial relation" test because it expands the definition of "commerce" beyond the framers' intent.

   (b) Stevens, dissenting: the welfare of commerce depends on education. Guns threaten education, so they also threaten commerce.

   (c) Souter, dissenting: the Court returns to pre-1937 "highly formalistic notions of 'commerce'" (e.g., *Hammer*).

   (d) Breyer, dissenting: gun violence has marked effects on education, and in turn, on commerce.

5. *National Federation of Independent Businesses v. Sibelius* (2012, Roberts): the Commerce Clause only gives Congress the power to regulate economic *activity*. It does not grant the power to *create* economic activity.[41] However, the individual mandate is valid under Congress's taxing power. " . . . it makes going without insurance just another thing the government taxes."[42]

   (a) Ginsburg, concurring and dissenting: the framers intended the Constitution to be a **"great outline"** with the "capacity to provide for future contingencies as they may happen . . ."[43] Congress had a rational basis for concluding that the uninsured substantially affected interstate commerce.

   (b) Scalia, dissenting: Abstention from commerce is not commerce.[44] The individual mandate directs the creation of commerce. There is not universal participation in the healthcare market, and the federal government has no power to mandate it.

[39] Casebook p. 560.
[40] Casebook pp. 601–02.
[41] Handout p. 5.
[42] Handout p. 10.
[43] Handout p. 11, quoting Hamilton in Federalist No. 34.
[44] Handout p. 18.

1.9 Limits on the Fourteenth Amendment

1. Questions:

   (a) Why did *Jones* rely on the Thirteenth Amendment and not the Fourteenth (either under equal protection or due process)?

   (b) How does *Boerne* help predict how the Court will rule in *Shelby County v. Holder*?

2. *Jones v. Alfred H. Mayer Co.* (1968, Stewart): Congress has the power under the Thirteenth Amendment to prohibit racial discrimination in the sale or rental of real estate (upholding the 1866 Civil Rights Act, authorizing Congress to determine "what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.").

   (a) Oregon v. Mitchell: was the only case between 1937 and 1987 to hold an act of Congress unconstitutional based on a lack of enumerated power. The Rehnquist Court signaled a shift towards limiting federal powers.

3. *City of Boerne v. Flores* (1997, Kennedy): Congress lacks the power "to determine what constitutes a constitutional violation."

4. *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder* (2009, Roberts): § 5 of the Voting Rights Act requires preclearance for electoral law changes in certain districts. The Court did not reach the question here, but strongly suggested that § 5 exceeds Congress's power.

§ 2 Interpreting the Constitution

2.1 Introduction to the Course

1. The Articles of Confederation:
   (a) Submitted to the states in 1777; took effect in 1781 when the last state, Maryland, assented.
   (b) ". . . a treaty among a group of small nations . . . "[45]
   (c) Voluntary taxes: "pompous petitions for charity."[46]
2. Feb. 1787: Congress authorized a convention "for the sole and express purpose of revising the Articles of Confederation"—but it led to the drafting of the new Constitution. [47]
3. Amendments to the Articles of Confederation needed the states' unanimous consent, but Article VII of the Constitution only required nine states' approval. Rhode Island rejected it and North Carolina postponed ratification. The Constitution took formal effect in June 21, 1788 when the ninth state, New Hampshire, ratified. By Washington's inauguration in 1789, 11 states had ratified.
4. **Necessary and Proper Clause**: "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers."[48]
5. Should there have been a Bill of Rights?
   (a) In Federalist 84, Hamilton responded to calls for a bill of rights: "the bill of rights . . . would afford a colourable pretext to claim more [powers] than were granted. For why declare that things shall not be done which there is no power to do? . . . it is evident it would furnish to men disposed to usurp, a plausible pretence for claiming that power."[49]
   (b) Anti-federalist responses to Hamilton's argument pointed out that the Constitution emphasizes limitations elsewhere, e.g., the limitation on granting titles of nobility.[50]
6. 1791: states ratified ten of twelve proposed amendments.
7. **Federalists**: Wanted to enhance the power of the federal government. Lost the election of 1800 and "utterly collapsed following its failure to adequately support the war of 1812."[51]

[45] Casebook p. 19.
[46] Casebook p. 19.
[47] Casebook p. 21.
[48] U.S. Const. art. I, § 8; casebook p. 4.
[49] Casebook p. 25.
[50] U.S. Const. art. I, § 9; casebook p. 26.
[51] Casebook p. 137.

8. **Anti-Federalists**: opposed the creation of a strong federal government and, later, opposed the 1787 constitution.
9. **Democratic-Republicans**: founded by Jefferson to oppose Hamilton, a federalist, in 1791.
10. **Separation of powers**: executive vs. judicial vs. legislative.
11. **Federalism**: federal government vs. states, i.e., limits on federal power.
12. **Political question doctrine**: the Supreme Court does not resolve political questions. Those questions are resolved through the political process.
13. Most Supreme Court cases do not involve constitutional issues.
14. States have general (but subordinate) **police powers**. The federal government has limited (but supreme) **enumerated powers**. In case of conflict, federal law preempts state law because of the **Supremacy Clause**.[52]
15. **Preamble**: radical because authority comes from below; flawed because structurally it supports slavery (e.g., 3/5ths vote).

2.2 Supreme Court as Expositor of the Constitution

2.2.1 Supreme Court, 1798–1801

1. "Riding circuit": there were no circuit courts, so Supreme Court Justices traveled to sit with district judges.
2. Early on, the Court assumed power to:
   (a) Review state legislation that conflicted with federal treaties and statutes—e.g., *Ware v. Hylton* (first establishing judicial review of state law under the Supremacy Clause).[53]
   (b) " . . . construe federal legislation in light of presumably binding constitutional requirements."[54]
3. " . . . the basic assumption underlying *Marbury* seems to have been relatively well established by 1796."[55]
4. Justice Marshall aimed for a unanimous "Opinion of the Court."

[52] U.S. Const. art. VI, cl. 2.
[53] Casebook p. 97.
[54] Casebook p. 97
[55] Casebook p. 98.

2.2.2 Election of 1800

1. Federalist No. 10: Madison warned of "factions." The "permanent and aggregate interests of the community" should outweigh the strategic interests of a political party.

2. Two parties emerged by the election of 1796: **Federalists** (Adams, Hamilton) and **Democratic-Republicans** (Jefferson).

3. The electoral college picked both the President and VP. In 1796, Adams (a Federalist) got 71 votes and became President, and Jefferson (a Democratic-Republican) got 68 and became VP.

4. 1800:

   (a) Jefferson and his "de facto running mate" Burr both got 73 votes each. Adams received 65.

   (b) The tie sent the election to the House, where each state's delegation had one vote.[56] Although Jefferson's Republicans had won a majority in the next Congress, the current lame-duck Congress still had a Federalist majority. The Federalist "irreconcilables" tried to block Jefferson and Burr's victory, until they finally gave up and allowed their states to vote for Jefferson. Jefferson became President and Burr VP.

5. The Twelfth Amendment (1804) separated the Presidential and VP ballots, allowing both candidates to run on a ticket.

6. The Federalist Congress in its last days passed the Judiciary Act of 1801, creating circuit courts and eliminating the practice of riding circuit. The Republicans feared the new crop of judges would tilt the courts in favor of the Federalists. The new Republican Congress repealed it in 1802 and passed the Judiciary Act of 1802, reassigning Justices to ride circuit. The Federalist raised two objections:

   (a) Could the circuit judges legitimately be eliminated? The "good behavior" clause presumably gave tenure for life.[57]

   (b) Was it constitutional to assign Supreme Court justices to duty on a lower court?

7. Fearing a challenge to the constitutionality of the Repeal Act, the Republicans eliminated the Supreme Court's 1802 term.

8. "...the central issue in both *Stuart v. Laird* and *Marbury v. Madison* was whether the Court would directly challenge th combined weight of executive and congressional authority, by carrying out the implications

[56] U.S. Const. art. II, § 1, cl. 3.
[57] U.S. Const. art. III, § 1.

of earlier decisions and actually invalidating a federal statute, thereby potentially provoking a full-scale constitutional crisis."[58]

2.2.3 Judicial Review: *Marbury v. Madison*

Does the Court have the final word in constitutional interpretation? Both Congress and the executive branch also interpret the Constitution, but whose say is final?

1. Adams had issued and signed an order appointing Marbury a justice of the peace. Marshall, then Secretary of State, failed to deliver it before the end of the Adams administration. Jefferson and Madison, the new Secretary of State, refused to deliver it. Marbury sued in December 1801 to receive the commission.

2. The "peculiar delicacy" of the case was its contentious political context and the impact of the Court's decision on the relations between the branches of government. Madison's failure to appear in court resulted from the controversy.

3. Justice Marshall:

   (a) Did Marbury have a right to the commission?

      i. Yes. The commission was complete when the President signed it and the Secretary of State affixed the U.S. seal.

   (b) If Marbury had a right to the commission, did he have right to a legal remedy? When can courts review the executive's actions?

      i. Yes. Acts "in cases in which the executive possesses a constitutional or legal discretion . . . are only politically examinable"—i.e., they are beyond judicial review. But when the act arises under a legal duty, "and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy. . . ."[59]

      ii. "The government of the United States has been emphatically termed a government of laws, and not of men."[60] Compare to Louis XIV: "The State, it is I."

      iii. The question of whether an officer has a vested right in his appointment, and therefore whether the President can remove him at will, is for the courts. Therefore the courts can review Marbury's dispute.

      iv. Whether a right is vested is a question for the courts to decide. Cf. the political question doctrine.

[58] Casebook p. 103.
[59] Casebook p. 112.
[60] Casebook p. 111.

(c) If Marbury had a right to a remedy, was it a writ of mandamus from the Supreme Court? Can the Court enforce the remedy? Can the Court declare a statute to be unconstitutional? Why?

i. The Judiciary Act of 1789, which established the federal court system, authorized the Supreme Court to issue mandamus to lower courts or officials (§ 13).[61] Madison was an official, so mandamus was unavailable only if the Judiciary Act was unconstitutional.

ii. Marshall: the Constitution granted the Supreme Court original jurisdiction in only two types of cases (those involving ambassadors, etc., and those in which a state is a party). The Constitution's division of the Court's jurisdiction between original and appellate meant that it did not intend to give Congress the power to expand the Court's original jurisdiction.

iii. Congress therefore did not have the power to expand the Court's original jurisdiction. § 13 of the Judiciary Act was unconstitutional.

iv. **Constitutional supremacy**: the Supremacy Clause established the Constitution as the "supreme law of the land."[62]

v. **Judicial review**: limited government requires the Court to review the constitutionality of statutes. "It is emphatically the province and duty of the judicial department to say what the law is."[63]

2.2.4 The Marshall Court

1. Marshall established a tradition of outward unanimity (not always followed); tried unsuccessfully to prevent dissents and concurrences—a "single impersonal opinion."[64]

2. Some argue Marshall furthered Federalist partisan goals by (1) enhancing the federal government's power and (2) designing protections for upper class privileges. Others argue that his moves to increase federal power, increase the judiciary's power, and strengthen property rights against state regulations were political only in the sense of higher political ideology.[65]

2.3 Theories of Judicial Review

2.3.1 Overview

1. **Judicial interpretation: first or last word?** Is the court's role mainly to legitimize the national government's actions or to invalidate them? His-

[61] Casebook p. 113.
[62] U.S. Const. art. VI, cl. 2.
[63] Casebook p. 116.
[64] Casebook p. 137
[65] Casebook p. 137.

torically, it validates them far more often than not.[66]

2. **Judicial supremacy and judicial finality**: do other branches have to accept Court decisions as authoritative (judicial supremacy)? Does the court get the last word, or do other branches also have the authority to interpret the Constitution (judicial finality/exclusivity)?[67]

3. **Departmentalism**: each branch of government can interpret the constitution.[68]

4. **Constitutional protestantism**: does the "church" have the keys to scriptural interpretation, or is scripture accessible to popular understanding?[69]

5. **Popular constitutionalism**: it was widely understood at the time of the founding that popular elections would be the forum for constitutional debate. Courts based their constitutional interpretations as political acts on behalf of the people, rather than a position as privileged interpreters.[70]

2.3.2 Precedents

1. The Constitution does not provide for judicial review.

2. Blackstone: in England, the (unwritten) constitution did not control acts of parliament.[71]

3. Natural law as the basis—Hamilton, Federalist No. 78: the constitution trumps legislation—"They ought to regulate their decisions by the fundamental laws . . . "[72]

4. The framers' intent regarding judicial review is in dispute. It was not firmly established by the Philadelphia convention.

2.3.3 Judicial Review in a Democratic Polity

1. Frameworks beneath the theories of judicial review:

   (a) **Functionalism**: the Court's actions contribute to maintaining a certain kind of American polity.

   (b) **Originalism and textualism**: the Court acts on the framers' intent or on its reading of the text itself.

[66] Casebook p. 121 § 1.
[67] Casebook pp. 121–22 § 2.
[68] Casebook p. 122 § 3.
[69] Casebook pp. 122-23 § 4 and Sanford Levinson, *Constitutional Faith*.
[70] Casebook pp. 123-24 § 5 and Larry Kramer, *The People Themselves*.
[71] Casebook p. 124.
[72] Casebook p. 125.

2.3.3.1 The Countermajoritarian Difficulty

1. Alexander Bickel: judicial review "thwarts the will of the representatives of the actual people of the here and now . . . " It's a "deviant institution in the American democracy."[73]

   (a) So—why can it exercise broad power?

2. Countermajoritarian = elite?

2.3.3.2 Justification 1: Supervising Inter- and Intra-Governmental Relations

1. Judiciary oversees interactions within the federal government and between the federal government and the states.

2. The Court's power to review state court decisions and the constitutionality of state court decisions is well established. See §25 of the Federal Judiciary Act of 1789, *Martin v. Hunter's Lessee*, and *Cohens v. Virginia*.[74]

2.3.3.3 Justification 2: Preserving Fundamental Values

1. Bickel: government should protect our immediate needs as well as "certain enduring values." The judiciary is best equipped to enforce these constitutionally protected values because they are insulated from outside pressures—to give a "sober second thought."[75]

2.3.3.4 Protecting the Integrity of Democratic Processes

1. John Hart Ely ("process-defect" or "process perfecting" theory): rather than preserve fundamental values, the Court should base its decisions on promoting democratic participation and representation. The Court should scrutinize legislation that restricts processes of political accountability or that prejudices minorities. In other words, make sure democracy works. The Court need not worry about values—it should only protect the process.

   (a) Leaves unchallenged the existing set of values. Can the Court possibly *not* base its decisions on values? Cf. *Roe v. Wade*.

   (b) What if society is fundamentally unfair? What if a smooth process ratifies existing unfairness?

[73] Casebook p. 126 and Alexander Bickel, *The Least Dangerous Branch*.
[74] Casebook p. 128–29.
[75] Casebook pp. 130–31.

2.3.3.5 The Countermajoritarian Difficulty Challenged

1. There are other countermajoritarian forces in our governmental structure—e.g., equal representation for all states regardless of population in the Senate (and in the House in cases of Electoral College deadlock), the filibuster, the presidential veto.[76] In addition, the Treaty Clause[77] requires a two-thirds Senate vote to ratify treaties and Article V requires a two-thirds in both houses to propose an amendment and three-fourths of states to ratify.

2. Others have challenged the idea that judicial review poses a countermajoritarian difficulty at all.

   (a) Robert Dahl: in other political contexts, "*minorities* rule" by aggregating together. The same happens on the Court. The high turnover rate of Justices makes it unlikely that the Court would "systematically thwart[] congressional policy."[78] Where the court has struck down significant legislation, it almost always reflected national consensus, or else its decisions were quickly reversed.

   (b) Martin Shapiro: a wide range of countermajoritarian forces influence the other branches—"the congressional committee system, the role of seniority, the power of lobbyists, the presidential nominating conventions, the Electoral College, the myriad federal agencies, and the relations among those agencies, their parallel congressional committees, and the industries subject to agency regulation . . . "[79] The executive and legislative branches are amalgams of majoritarianism and anti-majoritarianism.

