Constitutional Law – OUTLINE
Spring 2005, Professor Maclin

The Supreme Court's Authority

Judicial Review: Power of Federal Courts to Review Acts of Congress
Marbury v. Madison (U.S. 1803)

- Note historical and political context (see notes and text, p.3, 11)
- Overarching Debate: Do Federal Judges have the authority to review the constitutionality of acts of Congress?
- Adams had appointed Marbury to a D.C. judgeship, he was approved by the senate and the commission was signed and sealed, but NOT DELIVERED. When Jefferson took-over, he directed Secretary of State Madison not to deliver the commissions and then asserted that the commissions were no good because they were not delivered; Marbury sued in an attempt to force Madison to deliver the Commissions
- Sec. 13 of Judiciary Act of 1789
    - *According to Marshall – Sec. 13 authorized S.Ct. to issue a writ of mandamus as part of its original jurisdiction*; this conflicts with original jurisdiction of S.Ct. set-out in Art. III of Constitution; Marshall reads Art. III as a ceiling for the S.Ct.'s original jurisdiction
        - Idea for original jurisdiction was to provide forum for most sensitive diplomatic trials even if congress created no inferior federal courts
    - *Marshall's interpretation is not convincing* – it is a stretch
        - S.Ct. power to issue writ follows clause about appellate jurisdiction! Seems to give S.Ct. ancillary power, etc. to issue writ as a remedial matter
        - But on this interpretation, no conflict between Sec. 13 and Art. III – not good for Marshall; so we move on
- **So the holding is that the S.Ct. has no jurisdiction to hear this case because Sec. 13 is repugnant to Art. III of the Constitution** → If Court had no jurisdiction, then why did Marshall decide the merits before saying no jurisdiction?
    - Should not have even decided the merits
    - Other reasons for not deciding on the merits
        - Suing a sitting cabinet officer is a delicate situation – entered a show cause order against Madison; Madison showed his contempt by not even responding
        - Jefferson interpreted the law to mean that the commission didn't vest until it was delivered – where's the deference to the President?
- Marbury is entitled to the commission as a matter of law
    - "The very essence of civil liberty certainly consists of the right of every individual to claim the protection of the laws, whenever he receives an injury"
    - **Dealing with the problem of Executive Discretion: Political vs. Administrative Decisions**
        - *Political/Discretionary acts are not reviewable by the court* → these are subject to electoral review NOT judicial review
        - "Questions, in their nature political, **or which are, by the constitution and laws**, submitted to the executive, can never be made in this court" (so

discretion reserved for the executive by the Constitution is not reviewable either)
        - HYPO: Abrogating treaties as a political decision; Constitution is silent on this, not reviewable by courts b/c within executive discretion
        - *Once commission is signed and sealed, it has vested and executive is under an Administrative LEGAL duty to deliver it – delivering it is not a discretionary political act*
- Why does the Constitution trump Sec. 13 of the Judiciary Act?
    - **Purpose of written constitution is to establish it as paramount, fundamental, and superior law that cannot be altered by an ordinary legislative act**
    - How do we know?
        - Art. VI – Constitution is supreme law of the land
        - Art. V – procedures for amending the Constitution
    - The Constitution controls in a conflict with any repugnant legislative act
- Begs the Question: **<u>Where does the constitution give federal judges the authority to review and act of congress and declare it unconstitutional?</u>**
    - *"It is emphatically the province and duty of the judicial department to say what the law is…If two laws conflict with each other, the courts must decide on the operation of each."*
    - Marshall asserts this power, but where is it?
        - Art. VI argument isn't persuasive: mentions constitution first when talking about the supreme law of the land, but the clause seems to be directed at state judges ("judges in every state shall be bound thereby")
        - <u>Wexler Article VI argument</u>: Since state court decisions are reviewable by the Supreme Court on Constitutional issues, it would be absurd to say that the Federal Courts (in particular the Supreme Court) lack the power to interpret the Constitution on its own since they must necessarily do so in reviewing state court decisions on the Constitution
            - ASSUMES that Article VI gives state judges the power to declare acts of Congress unconstitutional → there is really nothing explicit
        - Perhaps the power of judicial review is simply incident to the Court's Article III power to decide cases and controversies
            - Suppose that the constitutionality of an act of Congress is the only issue presented in a case → surely the Judicial Power extends to deciding such a question
            - The Power is only INCIDENT to that of being a judge
- Begs the Question: **<u>How broadly should we read Marbury? Which is better? Which is intended?</u>**
    - BROAD VIEW
        - "It is emphatically the province of the judicial department to say what the law is": But does this mean EXCLUSIVE province?
        - Federalist No.78 argues for broad view: courts designed to be an intermediate body between the people and the legislature to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts
        - <u>Cooper v. Aaron</u> (1958)