   (c) Mark Graber: legislatures send political hot potatoes to courts to avoid political difficulties. The Court rarely makes decisions that are opposed to the political majority.[80]

2.3.3.6 Lifetime Tenure

1. Derives from "good Behavior" in Article III, § 1. One problem is that Justices may cling to outdated thinking, which could be solved with term limits roughly mirroring the current average turnover rate.[81] Another argument is that judges are not, in fact, bound by strict rules and precedent.[82]

[76] Casebook p. 132.
[77] U.S. Const. art. II, § 2
[78] Casebook p. 133.
[79] Casebook pp. 134–35.
[80] Casebook p. 135.
[81] Casebook pp. 135–36.
[82] Casebook p. 136.

§ 3 Constitutional Crises

3.1 Reconstruction

3.1.1 *Dred Scott v. Sandford*

1. Can Congress ban slavery in the states? No.
2. The Court held the Republican party's main platform unconstitutional.

3.1.2 Reconstruction Amendments

3.1.2.1 History of the Adoption of the Fourteenth Amendment

1. "Black Codes" discriminated against ostensibly free slaves, e.g., prohibitions against weapons or liquor, or specific enforcement of labor contracts. They essentially outlawed normal employment for blacks.
2. Convict lease system: maybe as destructive as slavery, if not more so.
3. **Civil Rights Act of 1866: what rights were protected?**
   (a) The **"civil rights formula"** prohibited discrimination in "civil rights or immunities."[83]
   (b) Specific rights were enumerated, but there was still strong dispute about the scope of the civil rights formula. Voting was widely understood to be excluded, but the opposition worried that the scope would be construed broadly to end (supposedly legitimate) discrimination practices like segregation.
   (c) In addition worries about scope, the opposition also doubted whether the Thirteenth Amendment—which only banned slavery—authorized Congress to enact the civil rights bill.
   (d) The civil rights formula was eventually struck, and Congress enacted a bill that only protected a narrower set of enumerated rights (contracts, evidence, property, etc.).[84]
4. **Fourteenth Amendment**:
   (a) John Bingham introduced the proposed amendment language in the House.
   (b) Democrats and conservative-leaning Republicans worried that the amendment delegated too much power to Congress. Radical Republicans worried that the amendment was not "self-executing," i.e., its actual implementation would depend on the whims of Congress.

[83] Casebook p. 303.
[84] Casebook p. 307 n. 9.

(c) Many argued the amendment was the civil rights act in new clothes. The scope of the "privileges and immunities" clause was contested along the same lines at the civil rights formula in the earlier act. Many of these concerns were justified, as proponents made comments that the amendment's language *should* be construed broadly to end racial discrimination in all forms.[85]

(d) § explicitly overrules *Dred Scott* by establishing birthright citizenship for all people, blacks included.

5. Congress rejected other proposed amendments that explicitly required color blindness. Does this mean that Congress did *not* intend the Equal Protection Clause to require color blindness in all situations?

3.1.2.2 The Fourteenth Amendment Limited

1. The Reconstruction amendments mainly aimed to end slavery, but they also established protections for a broader range of rights. A key question was, what rights did the new amendments guarantee?

2. The right to vote was understood to be outside the scope of civil rights, but others were strongly contested.

3. The *Slaughter-House Cases* tested the meaning of "free labor" as a civil right.

4. At the time, the Bill of Rights was understood to apply only to the federal government. The states were free from its restrictions.

5. § 1 of the Thirteenth and Fourteenth Amendments are **self executing** in that people can base claims on them alone without additional statutory authority.

3.1.2.3 How Does the Court Decide What The Constitution Means? *The Slaughter-House Cases*

Is laboring freely a fundamental right? Do the Reconstruction amendments—the Fourteenth in particular—protect the right to labor, or does the power remain with the states?

The Court narrowly interpreted the privileges and immunities Clause in the Fourteenth Amendment. But some rights (e.g., the Bill of Rights) have later been held to be protected against encroachment by states via the Due Process Clause.

1. 1869: Louisiana wanted to move unpleasant slaughterhouses out of the New Orleans city limits. It granted exclusive slaughterhouse rights to a new corporation and required all New Orleans butchers to use its facilities.

[85] Casebook pp. 308–09.

2. Justice Miller:

   (a) The butchers were not deprived of labor because they were free to use the newly incorporated slaughterhouse.

   (b) The state's police power authorized it to protect "the general interests of the community."[86] Regulations of the meat industry "are among the most necessary and frequent exercise of this power."[87]

   (c) The state has the power to incorporate a municipality, so it should also have the power to form another corporation. The court did not think that the monopoly privileges granted to this corporation were "especially odious or objectionable."[88] Louisiana had this power unless something changed with the adoption of the Reconstruction amendments.[89]

   (d) **Butchers' Argument 1**: the statute created involuntary servitude in violation of the Thirteenth Amendment.

      i. The Reconstruction amendments were meant to end slavery. The amendments have nothing to do with labor and property rights.

      ii. The Court here asserted the power to discover the intent of the amendment's authors based on its own experience of the historical context.

   (e) **Butchers' Argument 2**: the statute abridged privileges and immunities of United States citizens.

      i. The Fourteenth Amendment draws a clear distinction between United States citizenship and state citizenship.

      ii. The privileges and immunities clause protects only *federal* rights against encroachment by the states.[90]

      iii. *Corfield v. Coryell*: "privileges and immunities" covers a broad range of "fundamental" rights (property, happiness, safety).[91] This broadness would grant the Court the power to strike down a wide range of state legislation, which would be an unacceptable structural shift.

      iv. States are responsible for a large domain of civil rights. The Fourteenth Amendment did not expand the power of the Court to act as a "perpetual censor upon all legislation of the States, on the civil rights of their own citizens . . . "[92] Such an interpretation would also grant broad police powers to Congress (in violation of the principle of enumerated powers), which would

[86] Casebook p. 320.
[87] Casebook p. 321.
[88] Casebook p. 321.
[89] Casebook p. 321.
[90] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . " U.S. Const. amend. XIV, § 1.
[91] Casebook p. 324.
[92] Casebook p. 324.

"fetter and degrade" the states and "radically change[] the whole theory of the relations of the State and Federal governments to each other . . . "[93]

v. Federal civil rights include asserting claims against the government, right to assembly, right to petition for redress of grievances, and habeus corpus.

(f) **Butchers' Argument 3**: the statute deprived butchers of property without due process.

i. This was not a deprivation of property. The due process argument is irrelevant.[94]

(g) **Butchers' Argument 4**: the statute denied equal protection.

i. No. The equal protection clause applies only to slavery.[95]

3. Justice Field, dissenting:

(a) Police powers do not allow a state to violate constitutional rights.

(b) Granting monopoly privileges to the new slaughterhouse corporation did not promote the health of the city.

(c) Granting monopoly privileges to the government (e.g., ferries, bridges) is different from granting monopoly privileges to private entity in "one of the ordinary trades or callings of life."[96] By the majority's rationale, "there is no monopoly, in the most odious form, which may not be upheld."[97]

(d) The Fourteenth Amendment *does* protect U.S. citizens against violations by state legislatures of "common rights" (i.e., inalienable natural rights, like the right to property and to pursue happiness)[98]

(e) Field made an anti-discrimination argument. He worried that "special and partial legislation" would grant unfair privileges to those who had the wealth to secure benefits for themselves.

4. Justice Bradley, dissenting:

(a) Blackstone identified three fundamental rights: personal security, personal liberty, and private property. The freedom to choose a profession is essential to the exercise of these rights.[99]

(b) The original Constitution prevented the federal government from abridging fundamental rights, which were enumerated in the text of the Constitution and in the Bill of Rights. Now, the Fourteenth

[93] Casebook p. 325.
[94] Casebook p. 325–26.
[95] Casebook p. 326.
[96] Casebook p. 326.
[97] Casebook p. 327.
[98] Casebook p. 327.
[99] Casebook p. 328.

Amendment extended the same protections to abridgement by the states.

(c) Ending slavery was not the sole purpose of the Reconstruction amendments. "It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens, and I think it was purposely so expressed."[100]

5. Justice Swayne, dissenting:

   (a) The first eleven amendments put "checks and limitations" on the federal government. The Reconstruction amendments limit state power.

   (b) "Labor is property, and as such merits protection . . . "[101]

   (c) The Fourteenth Amendment granted the federal government power to protect citizens' fundamental rights against oppression by the states. This power is "eminently conservative . . . bulwark of defense . . . can never be made an engine of oppression . . . cannot be abused."[102]

   (d) States are sometimes (often?) more oppressive than the federal government—contrary to the founders' fears.

      i. Swayne develops a political theory on the basis of national experience. Cf. the "new federalism" after 1995.

6. The belief in a "general constitutional law"—based on some kind of essential, natural law—allowed the Court to limit the power of both the federal government and state governments, even if the legislation in question did not explicitly violate the federal Constitution.[103] Justices Field and Bradley invoked this idea in arguing that the Fourteenth Amendment protected a set of general, fundamental rights. But the Court later held that it did not have jurisdiction to impose general constitutional law on the states in cases heard on appeal from state courts.

7. "Due process" in the Fifth and Fourteenth Amendments is not defined. The Court earlier held that that "due process" means (1) consistent with the Constitution and (2) consistent with common law practice in England.[104]

8. Today, the *Slaughter-House* interpretation of the Privileges and Immunities Clause—that the protected rights are narrow range of federal rights[105]—is still good law. But most of the Bill of Rights have been selectively incorporated into the Due Process Clause. Thus, *Slaughter-House* did not stop the rise of federal police powers.

[100] Casebook p. 329.
[101] Casebook p. 330.
[102] Casebook p. 330.
[103] Casebook p. 331.
[104] Casebook p. 333.
[105] Casebook p. 325

3.1.3 Early Application of the Fourteenth Amendment to Women

3.1.3.1 Women's Citizenship in the Antebellum Period

1. Suffrage was limited to propertied white males on the theory that "people should not be able to vote unless they possessed sufficient independence to exercise the franchise wisely." Dependent people (women, servants, etc.) would merely vote in the interests of their masters.[106]

2. **Coverture**: upon marriage, a woman's legal rights are subsumed into her husband's. Marital unity was a legal fiction under which the husband and wife were one.

3. Political rights were based on social status. People subordinate in society and family—e.g., women—lacked status and thus lacked political rights, including the right to vote.

4. Status-based rights were justified on the basis of a distinction between the **public realm** (economics, politics) and the **private realm** (home, family).[107] Moreover, women were already "virtually represented" by the male heads of their households (husbands or fathers).[108]

5. Another problem resulting from coverture: if a woman could not enter into a private contract, how could she enter into the social contract?[109]

6. *Shanks v. DuPont*: women do not automatically lose their citizenship by marrying aliens (but in this case, Shanks did renounce her American citizenship in favor of British citizenship). This was the first case to recognize that women had any form of political rights.[110]

7. The Declaration of Sentiments from Seneca Falls demanded suffrage and reform of marital status laws.

8. A few states had passed "married women's property acts" and "earnings statutes," but these "preserved the doctrine of marital service."[111]

3.1.3.2 The Right to Practice Law: *Bradwell v. Illinois*

Is the right to choose a profession one of the privileges and immunities guaranteed to citizens of the United States?

1. Illinois denied Myra Bradwell the right to practice law solely because she was a woman. She argued that the Privileges and Immunities Clause

[106] Casebook pp. 164–65.
[107] Casebook p. 165.
[108] Casebook p. 168.
[109] Casebook p. 166.
[110] Casebook p. 166.
[111] Casebook p. 167.

protected the rights in the Declaration of Independence. As part of the pursuit of happiness, she was guaranteed the right to pursue the profession of her choice. The protection of this right, she argued, should be equal before the law.

2. Justice Miller:
   (a) The right to practice law does not depend on United States citizenship.
   (b) *Slaughter-House*: the Fourteenth Amendment did not transfer to the federal government the right to regulate licenses to practice law. This power remains with the states. (This case was decided on the same day as *Slaughter-House*.)
3. Justice Bradley, concurring:
   (a) Bradley relies heavily on natural law.
   (b) Bradwell assumes that women should be granted the same privileges and immunities as men. But no, "the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman." Women belong in the domestic sphere. Their husbands represent their interests.[112]
   (c) As for unmarried women, they lack civil rights because they're really supposed to be mothers anyway.
   (d) Bradley's dissent relies not on an **authority-based theory**, in which husbands exercise dominion over their wives, but on an **affect-based theory**, in which women lack rights because of their "obligations to home and hearth."[113]

3.1.3.3 The "New Departure" and Women's Place in the Constitutional Order

1. The suffrage movement lost the battle to guarantee women's suffrage in the Fourteenth Amendment. Stanton and Anthony opposed the Fifteenth Amendment because of its "humiliat[ing] rejection of extending suffrage to women."[114]
2. Women's rights activists (e.g., Francis and Virginia Minor) began to argue that suffrage *is* a basic right of United States citizenship and that the Fourteenth Amendment banned states from denying it. This argument would be tested in *Minor* (below).
3. Also, it was established that naturalized citizens were guaranteed the right to vote. The government could therefore not logically deny the right to natural born citizens.

[112] Casebook p. 338.
[113] Casebook p. 339.
[114] Casebook p. 340.

4. Anthony: the Fourteenth Amendment automatically gave all citizens the right to vote. Moreover, women were previously in a condition of servitude to the males in their households, so the Fifteenth Amendment prevented states from denying them the right to vote.

5.

3.1.3.4 Does Citizenship Confer Suffrage? *Minor v. Happersett*

1. Virginia Minor tried to register to vote in Missouri. After being refused, she sued, arguing that women had a constitutional right to vote. The Supreme Court unanimously rejected her argument.

2. Justice Waite:

   (a) Are all citizens necessarily voters?

   (b) The Fourteenth Amendment did not create new privileges or immunities. It only furnished additional protections for existing rights.

   (c) Structural arguments:

      i. When the Constitution was adopted, no state (except maybe New Jersey) allowed all citizens to vote, including many explicit restrictions on women's suffrage. Nothing in the Constitution indicates intent to change these circumstances. If there were, "the framers . . . would not have left it to implication."[115]

      ii. If voting were a "privilege," then voters would be allowed to vote in multiple states, and that would be absurd.

      iii. The language of the Fourteenth Amendment would not be restricted to males if non-males had a right to vote (§ 2: males can be disenfranchised, but states' representation will be reduced proportionally).

      iv. The Fifteenth Amendment would have been superfluous if voting were a guaranteed privilege, because the guarantee would have already been in place. Moreover, it does not provide gender protections.

   (d) Contextual arguments:

      i. Women's suffrage has never been a requirement for admitting a state to the Union.

      ii. Non-citizens are sometimes allowed to vote. Therefore, the right to vote does not depend on citizenship.

   (e) "Certainly, if the courts can consider any question settled, it is this one."[116]

[115] Casebook pp. 343–344.
[116] Casebook p. 345.

3.1.4 "Separate but Equal"

3.1.4.1 Establishment of the "Separate but Equal" Doctrine

1. Many of the Court's post–Civil War decisions appear more responsive to the idea of black inferiority than racial equality.

2. **Compromise of 1877**: southern Democrats abandoned their support for Samuel Tilden and supported Republican Rutherford B. Hayes in exchange for the end of Reconstruction.

3. C. Vann Woodward: the result of the compromise was a relaxation of northern liberal opposition to southern segregationist policies. "Just as the Negro gained his emancipation and new rights through a falling out between white men, he now stood to lose his rights through the reconciliation of white men."[117]

4. *The Civil Rights Cases* held that equal protection applies to state actors, but not private actors. *Plessy* held that equal protection *applied to* but did not *prohibit* the Louisiana statute.

5. Congress based later civil rights legislation on its power to regulate interstate commerce.

3.1.4.2 Separate But Equal: *Plessy v. Ferguson*

First: the Thirteenth Amendment only applied to labor systems.

Second: the Fourteenth Amendment abolished *legal* but not *social* distinctions between races. "Separate but equal" does not impose a "badge of inferiority."

Justice Harlan, dissenting: "our Constitution is color-blind."

1. Homer Plessy challenged the constitutionality of a Louisiana law requiring blacks and whites to ride in separate (but "equal") railroad cars.

2. *Plessy* was a collusive lawsuit. The railroad didn't want to bear the expense of establishing separate but equal facilities.

3. Justice Brown:

   (a) This law did not violate the Thirteenth Amendment. That amendment abolished servitude and only applied to labor systems. A statute drawing "merely a legal distinction" between races "has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary certitude . . . "[118]

[117] Casebook p. 358.