- Little Rock integration case
- The federal judiciary is supreme in the exposition of the law of the Constitution…our interpretation is the supreme law of the land
- *Is this a RESTATEMENT or an EXPANSION of Marbury?*

▪ Dickerson v. U.S. (2000): Do other co-equal branches have to "toe-the-line" of the Supreme Court?

- **Congress cannot overrule the Supreme Court on Constitutional issues/interpretation by ordinary legislation**
- "We hold that Miranda, being a constitutional decision of this Court, may not be in effect overruled by and Act of Congress"
- But note Scalia – isn't congressional statute just prescribing the same rule as Miranda? – no coerced confessions?

o NARROW VIEW

▪ This views Marbury as enunciating a power of judicial review that is merely incident to the power to decide cases
▪ The judicial department does not have a monopoly on Constitutional interpretation

o My Musing: perhaps Marshall wants you imply that he is enunciating a broad and exclusive power, but the reality of it is that the constitution requires any such power to be narrow and rarely used as a result of separation of powers and federalism?

Judicial Review: Power of the Federal Courts to Review State Court Judgments

Martin v. Hunter's Lessee (1816)

- Virginia S.Ct. challenges U.S. S.Ct. power to review their decisions on federal questions – i.e. the Constitution
- VA Arguments
  - Such a power would produce more evils than occasional disputes would → no umpire provided for a reason
  - Congress could expand the jurisdiction of lower federal courts – funnel the cases through federal system
- S.Ct. Response
  - Constitution extends judicial power to federal courts and clearly authorizes federal court jurisdiction to questions of constitutional and federal law → The CASE, not the COURT gives the jurisdiction
  - Many provisions in the constitution remove and restrain the states' power → Art. I, Sec. 10
  - State interests and prejudices would influence operation of federal law
  - Need for uniformity
- Marshall weighs-in in Cohens v. Virginia

Lockhart v. Fretwell

- Mentioned by Maclin
- State interpretations don't have to give way to lower federal courts' interpretation of the constitution and federal law; State court not required to follow their local federal circuit's interpretation of federal/constitutional law

Congress' Power to Strip the Federal Courts of Jurisdiction

The Supreme Court

- Congress was required to create the Supreme Court: Art. III, "shall create"
- General dispute over Congress' authority is found in the "Exceptions" clause of Art. III, § 2

Dispute over the Meaning of the Exceptions Clause

- Does Congress have the power to preclude review of particular topics, such as abortion or school prayer?
- Proponents of Jurisdiction Stripping
  - Strict textual argument
  - Intended as a check on the power of the Judiciary
- Opponents of Jurisdiction Stripping
  - "exceptions" actually modifies "fact"
  - The Framers were concerned about the S.Ct.'s ability to overturn fact-finding by lower courts, especially when done by juries
- Alternatively: The Stripping Power just can't be used in a manner that violates other parts of the Constitution
  - That is, Congressional preclusion of review of certain issues would violate other parts of the Constitution
- **Internal vs. External Restraints on Congress' Authority to Control Jurisdiction**
  - External: Bill of Rights, etc.
  - Internal: Those connected to Art. III
    - Can't interfere with essential or core functions of the Court
    - Why should Court be allowed to single out classes of cases and issues for adjudication in state court?
    - Some argue that we should equate this to excluding classes of litigants
    - BUT…nothing that says all classes of cases have to be handled the same way