[118] Casebook p. 359. The Thirteenth Amendment today is still interpreted in similarly narrow terms, ignoring the possibility that group degradation is necessary to forced labor.

(b) The Fourteenth Amendment aimed to abolish *legal* distinctions between races, but not *social* distinctions (e.g., marriage, education). "Separate but equal" does not imply racial inferiority. Nor does it abridge privileges and immunities, deprive property without due process, or violate equal protection.[119]

(c) However, the act's of exemption from liability from damages is unconstitutional.

(d) The government's power to determine a passenger's race is not in question here.

(e) The plaintiff argued that the reputation of being a member of the dominant race is a form of property. The court agreed, but since blacks were not the dominant race, they had no property interests at stake in this case.

(f) The plaintiff also makes a slippery slope argument: why not segregate on the basis of hair color, etc.? The court answered that "every exercise of police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class."[120]

(g) Was the Louisiana separate-but-equal statute unreasonable or obnoxious? No.

(h) The plaintiff's "underlying fallacy" was that separate but equal facilities "stamps the colored race with a badge of inferiority." The plaintiff's position assumed (wrongly) that if the racial roles were reversed that whites would be oppressed. It also assumed (wrongly) that social prejudices can be overcome through legislation.[121] Law didn't cause group inequality and law can't fix it.

(i) The question of "the proportion of colored blood necessary to constitute a colored person" was not at issue here.

4. Justice Harlan, dissenting:

(a) The Reconstruction amendments were meant to remove race as a category on which the government could discriminate.

(b) The Thirteenth Amendment struck down "badges of slavery or servitude," of which separate but equal facilities is one.[122]

(c) The Louisiana statute was clearly intended to keep blacks out of whites' spaces. "No one would be so wanting in candor as to assert the contrary."[123]

[119] Casebook pp. 359–60.
[120] Casebook p. 361.
[121] Casebook p. 361.
[122] Casebook p. 362.
[123] Casebook p. 363.

(d) Justice Harlan also made the slippery slope argument. But he rejected the response exercise of the police power must be "reasonable," because courts do not have the power to assess the "policy or expediency of legislation."[124]

(e) "Our Constitution is color-blind, and neither knows nor tolerates classes among the citizens."[125]

(f) The *purpose* of the Reconstruction amendments was to grant citizenship to and protect the privileges and immunities of blacks.

(g) The *consequences* of disregarding this purpose would be to "permit the seeds of race hate to be planted under the sanction of law."[126] Law *does* cause group inequality.

(h) We denied citizenship to the Chinese, but allowed them to ride in the same railroad cars as whites. How can we grant citizenship to blacks, but make them ride in separate cars?

(i) "The thin disguise of 'equal' accommodations for passengers in railroad coaches will not mislead any one, nor atone for the wrong this day done."[127]

(j) Though Harlan did not draw this distinction, modern commentators have recognized two competing definitions of "equality":

i. **Anticlassification**: race is automatically suspect. "Our Constitution is color-blind."

ii. **Antisubordination**: groups can be mistreated or subordinated even when the law is racially neutral, e.g., poll taxes.

iii. Both of these views would strike down *Plessy*, but critically, they differ on affirmative action.

iv. Harlan was skeptical of subordination that excluded groups from *markets*, but he did not have a problem with *social* subordination.

3.2 Economic Rights and Structural Concerns

3.2.1 The *Lochner* Era: Substantive Due Process

3.2.1.1 Pressures for Intervention and the Rise of Substantive Due Process, 1874–1890

1. **Lochnerism**: the Court frequently struck down laws it held to be infringing on economic liberty or private contract rights.

[124] Casebook p. 363.
[125] Casebook p. 363.
[126] Casebook p. 364.
[127] Casebook p. 365.

2. **Substantive due process**: when does a government have an adequate reason to deprive a person of life, liberty, or property? **Procedural due process**: what procedures must the government follow before depriving a person of life, liberty, or property? E.g., notice and hearing.

3. By 1890, the Court had largely embraced Justice Bradley's dissent in *The Slaughter-House Cases* (the Fourteenth Amendment protects fundamental rights against state encroachment).

4. After *Slaughter-House*, corporate lawyers found little aid in the privileges and immunities clause, so they turned to due process.

5. *In Matter of Jacobs*: the New York Court of Appeals struck down a statute prohibiting the manufacture of cigars in tenement houses on the ground that it deprived owners and renters of property and liberty.[128]

6. *Godcharles v. Wigeman*: the Pennsylvania Supreme Court struck down a law requiring companies to pay wages in cash instead of company vouchers on the ground that it interfered with freedom of contract.[129]

7. Sui juris: people who possess full legal rights and capacity.

8. *Munn v. Illinois*: the Supreme Court upheld a law limiting grain-storage warehouse charges. The source of the state's power was the principle that allows regulation of private property when it is "affected with a public interest" or "affects the community at large."[130]

9. *The Railroad Commission Cases*: the Court upheld state regulation of railroad tariffs, but cautioned that there are limits on states' regulatory power.[131]

10. *Minnesota Rate Cases*: the Court "struck down a statute granting a state railroad commission unreviewable authority to set rates" on the principle that such regulations acted as deprivation of property without due process. It was significant because (1) it held that administrative rate-setting must be subject to judicial oversight and (2) courts had the responsibility to determine whether established rates were reasonable. It "practically overrule[d] *Munn v. Illinois*." The Court went on to review regulations of almost every kind.[132]

11. The *Lochner* majority viewed the state as a fundamental threat to liberty, espousing *classic liberalism*. Justice Harlan's argued that liberty requires freedom from severe constraints, following *modern liberalism*.

[128] Casebook pp. 412–13.
[129] Casebook p. 413.
[130] Casebook p. 413.
[131] Casebook p. 414.
[132] Casebook pp. 414–15.

3.2.1.2 Substantive Due Process: *Lochner v. New York*

The key tension in *Lochner* was between constitutional liberty and police powers. When is state regulation an appropriate exercise of police power, and when 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?"[133]

Today, almost everyone thinks *Lochner* was wrong. Why?[134]

First, some question whether freedom of contract is a fundamental right with which the government can only interfere to protect public health, safety, or morals.

Second, the Court was inconsistent during the *Lochner* era. For instance, it allowed maximum hour laws for coal minors but not for bakers.

Third, Court substituted its own values for those of popularly elected legislatures.

1. New York passed a statute limiting bakery employees to work no more than sixty hours per week or ten hours per day. Lochner was convicted of employing a baker for more than 60 hours per week.

2. Justice Peckham:

   (a) The New York statute interfered with the right of contract between employer and employee.

   (b) "The right to purchase or to sell labor is part of the liberty protected by this amendment [the Fourteenth], unless there are circumstances which exclude the right."[135] Liberty is not merely freedom from physical restraint.

   (c) States can restrict certain kinds of contracts, like contracts in violation of a statute or to let property for immoral purposes or other unlawful purposes.

   (d) When states regulate the rights of laborers, "it becomes of great importance to determine which shall prevail—the right of the individual to labor for such time as he may choose, or the right of the State to prevent the individual from laboring or from entering into any contract to labor beyond a certain time prescribed by the State."[136]

   (e) The Court previously upheld the regulation of labor contracts in *Holden v. Hardy* (involving miners)—but the Court dismisses that precedent as irrelevant.

   (f) This law was about the health of individuals working as bakers.

[133] Casebook p. 418.
[134] Chemerinsky pp. 636–37.
[135] Casebook p. 417.
[136] Casebook p. 417.

(g) To be valid, the regulation must have a clear and direct connection to public health. "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?"[137] There is no such connection here. Baking is not inherently unhealthy, and such regulations "cripple the ability of the laborer to support himself and his family."[138]

(h) The court here increased the federal government's power by asserting the power to review everything the states do in exercising their police powers.

(i) The court never finds a due process violation. "This is not a question of substituting the judgment of this court . . . "[139]—but in fact the court *does* substitute its judgment.

(j) If the principle is to keep the populace healthy and robust, then the state would have the power to regulate the exertion of all citizens—for instance, athletes. This argument resembles Justice Marshall's slippery slope argument in *Marbury*: if a statute is passed by Congress, it would be de facto constitutional—an absurd result.

(k) The New York legislature in passing the statute worried about employees' lack of bargaining power. The court dismissed this rationale, seemingly unwilling to allow legislatures to correct these kinds of imbalances. But sometimes this kind of paternalism is justified, according to the court—for instance, to secure "real equality of right" for women.[140]

(l) Defendant also argued that longer hours led to unclean bread. The Court disagreed.

(m) "It seems to us that the real object and purpose were simply to regulate the hours of labor between the master and his employés (all being men, sui juris), in a private business, not dangerous in any degree to morals or in any real and substantial degree, to the health of the employees."[141]

3. Justice Harlan, dissenting:

(a) When can courts strike down legislation? *Only* "if a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real substantial relation to those

[137] Casebook p. 418.
[138] Casebook p. 419.
[139] Casebook p. 418.
[140] Casebook p. 426.
[141] Casebook p. 420.

objects, or is beyond all question, a plain, palpable invasion of rights secured by the fundamental law."[142]

(b) Baking is hazardous to your health. This statute had a legitimate connection to public welfare.

(c) The Court's role is to defer to legislatures except in extraordinary cases. The majority, on the other hand, held that courts should review the reasonableness of legislation de novo. The majority clearly distrusted legislatures—for instance, by calling the statute in question "mere pretext."[143]

4. Justice Holmes, dissenting:

(a)

(b) The majority's opinion rests on an economic theory (presumably, laissez faire and social Darwinism). "[A] constitution is not intended to embody a particular economic theory . . . "[144]

(c) "I think that the word liberty in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion [as expressed through the legislature], unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles . . . "[145]

3.2.1.3 The Transformation and Federalization of General Constitutional Law

1. Under the Marshall and Taney Courts, the police power was thought to be broad in scope. *Lochner* signaled a restriction and the separation of two distinct domains: individual autonomy and police power. The Court policed the boundary between the two.[146]

3.2.1.4 The Meanings of "Liberty," "Property," and "Process"

1. *Liberty*: "The 'liberty' mentioned in [the Fourteenth] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned."[147]

[142] Casebook p. 420.
[143] Casebook p. 420.
[144] Casebook p. 422.
[145] Casebook p. 422.
[146] Casebook pp. 422–23.
[147] *Allgeyer v. Louisiana*—see casebook p. 423.

   (a) Some criticized this definition on the ground that under English common law and at the time the Constitution was written, "liberty" was understood to relate solely to liberty of the person, i.e., freedom from physical restraint.

2. *Property*: includes the right to make contracts.[148]

3. *Process*: unclear. Legislative process? Judicial process?

3.2.1.5 The Scope of the Police Power: Permissible and Impermissible Objectives

1. When can states exercise the police power? For what objectives?

2. *Holden v. Hardy*: in *Lochner*, the Court distinguished this case on the ground that the statute in question applied to miners, not bakers. The Court found the *Lochner* statute problematic because it regulated labor without an obvious connection to public welfare.

3. *Baltimore & Ohio R. Co. v. Interstate Comm. Comm'n*: the court upheld limitations on the hours of railroad employees in the name of the safety of employees and travelers.[149]

4. *Coppage v. Kansas*: statutes that compensate for employees' lack of bargaining power do not affect public welfare and therefore must be struck down.[150]

5. *Muller v. Oregon*: legislation protecting women in the workplace is valid because the state needs healthy mothers.[151]

3.2.1.6 Burdens of Proof and Questions of Degree

1. *Lochner* (Peckham, majority): "There [must] be some fair ground, reasonable in and of itself, to say that there is a material danger to the public health, or to the health of the employee, if the hours of labor are not curtailed."[152]

2. *Lochner* (Harlan, dissenting): law must "have a real or substantial relation" to the promotion of public health.[153]

3. Peckham and Harlan appear to agree about the standard. Why did they reach different results?

   (a) Maybe they apply the same standard with a different burden of proof.

[148] Casebook p. 424.
[149] Casebook p. 424.
[150] Casebook p. 425.
[151] Casebook p. 426.
[152] Casebook p. 419.
[153] Casebook p. 420.

(b) Maybe Peckham categorizes occupations as inherently hazardous or not, while Harlan puts them on a spectrum.

3.2.1.7 Laissez Faire, Lawyers, and Legal Scholarship

1. Smith, Spencer, Sumner.
2. Classic liberalism developed in reaction to authoritarianism in government and economics. In an industrialized society, regulation may be necessary to protect "individual freedom and equality of opportunity."[154]

3.2.1.8 A Survey of the Court's Work

1. 1890–1934: the court struck down around 200 regulations, but sustained as many, and declined to hear many more.
2. "The Court let stand most laws that appeared to protect the health, safety, or morals of the general public or to prevent consumer deception."[155] It also permitted regulation of rates for railroads and public utilities.
3. Regulations like minimum wage laws "seemed obviously designed to readjust the market in favor of one party to the contract—and this was entirely at odds with the underlying principle of laissez faire."[156]

3.2.2 The Commerce Clause

3.2.2.1 Congressional Regulation of Interstate Commerce

1. Before the Civil War, most cases addressing the commerce clause involved the validity of state regulation. After the War, the focus shifted to the scope of Congress's legislative powers.
2. Congress began seriously regulating interstate trade with the Interstate Commerce Act of 1887 and the Sherman Antitrust Act of 1890.
3. The Court consistently upheld railroad regulations.[157]
4. Three recurring doctrinal issues:[158]
   (a) Whether the *subject* of congressional regulation was actually "interstate commerce" or some other local activity.
   (b) Whether the *purposes* of congressional regulation were consistent with the purposes of the commerce clause.
   (c) Whether the regulation ran afoul of the Tenth Amendment.

[154] Casebook pp. 428–29.
[155] Casebook p. 430.
[156] Casebook p. 431.
[157] Casebook pp. 435–36.
[158] Casebook pp. 436–37.

5. What should Congress do with its commerce clause powers?
   (a) Actually regulate commerce.
   (b) Promote public policy. *Hammer*.

3.2.2.2 *Champion v. Ames*

Congress can use its Commerce Clause powers to protect commerce as well as promote public policy goals.

1. An 1895 congressional statute prohibited sending lottery tickets between states through the mail. Champion, indicted for violating the law, challenged its constitutionality.
2. Justice Harlan:
   (a) Champion argued that mailing lottery tickets did not constitute commerce. The government (Ames) argued that it did.
   (b) The Constitution does not define "commerce," but "undoubtedly" it includes traffic in things with "a recognized value in money."[159] Lottery tickets have value.
   (c) Champion next argued that Congress had the power to *regulate* but not *prohibit* interstate commerce. The Court rejected this argument, holding that even if Congress intended to prohibit "the widespread pestilence of lotteries," its power "to regulate commerce among the States is plenary, complete in itself, and is subject to no limitations except such as may be found in the Constitution."[160]
   (d) Champion argued further that the act violated the Tenth Amendment. Held: no—the act does not limit commerce within the states, only between them. In other words, the Tenth Amendment does not apply to the commerce clause. So is the Tenth Amendment a tautology? Maybe—but it retains symbolic and rhetorical power.
   (e) " . . . Congress, for the purpose of guarding the people of the United States against the 'widespread pestilence of lotteries' and to protect the commerce which concerns all the States, may prohibit the carrying of lottery tickets from one State to another."[161] Congress *can* regulate injurious things. The question is how much.
3. Justice Fuller, dissenting:
   (a) Police power is reserved to the states. This act was an exercise of police power. It was beyond Congress's authority in violation of the Tenth Amendment.

[159] Casebook p. 437.
[160] Casebook p. 438.
[161] Casebook p. 439.

(b) Lottery tickets are not "articles of commerce" any more than private insurance contracts, which the Court had previously held to be beyond the reach of Congress's authority to regulate under the commerce clause. This act cannot be valid "unless the power to regulate interstate commerce includes the absolute and exclusive power to prohibit the transportation of anything or anybody from one State to another . . . "[162]

(c) "An invitation to dine, or to take a drive, or a note of introduction, all become articles of commerce under the ruling in this case, by being deposited with an express company for transportation."[163] In other words, there would be no limits on Congress's power.

3.2.2.3 *Hammer v. Dagenhart*

The power to prohibit commerce depends on the harmful nature of the prohibited trade. Lotteries, for instance, are a "widespread pestilence" and therefore fall within Congress's regulatory authority. *Champion.* But child labor does not. Moreover, Congress does not have the authority to prevent unfair competition between states.

1. Dagenhart worked in a cotton mill with his two minor sons. He challenged the constitutionality of an act of Congress "intended to prevent interstate commerce in the products of child labor."[164]

2. The district court held the act unconstitutional.

3. Justice Day:

   (a) Key question: "Is it within the authority of Congress in regulating commerce among the States to prohibit the transportation in interstate commerce of manufactured goods" produced with child labor?[165]

   (b) The government (Hammer, the DA for the Western District of North Carolina) argued that Congress was within its Commerce Clause authority. The government argued that the Commerce Clause automatically gives Congress the power to prohibit interstate trade of "ordinary commodities." The Court disagreed, holding that the power to prohibit depends on "the character of the particular subjects dealt with."[166] For instance, in *Champion*, Congress's authority rested on the harmful effects of lotteries. But "[t]his element is wanting in the present case."[167]

[162] Casebook pp. 439–40.
[163] Casebook p. 440.
[164] Casebook p. 441.
[165] Casebook p. 442.
[166] Casebook p. 442.
[167] Casebook p. 442.

(c) The government argued further that regulation was necessary to prevent states that allowed child labor to gain unfair trade advantages over states with child labor restrictions. The Court held that Congress has no power "to require the States to exercise their police power so as to prevent possible unfair competition." Under any other result, "all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated and thus our system of government be practically destroyed."[168]

4. Justice Holmes, dissenting:

   (a) Congress has the power to regulate (and therefore prohibit) interstate commerce. Whether its regulations indirectly affect economic activity within the states is irrelevant to the exercise of its authority.

   (b) Congress has the power—not the courts—to implement public policy. "It may carry out its views of public policy whatever indirect effect they may have upon the activities of the States. . . . The public policy of the United States is shaped with a view to the benefit of the nation as a whole."[169]

3.2.2.4 Prisonner's Dilemmas

1. State economies face a classic prisoner's dilemma, or race to the bottom: on their own, states will be better off if they cooperate in economic policy, but each has a stronger incentive to defect. So if state A passes a child labor law, its production costs will rise, and state B will gain an economic advantage—but both states would benefit more if they both passes child labor laws.

2. One counterargument is that this is not a true prisoner's dilemma because states may not agree that child labor laws are best for their citizens.

3. The federal government can provide the necessary centralized coordination to solve this dilemma.

[168] Casebook p. 443.
[169] Casebook pp. 444–45.

§ 4 The Modern Constitution

4.1 Overview

4.1.1 The New Deal and Economic Due Process

4.1.1.1 Constitutional Adjudication in the Modern World ("Incorporation")

1. **The Evolution of the Bill of Rights and Its "Incorporation" against the States**
   (a) The Bill of Rights played a small role in the antebellum era—e.g., the Court did not strike down the Alien and Sedition Act of 1798.
   (b) The Bill affirmed rights against the central government but not against the states.
   (c) The Civil War "dramatized the need to limit abusive states" via the Fourteenth Amendment.[170]
   (d) From the 1830s, antislavery activists developed the **"declaratory"** interpretation of the Bill "as affirming and declaring pre-existing higher-law norms applicable to all government, state as well as federal," rather than creating new or federalism-based rules against the federal government.[171]
   (e) The Reconstruction Republicans who framed the Fourteenth Amendment wanted to secure fundamental rights—privileges and immunities—against violations by the states. The Bill of Rights was a major source of these fundamental rights.
   (f) "By the end of the [19th] century almost all of the rights and freedoms specified in the Founders' Bill had come to be applied against state and local governments."[172]
   (g) Justice Cardozo: restrictions on Congress are tighter than restrictions on the states—or, the states are not bound by the full Bill of Rights.
   (h) Justice Black: the theory of **"total incorporation"** held that Fourteenth Amendment incorporated the full Bill and bound the states to it.[173]
   (i) Justice Brennan: under **"selective incorporation,"** the Court would decide which parts of the Bill were "fundamental" and therefore binding on the states. The Warren court usually found clauses of the Bill to be fundamental.
   (j) "Today, virtually all the Bill of Rights has come to apply with equal vigor against state and local governments."[174]

[170] Casebook p. 487.
[171] Casebook p. 487.
[172] Casebook p. 489.
[173] Casebook p. 490.
[174] Casebook p. 490.

4.1.1.2 The Decline of Judicial Intervention Against Economic Regulation

1. After 1934, the government passed economic regulations to deal with the depression. The Court struck down a half-dozen of them in 1935 and 1936. In 1937, Roosevelt's court packing threat led the Court to uphold "New Deal legislation against both economic due process and federalism-based challenges."[175]

2. *Nebbia v. New York*: a storekeeper was convicted of selling milk below the mandated minimum price. The Court held that regulations are appropriate for industries "affected with a public interest." "The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."[176] However, the Court did not make a clean break from the *Lochner* doctrine that courts should not interfere with private relations unless the business was "affected by a public interest."

4.1.1.3 1935–1937

1. *Morehead v. New York ex rel. Tipaldo*: a minimum wage law for women was invalid, on authority of *Adkins v. Children's Hospital*. " . . . the State is without power by any form of legislation to prohibit, change or nullify contracts between employers and adult women workers as to the amount of wages to be paid."[177]

2. After Roosevelt's court packing scheme, the Court changed course and overruled *Adkins*.

4.1.1.4 Rational Review: *United States v. Carolene Products*

How can the Court justify judicial review after the 1937 changes in constitutional thought? In *West Coast Hotel*, the Court held that "regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."[178] In *Carolene Products*, the Court held that regulation is constitutional if it rest on "some rational basis." The Court granted broad discretion to Congress on economic regulations and limited its own powers of judicial review. In "footnote four," the Court reframed the basis for judicial review as (1) fidelity to the Constitution's actual text and (2) protecting democratic rights.

1. The Filled Milk Act prohibited interstate commerce in milk containing vegetable fat in place of milk fat. Carolene, a filled milk manufacturer,

[175] Casebook p. 499.
[176] Casebook p. 500.
[177] Casebook p. 511.
[178] Casebook p. 516.

challenged the constitutionality of the act under the commerce clause and the Fifth Amendment.

2. Justice Stone:

   (a) The Court dismissed the Fifth Amendment claim. Congress had the power to regulate products that posed a harm to public health, and it had no obligation to regulate *all* evils.

   (b) Legislation regulating harmful things is not unconstitutional by default. The court should accept Congress's factual presumptions as true. The basis for the constitutionality of a statute is whether it is rational: "regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators."[179]

3. Justice Black, concurring:

   (a) Carolene should have had the chance to prove that its product was not injurious to public health.

4. "Interest group pluralism": the idea of the "public interest" has little substance of its own; rather, it reflects the interests of the current majority. The "pluralist model assumes that no groups persistently exercise inappropriate or unfair degrees of political power in a democracy."[180]

5. Why should the Court ever strike down any legislation? **Footnote four** has an answer. First, if the legislation specifically contradicts the Constitution (e.g., by violating the Bill of Rights), the Courts can find it unconstitutional. Second, the Court can act to protect democratic civil rights and certain "discrete and insular minorities." There is much controversy about how to determine when the Court should exercise judicial review under this model.[181]

   (a) There are no fixed majorities. Rather, there are changing coalitions of minorities. Groups that cannot form these coalitions are **discrete and insular minorities**. The political process does not protect these groups' interests, so the courts must.

4.1.1.5 Applying Rational Review: *Williamson v. Lee Optical*

The Court will uphold a law if it is reasonable and if the Court can imagine a legitimate purpose.

[179] Casebook p. 515.
[180] Casebook p. 517.
[181] Casebook p. 515 (footnote four), p. 517–18.

" . . . the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

Here, public health was the legitimate purpose.

Government is also allowed to address evils one step at a time. It need not address all evils at once.

1. An Oklahoma law prevented anyone not licensed as an optometrist or ophthalmologist to work on glasses.

2. Justice Douglas:

   (a) First: the District Court held that § 2 (unlicensed people cannot work on glasses without a prescription from someone licensed) was invalid under the due process clause. The Supreme Court held that the Oklahoma legislature was within its power to regulate in the public interest.

   (b) Second: the District Court held that part of § 3, exempting makers of ready-made classes, violated equal protection.

   (c) The District Court held that part of § 3, regulating the sale of "optical appliances," violated the due process clause. The Supreme Court held that "an eyeglass frame is not used in isolation . . . ; it is used with lenses; and lenses, pertaining as they do to the human eye, enter the field of health. The legislature is therefore empowered to regulate the frames alone.[182]

   (d) Fourth: the District Court held that part of § 4, preventing retailers from subletting to eye doctors, violated due process. The Supreme Court held that the regulation aimed to "free the profession, to as great an extent as possible, from the taint of commercialism."[183] It was therefore a valid exercise of the legislature's power to protect public safety.

3. Why did the Court not think that opticians were a discrete and insular minority?

4.1.2 The Commerce Clause

4.1.2.1 Relaxation of Judicial Constraints on Congressional Power

1. ***NLRB v. Jones & Laughlin***: the National Labor Relations Act prohibited employers "from engaging in unfair labor practices affecting commerce." Jones & Laughlin was accused of violating the act by interfering with employees' organizing and collective bargaining rights. The Court

[182] Casebook p. 521.
[183] Casebook p. 522.

held that Jones & Laughlin's activities would have an indirect but significant impact on commerce: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."[184]

4.1.2.2 *United States v. Darby*

1. The Fair Labor Standards Act prescribed minimum wage and maximum hour requirements for employees engaged in the production of goods related to interstate commerce. Darby, a Georgia lumber manufacturer, was accused of violating the act.

2. The district court quashed the government's indictment. The government appealed.

3. Justice Stone divide his opinion into two parts.

4. Part 1 (prohibition of shipment of proscribed goods in interstate commerce under § 15(a)(1)):

   (a) " . . . the only question arising under the commerce clause with respect to such shipments is whether Congress has the constitutional power to prohibit them."

   (b) The government argued that Congress acted "under the guise of regulation of interstate commerce." But its real aim was to regulate hours and wages.[185]

   (c) Held: Congress's freedom to exercise its commerce clause powers do not depend whether "its exercise is attended by the same incidents which attend the exercise of the police power of the states."[186] Or: Congress is free to exercise police power via the commerce clause as long as the commerce clause exercise is valid on its own.

   (d) *Hammer v. Dagenhart*, which held that Congress's commerce clause powers were limited to regulation of things with "some harmful or deleterious property," is now overruled.

5. Part 2 (validity of the wage and hour requirements under §§ 15(a)(2), 6, and 7):

   (a) Darby's employees were not themselves engaged in interstate commerce. The question was whether employees engaged in the production of goods for interstate commerce were within the reach of Congress's regulatory power.

[184] Casebook p. 550.
[185] Casebook p. 551.
[186] Casebook p. 551.

(b) Congress intended the act not only to prevent transportation of the prohibited product, but also to "stop the initial step toward transportation, production with the purpose of so transporting it."[187] Such regulation was within Congress's power.

(c) Congress also appropriately exercised its commerce clause power in coordinating economic activity between the states by limiting "a method or kind of competition in interstate commerce which it has in effect condemned as "unfair.""[188]

4.1.2.3 *Wickard v. Filburn*

1. The Agricultural Adjustment Act of 1938 mandated maximum allotments of wheat for farmers. Filburn was accused of violating the act by growing wheat for personal use in excess of the allotment.

2. Justice Jackson:

   (a) " . . . even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a **substantial economic effect on interstate commerce** . . . "[189]

   (b) The act in question was meant both to regulate the amount of wheat on the market and "the extent . . . to which one may forestall resort to the market by producing to meet his own needs."[190] If everyone produced personal wheat as Filburn did, it would have a substantial impact on the interstate wheat market. Therefore, personal wheat production was within Congress's regulatory power under the commerce clause.

      i. This was the same argument that justified the insurance mandate in the Affordable Care Act.

4.1.2.4 Post-*Hammer* Issues

1. The *Darby* court moved away from the *Hammer* world in which Congress could only regulate items it saw as "noxious'in themselves'".

2. Does *Darby* mean that Congress is free to regulate interstate commerce for noneconomic reasons? Or does it mean that courts should not try to discern Congress's motives as long as the regulation is a valid exercise of its commerce clause power?[191]

[187] Casebook p. 552.
[188] Casebook p. 553.
[189] Casebook pp. 553–54.
[190] Casebook p. 554.
[191] Casebook pp. 554–55.

3. *Darby* and *Wickard*, both unanimous, might suggest that Congress enjoyed unlimited powers to regulate the national economy. But both cases involved issues of economic competition where only Congress could solve the coordination problem between states. States may have wanted to implement similar economic regulation but couldn't because of the prisoner's dilemma.

4.1.2.5 On Constitutional Revolution: Ackerman vs. Balkin

1. Bruce Ackerman:
   (a) Theory of "constitutional moments": at significant points, Americans "amend" the Constitution outside of Article V—e.g., Reconstruction, New Deal. Political momentum transforms the Court, which reinterprets constitutional principles.[192]
   (b) Constitutional moments are "the epitome of democratic self-governance."[193]
   (c) Constitutional moments "establish new standards for legitimacy and correctness."[194]
2. Jack Balkin and Sanford Levinson:
   (a) Theory of "partisan entrenchment": the executive packs the judiciary with like-minded judges, producing significant changes in constitutional interpretation over time.[195]
   (b) Change can be gradual or dramatic. The process is "roughly but imperfectly democratic" because in the long run, courts become responsive to political majorities.[196]
   (c) Change is not necessarily legitimate or correct.

4.2 The Modern Equal Protection Clause: Race

4.2.1 Racial Discrimination and National Security

4.2.1.1 Ethnic Diversity and the United States: *Chae Chan Ping v. United States*

Can Congress abrogate a treaty? Yes (and this is still good law.)

Are there any limits on Congress's power to regulate immigration by discriminating on the basis of race or national origin? No. (Today, administrative agencies are barred from discriminating, but Congress is not.)

[192] Casebook pp. 556–57.
[193] Casebook p. 557.
[194] Casebook p. 558.
[195] Casebook p. 557.
[196] Casebook p. 558.

1. Ping lived in San Francisco for 12 years. He returned to China, and when he left the US, he obtained a certificate granting him reentry. While he was away, Congress passed an amendment to the Chinese Exclusion Act, which annulled Ping's certificate and his right to return. The district court rejected his claim that the law restrained him of his liberty.

2. Justice Field:

   (a) The act in question was based on "a well-founded apprehension . . . that a limitation to the immigration of certain classes from China was essential to the peace of the community on the Pacific coast, and possibly to the preservation of our civilization there."[197]

   (b) Chinese immigration had been "approaching the character of an Oriental invasion, and was a menace to our civilization."[198]

   (c) Ping argued that the act in question violated a labor treaty with China.

   (d) The Court here held that there was "nothing in the treaties between China and the United States to impair the validity of the act of congress of October 1, 1988 [which prevented Ping's return]."[199] Moreover, Congress would have had the power to override an earlier treaty.

   (e) Congress has the constitutional power to "legitimately control all individuals or governments within the American territory."[200] Field's opinion quoted no specific constitutional authority for Congress's power to regulate immigration. Instead, its authority derives "from the nature of sovereignty itself."[201]

4.2.1.2 Strict Scrutiny: *Korematsu v. United States*

Strict scrutiny: is there justification for the government's violation of rights? If not, the law is invalid.

Here, the violation was the deprivation of the rights of all people of Japanese descent. The justification was national security. The law was held valid.

1. Facts:

   (a) December 7, 1941: Pearl Harbor.

   (b) February 19, 1942—Executive Order 9066: From fear of espionage and sabotage, all people of Japanese descent, whether American citizens or not, were forced to relocate to internment camps.

[197] Casebook p. 399.
[198] Casebook p. 400.
[199] Casebook p. 402.
[200] Casebook p. 403.
[201] Casebook p. 405.

   (c) Later orders enforced 9066. Fred Korematsu was convicted of violating the exclusion order.

2. Justice Black:

   (a) Laws that restrict the rights of a single racial group are "immediately suspect" but not unconstitutional by default.

      i. This was the origin of the **strict scrutiny** standard, although the *Korematsu* court itself did not employ strict scrutiny.

   (b) Here, military necessity validated an otherwise unconstitutional act, as in *Hirabashi*.[202]

   (c) "Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire . . . "[203]

3. Justice Frankfurter, concurring:

   (a) " . . . the validity of action under the war power must be judged wholly in the context of war."[204]

4. Justice Roberts, dissenting:

   (a) Confining someone to a "concentration camp" because of his ancestry violates his constitutional rights.[205]

5. Justice Murphy, dissenting:

   (a) "The judicial test of whether the Government, on plea of military necessity, can validly deprive an individual of any of his constitutional rights is **whether the deprivation is reasonable**."[206] The order here "clearly does not meet that test."

   (b) The justification for the order was based "mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment . . . "[207]

   (c) "I dissent, therefore, from this legalization of racism."[208]

6. Justice Jackson, dissenting:

   (a) If the government had enacted such a law during peacetime, the Court would refuse to enforce it. By the majority's logic, any law passed during war under the guise of military necessity would be constitutional by default.

[202] Casebook p. 968.
[203] Casebook p. 969.
[204] Casebook p. 969.
[205] Casebook p. 970.
[206] Casebook p. 970.
[207] Casebook p. 971.
[208] Casebook p. 972.

(b) "I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can only apply law, and must abide by the Constitution, or they cease to be civil courts and instead become instruments of military policy."[209]

(c) The Court should not constitutionalize this behavior. The rationale will stand as precedent "like a loaded weapon" to be used in the future.[210]

4.2.2 *Brown*

4.2.2.1 Background

1. The NAACP advanced two arguments against "separate but equal." First, most states did not attempt to show that separate facilities were actually equal, so the NAACP hoped the "separate but equal" defense would be unavailing. Second, genuinely separate but equal facilities would be awesomely expensive and ultimately impossible.[211]

2. The US lost face during the Cold War for promoting democracy abroad while resisting integration at home.[212]

4.2.2.2 Separate is Inherently Unequal: *Brown v. Board of Education*

1. The Court heard *Brown* and four companion cases during the 1952 term. In 1953, it set the cases for reargument, possibly because the Court was badly split on the outcome. Before reargument, Chief Justice Vinson died and Chief Justice Warren took his place.

2. Justice Warren:

   (a) The plaintiffs argued that school segregation deprived them of equal protection under the Fourteenth Amendment. "[S]egregated public schools are not 'equal' and cannot be made 'equal' . . . "[213]

   (b) Parties' arguments about the history and intent of the Fourteenth Amendment do not sufficiently resolve the issue.

   (c) The Court turned to the present effects of segregation on public education. "Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws."[214]

[209] Casebook p. 974.
[210] Casebook p. 974.
[211] Casebook pp. 894–95.
[212] Casebook p. 896.
[213] Casebook p. 899.
[214] Casebook p. 900.

(d) "To separate them [i.e., black students] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that that may affect their hearts and minds in a way unlikely ever to be undone."[215]

(e) Held: "in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal."[216]

3. The Court left open the questions of whether implementation should be (1) fast or slow and (2) the responsibility of the Supreme Court or local courts. In *Brown II* it would hold that implementation should be slow and local.

4.2.2.3 A "Dissent" from *Brown*: The Southern Manifesto

1. The framers of the Fourteenth Amendment did not intend it to affect education. Indeed, the Amendment's authors were the same men who voted to segregate Washington, D.C.'s schools.

2. The members of the Court "undertook to exercise their naked political power and substituted their personal political and social ideas for the established law of the land."[217]

4.2.2.4 Originalism and Anti-Discrimination Law

1. Bork: originalism should focus not on the intentions of the framers but on the meaning of the words to the public of the time.

4.2.2.5 Separate But Equal and Due Process: *Bolling v. Sharpe*

1. On the same day as *Brown*, the Court held that segregation in DC's public schools violated due process because it arbitrarily deprives black students of liberty (presumably, to pursue education).[218]

4.2.2.6 Beyond Originalism?

1. Paul Brest: interpreters should consider the text and original understanding but should not be bound by it.[219]

2. David Strauss: the Constitution is a common law system.[220]

3. Scalia: these multimodal approaches give courts too much discretion.[221]

[215] Casebook p. 901.
[216] Casebook p. 902.
[217] Casebook p. 903.
[218] Casebook p. 914.
[219] Casebook p. 920.
[220] Casebook pp. 921–22.
[221] Casebook p. 922.

4.2.3 *Brown II* and *Hernandez*

4.2.3.1 Reflections on the Opinion in *Brown*

1. *Brown* relied more on social science than legal precedent.[222]
2. Achieving unanimity was no small accomplishment.

4.2.3.2 The Enduring Significance of *Brown*

1. *Brown*'s immediate impact was minimal–but it "opened new doors for resisting segregation through actions at law. It invalidated arguments in favor of segregation, both by excluding them from the courtroom and by stigmatizing their use in public debate."[223]

4.2.3.3 Four Decades of School Desegregation: (*Brown II*, *Green*, *Swann*)

1. *Brown II* granted local courts the authority to implement *Brown*—and options to delay, despite the directive to implement *Brown* "with all deliberate speed."[224]
2. In the 1960s, courts approved two types of desegregation plans:
   (a) *Residence*: basing school attendance on place of residence would have produced substantial desegregation, but it was not widely used because it would have placed white students in inferior traditionally black schools.
   (b) *Freedom of choice*: each student could opt to attend a formerly white or black school, and the district would bus them there. This was the prevalent approach. It did not lead to much desegregation.
3. Justice Black, 1964: "[t]here has been entirely too much deliberation and not enough speed. . . . "[225]
4. *Green*: the Court held that a school district that was not residentially segregated "could not employ a freedom-of-choice plan when its effect was to perpetuate the long-standing tradition of segregation."[226]
5. After *Green*, many school districts replaces freedom of choice with geographic zoning, spurring white flight.[227]

[222] Casebook p. 493.
[223] Casebook p. 926.
[224] Casebook p. 928.
[225] Casebook p. 931.
[226] Casebook p. 932.
[227] Casebook p. 934.

4.2.3.4 The Turning Point—Interdistrict Relief: (*Milliken v. Bradley*)

For the first time since *Brown*, the Court found that a district court had gone too far in remedying segregation.

1. The city of Detroit was mostly black and the surrounding suburbs were mostly white. The district court tried to enforce integration of the two areas. The Court reversed because there was no "evidence of race-dependent action (such as manipulating boundaries) designed to segregate the city's Blacks from the suburbs' Whites."[228]

2. Justice White, dissenting: an interdistrict remedy would be more effective under the circumstances than an intracity remedy.

3. Justice Marshall, dissenting: the school board was acting as an agent of the state. Since the state was responsible, an interdistrict remedy should have been available.

4.2.3.5 An Era of Retrenchment

1. The Court later held that "[w]here resegregation is a product not of state action but of private choices, it does not have constitutional implications."[229] Constitutional remedies are limited when white flight effects resegregation.

4.2.4 Strict Scrutiny (Anticlassification vs. Antisubordination)

1. Three types of race cases:
   (a) **Jim Crow**: formal, overt racial distinctions.
   (b) **Disproportionate impact**: no overt discrimination, but the decision impacts certain groups more than their size warrants. How should the law respond? Do you need to prove intent?
   (c) **Affirmative action**: racial classification for remedial purposes.

4.2.4.1 Rationalizing *Brown*: *Hernandez v. Texas* The Court developed a two-part test for identifying race-based equal protection violations. First, is there a distinct class? Second, is there systematic discrimination against that class?

Haney-López argues that this is the same rationale underlying *Brown*.

1. Hernandez, a man of Mexican descent, was convicted of murder in Texas. He argued that people of Mexican descent were systematically excluded

[228] Casebook p. 941
[229] Casebook p. 945.

from juries, depriving him, as a member of that class, of equal protection.[230]

2. The Court developed a two-part test to determine whether there was an equal protection violation:
   (a) Is there a distinct class?
   (b) Was the class unreasonably singled out for different treatment?
3. There are several ways to determine whether a group is a distinct class, including the "attitude of the community," participation in business and community groups, targeted segregation ("No Mexicans Served"). On these criteria, Mexican-Americans were a distinct class.
4. The fact that not a single juror in 25 years was Mexican established a strong prima facie case of discrimination. Held for Hernandez.
5. Haney-López: the Court's reasoning here is the same as it was in *Brown*, but here it is explicit, whereas in *Brown* it was fuzzy.
   (a) Cf. Herbet Wechsler, who argued that *Brown* had no constitutional principle.

4.2.4.2 The Antidiscrimination Principle

1. To what forms of racial segregation did *Brown* apply?
2. "*Brown* did not proscribe racial classification or declare it suspect. Rather, it addressed the harmful consequences of separating school children in a particular institutional context."[231]
3. In the 1950s, the Court refused to address antimiscegenation laws, but took up the question in 1967 in *Loving*.

4.2.4.3 Suspect Classification: *Loving v. Virginia*

When race is involved in any way, the Court moves from rational review ("any legitimate state interest") to strict scrutiny ("compelling government interest").

Loving also struck down the last pillar of Jim Crow—antimiscegenation laws—and held that racial discrimination implicates both equal protection (i.e., equality) and due process (i.e., liberty).

1. Loving, white, married Jeter, black, in Washington, DC. Upon returning to Virginia, the two were indicted under the state's antimiscegenation statute. They argued the law violated equal protection and due process.
2. Justice Warren:

[230] Casebook pp. 1010–11.
[231] Casebook p. 958.

(a) The state argued first that the law did not violate equal protection because it punished members of each race to the same degree.

(b) The state argued second that the "scientific evidence is substantially in doubt" about the desirability of interracial marriages, so the court should "defer to the wisdom of the state legislature . . . "[232]

i. The Court rejected this argument because racial classification warrants a higher level of scrutiny.

(c) The state also argued that the framers of the Fourteenth Amendment did not intend to make unconstitutional state antimiscegenation laws. The court responded that the Amendment had a "broad[], organic purpose," so original intent is not determinative.[233]

(d) The state argued further that the Court set a favorable precedent in *Pace v. State of Alabama*, where it upheld heightened penalties for interracial fornication on the ground that it punished all races equally. The Court here overturned *Pace*, holding that the "clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."[234]

(e) " . . . the Equal Protection Clause demands that racial classification, especially in criminal statutes, be subjected to the 'most rigid scrutiny,' Korematsu . . ., and, if they are ever to be upheld, they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate."[235]

(f) In this case, "[t]here is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification."[236]

3. The underlying rationale, which the Court struggles to make clear, is that race is intimately tied to group subordination.

4.2.4.4 What is a Race-Dependent Decision?

1. Race-dependent decisions are not always overt. Brest et al. use "race-motivated" to refer to a decision in which race motivates the decisionmaker in any way.[237]

2. What obligations does the antidiscrimination principle impose on initial decisionmakers?

[232] Casebook p. 961.
[233] Casebook pp. 961–62.
[234] Casebook p. 962.
[235] Casebook p. 962.
[236] Casebook p. 962.
[237] Casebook p. 1021.

3. When should courts inquire into whether a decision was race-dependent?

4. ***Yick Wo v. Hopkins*—Discriminatory Administration of an Otherwise "Neutral" Statute**: the San Francisco Board of Supervisors granted laundromat permits to nearly all of 80 Caucasion applicants and none of 200 Chinese applicants. The Court held that there was no reason for it except to express hostility to a group.

5. **"Queue Ordinance Case": *Ho Ah Kow v. Nunan*—The Race-Dependent Decision to Adopt a Nonracially Specific Regulation or Law**: every male prisoner's hair had to be cut to within one inch. The practical effect was to coerce Chinese people into paying fines, because they dreaded the cutting of the queue (a braid they held sacred).

   (a) **Gomillion v. Lightfoot**): the Alabama legislature changed the boundaries of Tuskegee from a square to "an uncouth twenty-eight-sided figure."[238] The sole purpose was to segregate voters by race.

6. ***Gaston County v. United States*—Transferred De Jure Discrimination**: a voting literacy test disproportionately disenfranchised blacks. The Court held that years of inferior education meant that blacks were less equipped to pass the test, so the test was discriminatory.

4.2.4.5 Title VII and Disparate Impact: *Griggs v. Duke Power*

Title VII prohibits employers from requiring job applicants to have high school diplomas and pass a general intelligence test without showing that those criteria predict job performance.

1. An employer required job applicants to have a high school diploma and pass a general intelligence test.

2. Justice Burger: the Civil Rights Act "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited."

4.2.4.6 *Washington v. Davis*

The Court declined to read the *Griggs* "disparate impact" standard into the Fourteenth Amendment.

1. The Civil Service Commission issued a personnel test to applicants who sought to become police officers. Plaintiffs sued to invalidate the test on the grounds that it violated the Fifth Amendment.

2. The appellate court held for the plaintiffs, incorporating the *Griggs* interpretation of Title VII into the Fifth and (by implication) the Fourteenth Amendments.

[238] Casebook p. 1023.

3. Justice White:
   (a) Something is not unconstitutional "*solely* because it has a racially disproportionate impact."[239]
   (b) De jure segregation is not the same as de facto segregation.
   (c) "Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[240]
4. Justice Stevens, concurring: there is not such a bright line between discriminatory purpose and discriminatory impact. "For normally the actor is presumed to have intended the natural consequences of his deeds."[241]

4.2.5 *Griggs* as a Constitutional Principle and *Griggs* versus *Davis*

1. *Davis* exempted policies from violating the Fifth and Fourteenth amendments on disparate impact alone. As a solution, what about a requirement that policymakers confront the racial impact of their policies?[242] Environmental impact statements are analogous and are already required.
2. There is little legislative history to support the "disparate treatment" interpretation of Title VII from *Griggs*. So why the different outcome from *Davis*? One possible explanation is that Title VII applies only to employment, while the Fourteenth Amendment applies to all scenarios. Another possible explanation is that the police department in *Davis* was full of black officers, including the chief.

4.2.6 The *Arlington Heights* Factors

1. Factors that courts can use to determine when government decisions are racially motivated:
   (a) The impact of the action, including patterns that emerge.
   (b) The decision's historical background.
   (c) The sequence events leading up to the decision.
   (d) "Departures from the normal procedural sequence."[243]
   (e) Substantive departures from normal procedure.
   (f) Legislative or administrative history.

[239] Casebook p. 1027.
[240] Casebook p. 1028.
[241] Casebook p. 1030.
[242] Casebook p. 1034.
[243] Casebook p. 1040.

4.2.7 Colorblindness

4.2.7.1 *United Jewish Organizations v. Carey*

1. The Voting Rights Act (1965) required states to send their proposed redistricting plans to the federal government for approval. In 1974, New York redrew two districts to create "substantial nonwhite majorities." As a result, the Hasidic community was split into two districts.
2. The United Jewish Organizations argued that the redistricting was unconstitutional because it was based solely on race.
3. Justice White:
   (a) There was "no doubt" that the State deliberately used race as a factor. But since there was no stigma attached to its use, and since whites were not denied fair representation, there was no constitutional violation.
4. Justice Stewart, concurring:
   (a) UJO argued that "racial awareness in legislative reapportionment is unconstitutional per se."
   (b) But since there was (1) no disparate impact (*Davis*) (2) no discriminatory intent, there was no constitutional violation.
5. Justice Brennan, concurring in part:
   (a) It can be difficult to determine whether a given race classification actually furthers benign rather than illicit objectives.
   (b) Even when used remedially, race classifications can "serve to stimulate our society's latent race consciousness."[244]
   (c) " . . . we cannot ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society. . . ."[245]

4.2.7.2 Affirmative Action Quotas: *University of California v. Bakke*

UC Davis's affirmative action plan was unconstitutional. However, race is not categorically off limits.

1. The University of California, Davis medical school allocated 16 of 100 slots for minority students. Alan Bakke, a white applicant, was denied admission. He argued that the system amounted to a racial quota in violation of the Fourteenth Amendment.

[244] Handout p. 3.
[245] Handout p. 3.

2. Justice Powell:
   (a) "Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination."[246]
   (b) UC Davis argued that "discrimination against members of the white 'majority' cannot be suspect if its purpose can be characterized as benign."[247] The Court rejected this argument.
   (c) The Davis program had four goals:[248]
      i. Reduce the historic deficit of minorities in medical school and the medical profession.
      ii. Counter the effects of societal discrimination.
      iii. Increase the number of physicians who will work in underserved communities.
      iv. Obtain the educational benefits that flow from a diverse student body.
   (d) The Court held that all but the last were unconstitutional. It held that a system like Harvard's, which awards a "plus" to minority applicants, would be permissible—but a quota system like Davis's is not allowed.
3. Justice Blackmun, concurring in part and dissenting in part:
   (a) Race-neutral affirmative action is impossible. "[I]n order to treat some persons equally, we must treat them differently."[249]
4. Justice Marshall, concurring in part and dissenting in part:
   (a) Marshall began with a long history of racial inequality in the US. That history created a range of present inequalities.
   (b) The Fourteenth Amendment does not prohibit remedies for past discrimination.

4.2.7.3 Compelling Government Interest: *Richmond v. Croson*

Race-based classifications are subject to strict scrutiny. Race-based affirmative action programs must be related to a compelling government interest—the same standard as programs that intentionally discriminate *against* racial groups.

4.2.7.4 Strict Scrutiny for Racial Classifications By Congress: *Adarand v. Pena*

The *Croson* rule—that any racial classification is subject to strict scrutiny—applies to Congressional actions as well as state and local actions.

[246] Handout p. 3.
[247] Handout p. 5.
[248] Handout part II pp. 1–2.
[249] Handout p. 8.

4.2.8 The Intent Standard, Version 2: *Feeney* and After

4.2.8.1 Discussion Following *Washington v. Davis*

1. In *Feeney*, the Court elaborated the *Davis* discriminatory purpose requirement, holding that foreseeable impact "was not sufficient to prove discriminatory purpose under the Equal Protection Clause":
   (a) "'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part **'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group.**"[250]

4.2.8.2 Commentaries on the Intent Standard

1. Linda Hamilton Krieger: under social cognition theory, "a self-professed 'colorblind' decisionmaker will fall prey to . . . various sources of cognitive bias." The test should be whether race "made a difference" in the decision, not whether the decisionmaker intended for it to make a difference.[251]
2. Charles Lawrence: when social practices convey unconscious racism—e.g., erecting a wall between the black and white parts of town—courts should recognize discrimination.

4.2.8.3 *McCleskey v. Kemp*

1. McCleskey was sentenced to death in Georgia for murder.
2. A study by David Baldus and others showed that blacks in Georgia were more likely than whites to receive the death penalty, especially when killing whites.
3. Justice Powell:
   (a) McCleskey first argued that the Baldus study demonstrated that he was discriminated against on the basis of race. The Court held that McCleskey must show that the decisionmakers acted with discriminatory purpose. But each jury is unique, and the state cannot rebut McCleskey's claims because it cannot know the jury's motivations. Moreover, criminal law requires great discretion of decisionmakers in the criminal justice system.
   (b) Next, McCleskey argued that the state acted with a discriminatory purpose by allowing the capital punishment statute to remain, despite its disparate impact on blacks. The Court held, quoting *Feeney*, that McCleskey would have to show that the state acted because of, not in spite of, its adverse effects on a racial group.[252]

[250] Casebook p. 1031.
[251] Casebook pp. 1035–36.
[252] Casebook p. 1058.

(c) Finally, McCleskey argued that Georgia's capital punishment system is arbitrary and capricious, and therefore that his sentence was excessive. The Court held that the criminal justice system requires discretion.

4. Justice Brennan, dissenting:

   (a) Race was a major factor in McCleskey's death sentence. Racism remains.

5. Justice Blackmun, dissenting:

   (a) A legitimate basis for conviction does not outweigh an equal protection violation. McCleskey must pass a three-step test, at which point the burden shifts to the prosecution to rebut the defendant's case:

      i. Was he a member of a distinct class, singled out for different treatment? Yes—the Baldus study proves this.

      ii. Was there a "substantial degree of different treatment"?[253] Yes—the Baldus study proves this as well. Race was more important in sentencing even than whether the defendant was the prime mover in the homicide.

      iii. Is the allegedly discriminatory procedure susceptible to abuse? Yes. Evidence of prior discrimination shows that the process was susceptible to abuse.

   (b) So, the burden of proof should have shifted to the state.

   (c) Also, in its focus on the unknowability of the jury's motives, the majority's opinion ignores the great discretion prosecutors have in pursuing the death penalty.

4.2.8.4 Memo from Justice Scalia on *McCleskey* Draft Opinion

1. Two hesitations about Justice Powell's opinion:

   (a) The uniqueness of juries and trials does not weaken the conclusions of the Baldus study.

   (b) Racial factors in sentencing, no matter how strong, should not warrant reversal.

4.2.9 Affirmative Action in Higher Education (Diversity)

1. See *Bakke* above.

[253] Casebook p. 1051.

4.2.9.1 Affirming *Bakke*: *Grutter v. Bolinger*

1. The University of Michigan Law School implemented an admissions policy that considered a range of "soft variables," including race. Without setting racial quotas, the law school sought to enroll "a critical mass of underrepresented minority students . . . "[254] Barbara Grutter, a white applicant, was denied admission. She brought suit under the Fourteenth Amendment and Title VII.

2. Justice O'Connor:

   (a) The law school did not impose racial quotas.

   (b) Race was an "extremely strong factor," but "not the predominant factor" in admissions.[255]

   (c) Powell, *Bakke*: when governmental decisions involve race or ethnicity, the government must show a "compelling governmental interest."[256] Student body diversity is such an interest.[257]

   (d) The Court has traditionally given great deference to universities' academic decisions. The Court will assume good faith absent evidence to the contrary.[258]

   (e) Diversity is critical to education and citizenship.[259]

   (f) *Bakke* required affirmative action programs to be "narrowly tailored." Michigan's program was individualized and narrowly tailored. The implication of a quota system is undermined by the fact that the racial makeup of the incoming class varies greatly between years.

   (g) A lottery system would be inappropriate because it would force the school to sacrifice its "nuanced judgment," which would harm other educational values.[260]

   (h) "[R]ace-conscious policies must be limited in time. . . . We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."[261]

3. Justice Ginsburg, concurring:

   (a) Discrimination in education is still a real threat. Someday, we hope, affirmative action will no longer be necessary.

4. Justice Rehnquist, dissenting:

[254] Casebook p. 1121.
[255] Casebook p. 1122.
[256] Casebook p. 1122.
[257] Casebook p. 1123.
[258] Casebook p. 1124.
[259] Casebook p. 1125.
[260] Casebook p. 1129.
[261] Casebook p. 1129.

(a) The law school's admissions program was not narrowly tailored to its goals.[262]

(b) The law school asserts it wants to create a "critical mass" of *each* underrepresented minority group. But this claim is hard to take seriously when there have been as few as three Native Americans and as many as 108 blacks. The disparity indicates that the school's "alleged goal of 'critical mass' is simply a sham . . . "[263]

(c) The class's racial composition may fluctuate between years, but it almost exactly tracks the makeup of applications by race, suggesting that the admissions policy is actually "a carefully managed program designed to ensure proportionate representation of applicants from selected minority groups."[264]

5. Justice Kennedy, dissenting:

(a) Race is likely to be outcome determinative for applicants in the bottom 15 to 20 percent numerically.[265]

(b) The law school has not shown that individual assessment is safeguarded throughout the admissions process. It has not met its burden under strict scrutiny.[266]

(c) The Court gives too much deference. "Deference is antithetical to strict scrutiny, not consistent with it."[267]

6. Justice Scalia, dissenting:

(a) Agree with Rehnquist—the program was a sham.[268]

(b) Agree with Thomas—Michigan's interest in maintaining its prestige led it to create the current admissions program.

(c) Should we extend the justification of enhancing cross-racial understanding, etc., to civil service jobs—or all jobs?[269]

7. Justice Thomas, concurring in part and dissenting in part:

(a) Only extraordinary threats—anarchy, violence, etc.—constitute a compelling government interest.[270]

(b) The law school rejected any race-neutral alternatives that would have reduced its "academic selectivity." Thus, the current policy is at least in part fueled by the school's desire to preserve its elite status.

[262] Casebook p. 1130.
[263] Casebook pp. 1130–31.
[264] Casebook p. 1131.
[265] Casebook p. 1132.
[266] Casebook p. 1132.
[267] Casebook p. 1133.
[268] Casebook p. 1133.
[269] Casebook p. 1134.
[270] Casebook pp. 1135–1136.

The educational benefits the current policy produced were marginal, and "marginal improvements in legal education do not qualify as a compelling state interest."[271]

(c) Racial heterogeneity often impairs learning.[272]

(d) In *Virginia*, the Court gave no deference when sex discrimination was involved, which only required intermediate scrutiny. Why should it give more deference here when the standard is strict scrutiny?[273]

(e) California banned affirmative action in public education, but minority representation has nonetheless remained steady.[274]

(f) Minorities may benefit from attending less elite law schools for which they are better prepared.[275]

4.2.9.2 Automatic Point Bonus for Minority Applicants: *Gratz v. Bollinger*

Universities using point systems for admissions cannot grant automatic bonuses to minority applicants because of their race.

4.2.10 Race and Public Policy

4.2.10.1 School Assignments: *Parents Involved in Community Schools v. Seattle School District No. 1*

Schools cannot consider race when assigning students to schools, even if racial imbalances exist between schools.

4.2.10.2 *Ricci v. DeStefano*

4.3 The Modern Equal Protection Clause: Gender

4.3.1 Intermediate Scrutiny

4.3.1.1 Social Movements

1. The Court rejected early attempts to apply the Fourteenth Amendment to sex discrimination, e.g., Justice Bradley's dissent in *Bradwell*, based on the "separate spheres" ideology.[276] It held similarly that the right to vote was not a privilege or immunity.

[271] Casebook p. 1136.
[272] Casebook pp. 1137–38.
[273] Casebook p. 1138.
[274] Casebook pp. 1138–39.
[275] Casebook pp. 1140–41.
[276] Casebook p. 1180.

2. *Adkins*: a minimum wage law for women violated freedom of contract; overruled in 1937, and then again in 1948 in *Goesaert v. Cleary*, in which the Court upheld a Michigan "barmaid" law on rational review.[277]

3. *Reed v. Reed*: while purportedly applying rational review, the Court struck down an Idaho law that preferred men over women as estate administrators as "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."[278]

4. 1963: Equal Pay Act.

5. 1964: Title VII of the Civil Rights Act.

6. NOW was formed to pressure the EEOC to enforce Title VII's sex discrimination prohibition. NOW and others advanced the analogy between race and sex. Pauli Murray advanced the stereotyping argument. Ginsburg drafted the appellant's brief in *Reed*.

7. Activists in the sixties followed a "dual strategy": (1) a broader interpretation of the Fourteenth Amendment and (2) the enactment of an Equal Rights Amendment.[279]

4.3.1.2 Heightened Scrutiny for Gender Classifications: *Frontiero v. Richardson*

Gender-based classifications require heightened scrutiny.

1. A federal law granted extra allowances to uniformed service members who supported dependents. Men who claimed their wives as dependents automatically won the allowance, but women who claimed their husbands had to prove that their husbands depended on them for more than half of their income.

2. Sharron Frontiero challenged the law on due process grounds.

3. The government argued that the law was justified because under most circumstances, its assumptions about dependency were true, which made administration of the program far more efficient.

4. Justice Brennan:

   (a) *Reed*: sex-based classifications warrant strict scrutiny.

   (b) Like race, sex is immutable and "frequently bears no relation to ability to perform or contribute to society."[280]

[277] Casebook p. 1182.
[278] Casebook p. 1183.
[279] Casebook p. 1187.
[280] Casebook p. 1190.

(c) The government failed to make a persuasive argument about administrative efficiency—and even if it had, "the Constitution recognizes higher values than speed and efficiency."[281]

(d) Held: the program violated the due process clause of the Fifth Amendment.

4.3.2 Relevant Differences or Stereotypes

4.3.2.1 What Justifies Special Constitutional Scrutiny for Gender Classifications or for Gender Discrimination (And Are They the Same Thing?)

1. MacKinnon: state-based sex discrimination often occurs without overt sex classification. Ignoring documented harms should be considered "state action."[282]

2. The Fourteenth Amendment was not originally understood to grant women political rights or to make marital status rules unconstitutional.

3. Race-gender analogies involve two strategies: (1) asking whether the rationales for declaring race a suspect class also apply to gender, and (2) identifying the features of race that make it special and asking whether gender shares those features.

4. There are important differences between race and gender—e.g., race has a history of disdain and overt subordination, while gender has a history of paternalism and less overt subordination.[283]

5. Sylvia Law: there are legally relevant biological distinctions between men and women, but not between races.[284]

6. Richard Wasserstrom: sex is significantly more complicated and more deeply socially embedded than race. "Women are both put on a pedestal and deemed not fully developed persons."[285] Should gender therefore receive higher scrutiny than race, or is law complicit in the structures it attempts to reform?

7. John Ely: a pervasive prejudice can convince its victims of its own correctness—for instance, one could argue that many women have accepted the "overdrawn stereotype."[286] But this argument is no longer plausible, given women's voting power. " . . . if women don't protect themselves from sex discrimination in the future, it won't be because they can't."[287]

[281] Casebook p. 1192.
[282] Casebook p. 1203.
[283] Casebook pp. 1206–07.
[284] Casebook p. 1207.
[285] Casebook p. 1208.
[286] Casebook p. 1209.
[287] Casebook p. 1210.

8. Catherine MacKinnon: "Socially, one tells a woman from a man by their difference from each other, but a woman is legally recognized to be discriminated against on the basis of sex only when she can first be said to be the same as a man."[288]

4.3.2.2 What Does Intermediate Scrutiny Prohibit? *Craig v. Boren*

1. Gender rights advocates argued that the Court should apply strict scrutiny to gender classification. This view won a plurality but not a majority in *Frontiero*. The court ultimately settled on **intermediate scrutiny**.[289]

2. In the early years after *Reed* and *Frontiero*, the Court in *Geduldig v. Aiello* did not extend sex discrimination protections to pregnant women.[290]

3. *Craig v. Boren*:

   (a) A male challenged an Oklahoma law allowing females but not males to buy "near-beer." The state argued that sex differences in drunk driving justified the distinction. The Court held for the plaintiff.

   (b) The Court adopted intermediate scrutiny. "To regulate in a sex-discriminatory fashion, the government must demonstrate that its use of sex-based criteria is "substantially related" to the achievement of "important government objectives"." It never explained why it employed different standards for race and gender.[291]

4. Before 1970s, legislatures and courts justified sex discrimination as "rationally reflecting differences in family roles." After a series of cases in the 1970s, "the Court struck down sex-based laws premised on the male breadwinner/female caregiver model."[292] Sex stereotyping grew closer to race stereotyping.

5. The dangers of stereotyping: cognitive error, obscured similarities between sexes, unfair categorization of individuals, unfair denigration of groups.

6. " . . . the law of marriage no longer expressly distinguishes between husbands and wives as it did for centuries."[293]

4.3.2.3 Same-Sex Marriage

1. Federal and state governments define marriage as a male-female union. No court has forbidden the government from discriminating by sex in deciding who can marry. Rather, courts have upheld the laws on the ground that

[288] Casebook p. 1211.
[289] Casebook p. 1213.
[290] Casebook pp. 1213–1214.
[291] Casebook p. 1214.
[292] Casebook p. 1215.
[293] Casebook p. 1219.

they punish the sexes equally because both men and women are barred from marrying the same sex. Same-sex marriage proponents argue that *Loving* invalidated this line of argument.[294]

2. *Baker v. State*: Judge Johnson in the Vermont Supreme Court held that sex-based marriage restrictions violated the state's constitution by enforcing sex stereotypes without any legitimate reason.[295]

3. Shortly after *Reed*, the Supreme Court dismissed an appeal for lack of a federal question from a Minnesota case upholding conventional marriage under the Equal Protection Clause. Some courts, including the California Supreme Court, have taken this as precedent.

4.3.2.4 Jury Service: *J.E.B. v. Alabama*

1. In a paternity suit, the state used most of its peremptory challenges to remove male jurors, leading to an all-female jury. The Supreme Court (Justice Blackmun) held, "[w]e shall not accept as a defense to gender-based peremptory challenges "the very stereotype the law condemns."" [296]

4.3.3 Not Sex-Based Differences

4.3.3.1 "Because Of," Not "In Spite Of": *Personnel Administrator of Massachusetts v. Feeney*

If a statute has a disparate impact on one gender, it is invalid only if the legislature passed it *because of* a desire to discriminate, not merely *in spite of* knowledge that a disparate impact would result.

4.3.3.2 Domestic Violence and Marital Rape

4.3.3.3 Biological Factors: *Geduldig v. Aviello*

Legislation that differentiates between sexes based on biological factors is not necessarily discriminatory. Applying the *Feeney* principle, the Court held that pregnancy was not a pretext for the legislature to invidiously discriminate against women.

4.3.4 Permissible Sex-Based Differences: *Michael M. v. Superior Court of Sonoma*

1. Michael M. was charged with statutory rape under a California law that made sex with an underage female a crime for the male but not for the

[294] Casebook p. 1219.
[295] Casebook pp. 1221–22.
[296] Casebook p. 1227.

female. He argued that the statute unlawfully discriminated on the basis of gender.

2. The California Supreme Court applied strict scrutiny, holding that state had a compelling interest in preventing teenage pregnancy.

3. Justice Rehnquist (plurality opinion):

   (a) The Supreme Court applied intermediate scrutiny, as it does in all gender classification cases. Under the *Craig* test, gender classification is permissible if it is "substantially related" to "important governmental objections."[297]

   (b) The State argued that "the legislature sought to prevent illegitimate teenage pregnancies."[298]

   (c) Michael M. argued that the statute should be broadened to hold females equally liable. The Court, however, held that the relevant question was whether the CA statute was within constitutional boundaries, not whether it was "drawn as precisely as it might have been . . ."[299] Moreover, a gender-neutral statute would be nearly impossible to enforce because it would deter females from reporting violations. " . . . the statute reasonably reflects the fact that the consequences of sexual intercourse fall more heavily on the female than on the male."[300] Affirmed.

4. Justice Stewart, concurring:

   (a) The Equal Protection Clause does not prevent states from distinguishing between genders, but it is important to prevent legislatures from using gender classifications as pretexts for "invidious discrimination."[301]

5. Justice Blackmun, concurring:

   (a) It's difficult to understand how the Court could uphold this law on the ground that teenage pregnancy carries major personal and social consequences, while at the same time ignoring similar consequences when it strikes down laws permitting abortion.

4.3.5 Separate Facilities—The VMI Case: *United States v. Virginia*

1. After a female applicant to VMI was denied, the United States sued Virginia and the VMI, alleging its male-only policy violated equal protection.

2. Justice Ginsburg:

[297] Casebook p. 1284.
[298] Casebook p. 1284.
[299] Casebook p. 1285.
[300] Casebook p. 1286.
[301] Casebook p. 1287.

(a) The VMI aimed to produce "citizen-soldiers." Neither its goals nor its methods were "inherently unsuitable to women."[302]

(b) Women have no opportunity to gain similar educational benefits elsewhere.[303]

(c) The District Court held that VMI's single-sex education was allowable because it created educational diversity and that its unique methods would be destroyed if it were forced to admit women.

(d) The Fourth Circuit reversed, holding that VMI must "do more than favor one gender." It offered three options: admit women, establish parallel institutions, or stop providing state support. Virginia chose to set up a parallel institution, VWIL. The district and appellate courts approved the plan.[304]

(e) *J.E.B. v. Alabama* held that "[p]arties who seek to defend gender-based government action must demonstrate an **'exceedingly persuasive justification'** for that action . . ."[305]

(f) "'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of members of either sex or for artificial constraints on an individual's opportunity."[306]

(g) The Court rejected both the diversity and modification arguments. Virginia "has fallen far short of establishing the 'exceedingly persuasive justification' that must be the solid base for any gender-defined classification."[307] VWIL was a separate but not equal institution.

3. Justice Rehnquist, concurring:

(a) Justice Ginsburg's "exceedingly persuasive justification" standard "introduces an element of uncertainty respecting the appropriate test" for evaluating whether gender classifications violate equal protection.[308]

(b) VMI's policies were not constitutionally suspect until *Mississippi Univ. for Women v. Hogan* 11 years ago. The Court should not consider evidence prior to *Hogan*.

(c) " . . . it is not the 'exclusion of women' that violates the Equal Protection Clause, but the maintenance of an all-men's school without providing any—much less a comparable—institution for women."[309]

[302] Casebook p. 1229.
[303] Casebook p. 1230.
[304] Casebook p. 1230–31.
[305] Casebook p. 1231.
[306] Casebook p. 1232.
[307] Casebook p. 1237.
[308] Casebook p. 1239.
[309] Casebook p. 1241.

4. Justice Scalia:

   (a) Agree with Justice Rehnquist that the majority "drastically revises our standards for reviewing sex-based classifications."[310]

   (b) Every age is closed-minded. The framers of the Constitution left future generations "free to change." "Even while bemoaning the sorry, bygone days of 'fixed notions' concerning women's education, the Court favors current notions so fixedly that it is willing to write them into the Constitution of the United States by application of custom-built 'tests.' This is not the interpretation of a Constitution, but the creation of one."[311]

   (c) The United States argued that the standard of review should be strict scrutiny. VMI's policy fails to meet majority's "exceedingly persuasive justification" standard if just one qualified woman is denied admission. This not intermediate scrutiny, as the Court claims, but strict scrutiny.

   (d) Single-sex education can carry substantial benefits, so it is "substantially related" to a state's educational interests.[312]

4.3.6 Affirmative Action, Intersectionality, and Marriage

4.3.6.1 Affirmative Action

1. Gender classification cases "have a considerably different flavor from the Court's affirmative action cases involving race."[313]

2. " . . . the most important questions arising in gender-based affirmative action concern the relationship of these older cases to the Court's newer jurisprudence on affirmative action."[314]

3. *Croson* and *Adarand* make it much more difficult to justify affirmative action programs that benefit blacks than programs that benefit women.[315]

4.3.6.2 Intersectionality

1. "Intersectionality": "the special problems that arise from the crosscutting nature of identity. . . ."[316]

4.3.6.3 Same-Sex Marriage

1. See "Same-Sex Marriage," above.

[310] Casebook p. 1241.
[311] Casebook p. 1243.
[312] Casebook pp. 1243–44.
[313] Casebook p. 1323.
[314] Casebook p.l 1324.
[315] Casebook p. 1326.
[316] Casebook p. 1258.

4.4 Modern Substantive Due Process

4.4.1 Implied Fundamental Rights: Contraception

4.4.1.1 Modern Substantive Due Process: *Griswold v. Connecticut*

The Bill of Rights guarantees a "penumbra" or "zone of privacy."

1. A Connecticut statute outlawed the use of contraceptives. Griswold, Executive Director of Planned Parenthood in Connecticut, and Buxton, of the Yale Medical School, challenged the law under the Due Process Clause after they were arrested.
2. Justice Douglas:
   (a) He begins by rejecting Lochnerism. "We do not sit as a superlegislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."[317]
   (b) Many rights, such as the right of association, are not explicit in the Constitution. But the First Amendment implies them. Freedom to associate, "while . . .not expressly included in the First Amendment its existence is necessary in making the express guarantees fully meaningful."[318]
   (c) Guarantees in the Bill of Rights carry "penumbras" and "zones of privacy."[319]
   (d) The Connecticut statute invades a zone of privacy by forbidding the use of contraceptives, rather than regulating their manufacture or sale. We wouldn't allow police to search marital bedrooms for evidence of contraceptive use.
3. Justice Goldberg, concurring:
   (a) The Constitution does not mention the right to marital privacy, but it is implied in the Ninth Amendment because it is a "fundamental and basic" right.[320]
4. Justice Harlan, concurring:[321]
   (a) " . . .the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided by the Constitution. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints."[322]

[317] Casebook p. 1343.
[318] Casebook p. 1343.
[319] Casebook p. 1344.
[320] Casebook p. 1346.
[321] From his dissent in *Poe v. Ullman*, incorporated here.
[322] Casebook p. 1347.

   (b) Statutes regulating fundamental rights, such as privacy, are subject to strict scrutiny.[323] Connecticut failed to show a compelling government interest because it has failed to enforce the statute against individual users.[324]

5. Justice White, concurring:

   (a) Statutes invading privacy *could* satisfy strict scrutiny. The statute's stated purpose—to deter illicit sexual relationships—would be a legitimate justification. But here, the ban on contraceptive use is not substantially related to the stated goal, because banning married couples' use of contraceptives does not directly deter illicit relationships.

6. Justice Black, dissenting:

   (a) Connecticut's policy is wrong, but it is not unconstitutional.

   (b) There is no fundamental constitutional right to privacy. The majority's reliance on *Meyer* and *Pierce* is unpersuasive because those cases have been discarded as *Lochner*-era relics.

   (c) The Court cannot reliably discern "fundamental principles of liberty and justice" or the "traditions and [collective] conscience of our people."[325]

7. Justice Stewart, dissenting:

   (a) Agree with Justice White that the law is "uncommonly silly" but not unconstitutional. The Constitution guarantees no fundamental right to privacy.[326]

   (b) Justice Goldberg's interpretation of the Ninth Amendment defies history.

   (c) " . . . it is not the function of this Court to decide cases on the basis of community standards."[327]

4.4.1.2 *Eisenstadt v. Baird*

1. The defendant was arrested for violating a statute prohibiting contraceptives for, among other things, preventing pregnancy for unmarried couples.

2. The Court (Justice Brennan) held that the statute violated the Equal Protection Clause because of its distinction between married and unmarried couples. But it avoided the question of whether access to contraceptives is a fundamental right.[328]

[323] Casebook p. 1347.
[324] Casebook p. 1148.
[325] Casebook p. 1351.
[326] Casebook p. 1351.
[327] Casebook p. 1351.
[328] Casebook p. 1354.

3. *Carey v. Population Services International*: " . . . the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State. Restrictions on the distribution of contraceptives clearly burden the freedom to make such decisions."

4.4.1.3 Theories of Fundamental Rights Adjudication

1. **Conventional Morality (or Ethos)**: the Court should enforce society's conventional morality. When legislatures deviate from society's ethics, the Court gives a "sober second look."[329]

2. **Rights-Based Theories**: the Court should protect fundamental rights *against* the will of the majority.[330]

3. **Justifications for Government Regulation**: the state has a legitimate interest in promoting morality and the stability of the family.[331]

4. **Criticisms of Fundamental Rights Adjudication**:

   (a) *The Critique of Consensus or Conventional Morality*: American society lacks a conventional morality, and if it did exist, courts could not reliably discover it. Ely.

   (b) *The Critique of Rights Theories*: natural law has been summoned by both sides. Moreover, natural law does not exists, at least not in a "form useful for resolving constitutional disputes."[332] Ely. It also favors the "reasoning class" (educated, upper-middle-class judges and lawyers).

   (c) *The Levels-of-Abstraction Problem*: it's unclear how the Court should frame its fundamental principles. Version 1: "the Court should not interfere with private acts." Version 2: "government may not prevent married couples from using contraceptives to prevent pregnancy." Critics argue that courts vary the level of abstraction to "make it come out right."[333]

   (d) *Lochnering*: Tribe: *Lochner* was wrong because it got the values wrong, but not because the Court assumed the power to evaluate economic regulation. Ely: *Lochner* was wrong because it granted protection to rights that "*seem* most pressing, regardless of whether the Constitution suggests any special solicitude for them."[334]

[329] Casebook pp. 1355–56.
[330] Casebook pp. 1358–59.
[331] Casebook p. 1359.
[332] Casebook p. 1362.
[333] Casebook p. 1364.
[334] Casebook p. 1365.

4.4.2 Implied Fundamental Rights: Abortion

4.4.2.1 *Roe v. Wade*

1. A Texas law prohibited all abortions except those necessary to preserve the life of the mother.

2. Justice Blackmun:

   (a) "This right of privacy, whether it be founded in the Fourteenth Amendment's conception of personal liberty and restrictions upon state action, as we feel it is, or . . . in the Ninth Amendment's reservations of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."

4.4.2.2 Abortion and the Equal Protection Clause

4.4.3 Decisions After *Roe*

4.4.3.1 *Planned Parenthood v. Casey*

4.4.3.2 *Gonzales v. Carhart*

4.4.4 Sexual Orientation and Due Process

4.4.4.1 Sexuality and Sexual Orientation

4.4.4.2 *Bowers v. Hardwick* The right to privacy does not protect the right to engage in private homosexual activity.

4.4.5 Sexual Orientation and Equal Protection

4.4.5.1 *Romer v. Evans*

There is no rational basis for discriminating against homosexuals solely because of animosity towards homosexuality.

1. Colorado adopted by referendum a constitutional amendment barring laws prohibiting discrimination on the basis of sexual orientation.[335]

2. Justice Kennedy:

   (a) Justice Harlan in *Plessy*: the Constitution "neither knows nor tolerates classes among citizens."[336]

   (b) State: it puts gays and lesbians in the same position as everyone else.

[335] Casebook p. 1505.
[336] Casebook p. 1506.

(c) Court: no—this amendment withdraws rights from homosexuals but not from others. It "imposes a special disability upon those persons alone."[337]

(d) The amendment fails rational review because it "lacks a rational relationship to legitimate state interests."[338]

(e) A law making it more difficult for one group to seek aid from the government violates equal protection.

(f) The only purpose of the amendment was "animosity" and a "desire to harm a politically unpopular group."[339]

3. Justice Scalia, dissenting:

(a) This is an issue of cultural preference, not equal protection.

(b) "The only denial of equal treatment [the Court] contends homosexuals have suffered is this: They may not obtain preferential treatment without amending the state constitution."[340]

(c) Under *Bowers*, the state can criminalize homosexual activity. So why is it unconstitutional for the state to enact other laws disfavoring homosexual conduct? "If it is rational to criminalize the conduct, surely it is rational to deny special favor and protection to those with a self-avowed tendency or desire to engage in the conduct."[341]

(d) What's so bad about expressing animus? Criminal law does it all the time.

(e) Statutes singling polygamists are now unconstitutional.

(f) The Colorado amendment was not meant to harm a politically unpopular group. Nor are homosexuals politically unpopular.

4.4.5.2 ***Lawrence v. Texas*** States cannot prohibit private sexual activity between consenting adults of the same sex.

4.4.5.3 Sexual Orientation as a Suspect Classification

4.4.6 Same-Sex Marriage

4.4.6.1 *California Marriage Cases*

[337] Casebook p. 1507.
[338] Casebook p. 1507.
[339] Casebook p. 1507.
[340] Casebook p. 1509.
[341] Casebook p. 1509–10.

4.5 Other Suspect Classifications and Fundamental Rights

4.5.1 Wealth and Education (Substantive Equal Protection)

4.5.1.1 *San Antonio Independent School District v. Rodriguez*

1. Texas established a public school financing system based largely on property tax revenues in each school district. To match the revenue of the Alamo Heights school district, the Edgewood district would have had to raise taxes to a rate an order of magnitude higher, in excess of a ceiling that state law imposed. Parents of children attending the Edgewood schools brought suit to invalidate the financing system as violative of equal protection.

2. The district court found for the parents.

3. Justice Powell:

   (a) Is wealth a suspect classification?

      i. The Texas system could be seen as discriminating against people who (1) are poor below a certain threshold, (2) are relatively poor, or (3) happen to reside in poor districts, regardless of their personal incomes.

      ii. In earlier cases setting precedent for wealth as a suspect classification, the victims were *completely* unable to pay for a certain benefit, and were therefore *absolutely deprived*.[342]

      iii. Plaintiffs failed to establish a class according to any of the above three categories. The class here was large and amorphous, and therefore not a suspect class.[343]

   (b) Is education a fundamental right?

      i. *Brown* and others held that education is an important right. But it is not a constitutionally guaranteed right, explicitly or implicitly. Education might impact a person's ability to participate in civil society, but so do food and shelter, and the Constitution doesn't guarantee those.

      ii. Texas's efforts were "affirmative and reformatory," so the proper standard of review was rational review.

   (c) Localities are free to define their own educational policies. "Some inequality" among districts is insufficient to warrant heightened review.

   (d) The Texas system passed rational review.

4. Justice White:

[342] Casebook p. 1625.
[343] Casebook p. 1627.

(a) Texas failed to show that its system was rationally related to its goal of maximizing local initiative.

5. Justice Marshall:

   (a) The Texas system failed to ameliorate the discriminatory effects of the local property tax.

   (b) The district court properly applied strict scrutiny.

   (c) The Court's standards of review do not fall into the strict binary of rational review or strict scrutiny. Rather, they fall on a spectrum.[344]

   (d) Education is similar to other rights that the Constitution does not explicitly protect but which the Court has classified as fundamental: procreation, voting, and criminal appeals.

   (e) Complete inability to pay and absolute deprivation are not the standards for wealth discrimination.

   (f) The State's alleged concern with local control is an excuse, not a justification.[345]

4.5.2 Alienage

4.5.2.1 Citizenship and Alienage under the Equal Protection Clause

1. The number of resident aliens in the US is increasing both in absolute numbers and in proportion to the population at large.[346]

2. **Public interest doctrine**: The state can discriminate based on alienage (1) to limit the use of public resources to its citizens, or (2) pursuant to its police powers to protect its citizens.[347]

3. *Truax v. Raich*: the Court invalidated a statute preventing businesses of five or more employees to have a workforce of more than 20% aliens, because it interfered with the right to earn a living. Also, it conflicted with federal authority to limit immigration.[348]

4. *Takahashi v. Fish & Game Commission*: the Court invalidated a California law that denied fishing licenses to aliens ineligible for citizenship. "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully within this country shall abide 'in any state' on an equality of legal privileges with all citizens under non-discriminatory laws."[349]

[344] Casebook p. 1633.
[345] Casebook p. 1638.
[346] Casebook p. 1157.
[347] Casebook p. 1158.
[348] Casebook pp. 1158–59.
[349] Casebook pp. 1159–60.

4.5.2.2 Rejection of the Public Interest Doctrine: *Graham v. Richardson*

1. Arizona required citizenship or 15 years of residence to receive welfare benefits. Richardson had immigrated from Mexico. She was permanently disabled but could not collect benefits because she was not a US citizen and had not lived in the US for 15 years.

2. Justice Blackmun:

   (a) Does the Equal Protection Clause prevent a state from limiting welfare benefits because of (a) citizenship or (b) duration of residency?

   (b) Alienage is a suspect classification, calling for heightened scrutiny.[350]

   (c) Arizona argued that the policy conserved limited public resources. The Court found this justification lacking, holding that "an alien as well as a citizen is a 'person' for equal protection purposes . . ."[351]

   (d) If aliens can be obligated to pay taxes and serve in the military, they should be able to collect public benefits.

   (e) Arizona's law also encroaches on Congress's power to regulate immigration.

4.5.2.3 *Bernal v. Fainter*

1. Bernal, a paralegal, challenged a Texas law requiring notary publics to be US citizens.

2. Justice Marshall:

   (a) Alienage classifications warrant strict scrutiny. For the law to stand, it "must advance a compelling state interest by the least restrictive means available."[352]

   (b) The "political function" exception allows alienage discrimination (or, only imposes rational review) for "positions intimately related to the process of democratic self-governance."[353]

   (c) The *Cabell* test allows alienage classifications if the classification is (1) specific and (2) closely related to governance. Teachers, police, and probation officers meet this requirement. Notaries public do not.

   (d) So, here, the "political function" exception did not apply, so the Court applied strict scrutiny.

   (e) Texas's justifications "utterly fail to meet the stringent requirements of strict scrutiny."[354]

[350] Casebook p. 1161.
[351] Casebook p. 1161.
[352] Casebook p. 1163.
[353] Casebook p. 1163.
[354] Casebook p. 1166.

3. Justice Rehnquist, dissenting:

   (a) The Constitution says nothing about "inherently suspect classifications" or discrete and insular minorities.

   (b) The Constitution itself recognizes a distinction between citizens and aliens, so how could alienage be a suspect classification?[355]

   (c) It's not irrational for states to require public servants to be citizens, because public servants wield much policymaking authority. Government will also be more efficient if citizens run it, because they understand its form and purpose. Finally, how do we know foreign-born public servants won't treat the jobs as "personal sinecures"?[356]

4.5.2.4 Regulation of Resident Aliens

1. Does the Equal Protection Clause of the Fifth Amendment restrict the federal government's immigration policy?

2. *Matthews v. Diaz*: yes. There is no basis for states to distinguish between aliens and citizens of another state, but the federal government distinguishes between citizens and aliens all the time. Congress can limit aliens' access to Medicare, even though the states can't impose similar limitations on access to public benefits.

3. *Hampton v. Mow Sun Wong*: the Court invalidated a regulation that barred aliens from working in the civil service—but it based its holding on due process (finding that ineligibility for employment in a major sector of the economy was a deprivation of liberty), explicitly avoiding the question of whether the regulation violated equal protection.

4.5.2.5 *Plyler v. Doe*

1. Texas revised its education laws to (1) withhold state funds from schools who educated children not "legally admitted" into the US and (2) allow school district to deny enrollment to the same children.

2. Justice Brennan:

   (a) Undocumented aliens are not a suspect class. The issue was whether their innocent children should receive broader protections against discrimination.

   (b) Immigration policy has created a "shadow population." Children of illegal immigrants lack culpability and the ability to change their status.

[355] Casebook p. 1167.
[356] Casebook p. 1169.

(c) " . . . education has a fundamental role in maintaining the fabric of our society."[357]

(d) Deprivation of education creates lasting inequality. It "poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit."[358]

(e) The Texas law cannot be considered rational unless it furthers a substantial state goal—i.e., the Court will apply intermediate review to laws classifying the innocent children of undocumented aliens.

(f) Three state interests might support the law:

i. It might protect the state from an influx of illegal immigrants. But there's no evidence that this is actually a problem. Indeed, illegal immigrants often contribute much to local economies while imposing lesser burdens on public benefit systems than citizen residents.

ii. Children of illegal immigrants are especially burdensome to educate. But the state provied no evidence to support this position.

iii. Children of illegal immigrants might be less likely than citizens to remain within the state after gaining an education. But the state takes no measures against citizens to ensure they remain in the state.

(g) "It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within out boundaries, surely adding to the problems and costs of unemployment, welfare, crime."[359]

(h) The law did not further a substantial state interest.

3. Justice Burger, dissenting:

(a) The issue is whether it is legitimate for the state to discriminate between lawful and unlawful residents "for purposes of allocating its finite resources . . ."[360]

(b) The Court does not clearly delineate a suspect class. Rather, it patches together pieces of a "quasi-suspect-class and quasi-fundamental-rights analysis."[361] It takes "an unabashedly result-oriented approach . . ."[362]

(c) "The Equal Protection Clause protects against arbitrary and irrational classifications, and against invidious discrimination stemming

[357] Casebook p. 1642.
[358] Casebook p. 1643.
[359] Casebook p. 1644.
[360] Casebook p. 1645.
[361] Casebook p. 1645.
[362] Casebook p. 1645.

from prejudice and hostility; it is not an all-encompassing 'equalizer' designed to eradicate every distinction for which persons are not "responsible.""[363]

(d) The majority concedes that illegal aliens are not a suspect class and that education is not a fundamental right. The standard should thus be rational review. It is entirely rational for a state to provide different benefits to lawful and unlawful residents.

[363] Casebook p. 1645.

§ 5 The Contemporary Debate over National Power

5.1 Federalism: Limits on the Commerce Clause

5.1.1 The 1960s Civil Rights Legislation: Commerce or Reconstruction? (*Heart of Atlanta Motel* and *McClung*)

1. "Second Reconstruction": the result of the civil rights movement in the 50s and 60s.[364]

2. A central question was whether the federal government's authority to enact civil rights legislation rested on the Commerce Clause or § 2 of the Thirteenth Amendment[365] and § 5 of the Fourteenth Amendment.[366]

3. Many questioned the legitimacy of basing social legislation on the Commerce Clause, but Congress ultimately chose that route.

4. Two cases challenged the legitimacy of basing civil rights legislation on the Commerce Clause:

   (a) *Heart of Atlanta Motel v. United States*: a Georgia motel challenged Title II. The Court unanimously upheld the statute, holding that the motel "stood readily accessible to interstate highways, advertised in various national media, and served a clientele 75 percent of which came from out of state."[367] Congress can enact moral regulation on the basis of its Commerce Clause power.

   (b) *Katzenbach v. McClung*: an Alabama restaurant challenged Title II. The Court held that racial discrimination affects interstate commerce. It also held that rational review is the appropriate standard for Commerce Clause cases.

5. Two later cases, *Daniel v. Paul* and *Perez v. United States*, also upheld the Civil Rights Act. But Justice Black dissented in *Daniel*, arguing that the Court's interpretation of the Commerce Clause gave the federal government "complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 states."[368] Justice Stewart dissented in *Perez*, arguing that if a class of people as a whole affects interstate commerce, prosecutors should still have to show whether individual members of that class themselves have an effect.

[364] Casebook p. 558.
[365] "Congress shall have the power to enforce this article by appropriate legislation."
[366] "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."
[367] Casebook p. 560.
[368] Casebook p. 563.

5.1.2 The Rehnquist Court: Finding Limits on Federal Power

1. *Oregon v. Mitchell* was the only case between 1937 and 1987 to hold an act of Congress unconstitutional based on a lack of enumerated power. The Rehnquist Court signaled a shift towards limiting federal powers.

5.1.3 *United States v. Lopez*

1. The Gun-Free School Zones Act criminalized possession of guns in school zones. Lopez, a high school student, was caught with a gun at school. He challenged the act as beyond the scope of congressional power under the Commerce Clause.

2. Justice Rehnquist:

   (a) Earlier cases (*Jones & Laughlin Steel*, *Darby*, *Wickard*) established Congress's authority to enact social legislation under its Commerce Clause Authority. They allowed Congress to (1) regulate activity that uses the *channels* of interstate commerce, (2) protect the *instrumentalities* of interstate commerce, and (3) regulate activities with a *substantial relation* to interstate commerce.[369] The first two categories were irrelevant in this case. Only the third is at issue.

   (b) The government argued that the statute affects interstate commerce because guns lead to costly violent crime, because gun violence reduces travel and thus impedes commerce, and because gun violence harms education which in turn harms economic productivity.

   (c) If the government's theories were correct, would there be any areas of criminal law that the government could not regulate under the Commerce Clause? Any activity can be characterized as commercial.[370]

3. Justice Kennedy, concurring:

   (a) Federalism was one of the framers' key values.

   (b) Broadening the Commerce Clause would disrupt the balance of power between state governments and the federal government.

   (c) Authority to regulate education lies with the states, and education is beyond commerce. States, however, are free to enact similar legislation.

4. Justice Thomas, concurring:

   (a) " . . . the term 'commerce' denoted sale and/or transport rather than business generally."[371]

[369] Casebook pp. 601–02.
[370] Casebook pp. 603–04.
[371] Casebook p. 608.

(b) A more expansive reading of the meaning of "commerce" would render many other constitutional clauses superfluous.

(c) "Taken together, these fundamental textual problems should, at the very least, convince us that the 'substantial effects' test should be reexamined . . ."[372]

5. Justice Stevens, dissenting:

(a) The welfare of commerce depends on education.

(b) "Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity."[373]

6. Justice Souter, dissenting:

(a) 1900–1937: the Court invalidated federal social and economic legislation on the basis "highly formalistic notions of 'commerce'"—e.g., *Hammer v. Dagenhart* (striking down legislation prohibiting commerce in goods manufactured with child labor).[374] After 1937, the Court's Commerce Clause jurisprudence expanded (*Jones & Laughlin Steel*, *Darby*, *Wickard*, and rational review).

(b) The majority opinion here is "a backward glance at old pitfalls . . ."[375]

(c) There is a close connection between education and commerce.

(d) Congress's Commerce Clause power is plenary. It doesn't matter whether the power to regulate education lies with the states.

(e) Congress's findings on the effects of gun violence are not determinative.[376]

7. Justice Breyer, dissenting:

(a) Three principles of Commerce Clause interpretation:

i. Congress can regulate activity that significantly effects interstate commerce. *Wickard.*

ii. Congress can regulate activity on the basis of its cumulative, not separate, effect. *Wickard.*

iii. Rational review is the proper standard.

(b) There is a substantial connection between this legislation and interstate commerce because gun violence has marked effects on education, and in turn, on commerce.[377]

[372] Casebook p. 609.
[373] Casebook p. 610.
[374] Casebook p. 611.
[375] Casebook p. 612.
[376] Casebook pp. 613–14.
[377] Casebook pp. 615–16.

(c) Upholding this act would not expand Congress's Commerce Clause power.

(d) The majority's distinction between commercial and noncommercial activities is tenuous. And anyway, education has a clear impact on commerce. " . . . Congress has often analyzed school expenditure as if it were a commercial investment . . ."[378]

5.1.4 The Constitutionality of Health Care Reform: *National Federation of Independent Businesses v. Sibelius*

1. At issue was the individual mandate of the Patient Protection and Affordable Care Act.

2. Justice Roberts:

   (a) Federalism guarantees liberty by diffusing sovereign power.

   (b) The individual mandate requires people to buy health insurance or pay a penalty to the federal government.

   (c) The government argued that the act was valid under (1) the Commerce Clause and (2) Congress's taxing power.

   (d) Commerce Clause:

      i. Hospitals must treat uninsured patients. They pass on the costs to insurers and insurers pass on the costs to consumers. The individual mandate prevents freeriding.

      ii. But the Commerce Clause only gives Congress the power to regulate economic *activity*. It does not grant the power to *create* economic activity.[379]

      iii. "Under the government's theory, Congress could address the diet problem by ordering everyone to buy vegetables."[380]

      iv. A limitless Commerce Clause would create a Hamiltonian "impetuous vortex."[381]

      v. All precedent Commerce Clause cases involve the regulation of preexisting economic activity.

   (e) Necessary and Proper Clause:

      i. The government argued that the individual mandate should stand because it is an integral part of the broader regulatory scheme.

      ii. But the Clause does not permit Congress to exercise great substantive powers outside those enumerated.

      iii. The individual mandate may be necessary, but it isn't proper.

[378] Casebook pp. 618–19.
[379] Handout p. 5.
[380] Handout p. 6.
[381] Handout p. 7.

(f) Taxing power:

i. The individual mandate is valid under Congress's taxing power. " . . . it makes going without insurance just another thing the government taxes."[382]

3. Justice Ginsburg:

(a) The framers intended the Constitution to be a "great outline" with the "capacity to provide for future contingencies as they may happen . . ."[383]

(b) Until now, the Court's Commerce Clause analysis asked (1) whether the regulated activities substantially affect interstate commerce and (2) whether there is a rational basis for the legislation and a reasonable connection between the regulation and the goal.

(c) Congress had a rational basis for concluding that the uninsured substantially affected interstate commerce.

(d) Everyone will eventually consume healthcare services. Thus, everyone is involved in interstate commerce of health insurance. This is not inactivity; every activity can be recast as inactivity.[384]

(e) The "broccoli horrible" is unlikely. Congress had a rational reason to legislate because of the uninsured freeriding problem. Other constitutional provisions could also check Congress's power. Finally, states have always had the power to impose mandates, but they rarely do.

(f) The individual mandate was both necessary and proper.

4. Justice Scalia:

(a) Abstention from commerce is not commerce.[385] The individual mandate directs the creation of commerce.

(b) There is not universal participation in the healthcare market, and the federal government has no power to mandate it.

5.2 Limits on the Fourteenth Amendment, Section 5

5.2.1 Mapping the Middle Ground: *Jones v. Mayer* and *Oregon v. Mitchell*

1.

2. *Jones v. Alfred H. Mayer Co.*: Congress has the power under the Thirteenth Amendment to prohibit racial discrimination in the sale or rental of real estate (upholding the 1866 Civil Rights Act, authorizing Congress to

[382]Handout p. 10.
[383]Handout p. 11, quoting Hamilton in Federalist No. 34.
[384]Handout p. 14.
[385]Handout p. 18.

determine "what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation.").

5.2.2 The Reconstruction Power

5.2.3 *City of Boerne v. Flores*

5.2.4 *Northwest Austin Municipal Utility District Number One (NAMUDNO) v. Holder*