Opposing Precedents

- Ex parte McCardle (1869) (pro-stripping)
  - Under an 1867 law, S.Ct. could hear appeals from lower Federal Courts in habeas corpus (h/c) cases; southern newspaper critic of Reconstruction brought an action under this law and Congress repealed the S.Ct.'s authority to hear h/c appeals under the 1867 law in 1868 before they could issue a decision in this case
  - **Court upheld Congress' power to repeal court's authority** to hear h/c appeal under Act of 1867; even in face of Congress' express intent to remove McCardle from the S.Ct. docket ("motives are irrelevant in exercise of constitutional power")
  - Relied on Exceptions Clause
    - **Positive grant of authority to Congress to make exceptions to the appellate jurisdiction of the court**
  - But Court noted they still had jurisdiction to hear h/c petitions brought under Judiciary Act of 1789

        - Court didn't preclude review, they only eliminated one of two bases for its authority
- Felker v. Turpin (1996) (pro-Stripping)
    - Dealt with Antiterrorism and Effective Death Penalty Act of 1996
    - Precluded 2d or successive applications for federal h/c relief without permission of Federal Court; denied S.Ct. review of denial of permission to make 2d or successive application
    - S.Ct. upheld the constitutionality of this jurisdictional restriction
        - Notes that it still doesn't preclude Art. III/Judiciary Act of 1789 power to entertain original jurisdiction h/c petitions
- U.S. v. Klein (1872) (anti-Stripping)
    - Court had said a Presidential pardon was prima facie evidence that you weren't a "supporter of the rebellion;" new Congressional law said that it meant that you were a supporter of the rebellion (context of property rights)
    - Court holds this unconstitutional
        - Congress may not dictate how a court should decide an issue because it interferes with judicial autonomy; Congress may not restrict S.Ct. jurisdiction in an attempt to dictate substantive outcomes
            - How can this statement be reconciled with McCardle? – that's what Congress did in that case and the Court upheld it
        - The Act denied the effect of a presidential pardon, thus interfering with executive autonomy
    - ESSENTAILLY – This Act violated the separation of powers principle
- Bottom Line is that Jurisdiction Stripping on a large scale is not something that can be politically feasible

Lower Federal Courts

- Can congress remove lower federal courts' jurisdiction on a class of issues?
    - Say…on gay marriage issue?
    - Why would it raise constitutional questions?
    - Disputed area of law…but there are PRACTICAL limitations in politics
- ALSO: Congress was not obligated to create the lower Federal Courts ("from time to time" in Art. III)
- But NOTE: Justice Story argued lower Federal Courts required in dicta in Hunter's Lessee
    - Some cases in Art. III beyond jurisdiction of state courts and not enough to get S.Ct. original jurisdiction
    - Thus, no lower federal courts would be at odds with the constitution
    - By mandating S.Ct. original jurisdiction in certain cases, the Framers made full exercise of federal judicial power dependant on the creation of lower federal courts

National Power

Expansion

McCulloch v. Maryland (1819)

- Immediate Issues
  - Does Congress have the power to incorporate a bank? (YES – IMPLIED)
  - May Maryland tax the Bank of the U.S. – a federal corporation? (NO)
- Background Issue of State Sovereignty: Who ratified the Constitution?
  - The **STATES** did (MD's argument)
    - Constitution was a result of the act of sovereign and independent states; not from "the people"
    - The sovereign and independent states created the Union
  - The **PEOPLE** created the Union (position Marshall adopts)
    - The government emanates directly from the people
    - The people adopted the Constitution and their adoption bound the state governments to abide by it
    - We are a government OF THE PEOPLE
    - Note the Preamble
- **Congress has the Power to Incorporate a Bank**
  - Explicitly enumerated powers cited in support of an implied power
    - Taxing Power; Borrow Money; Regulate Commerce; Declare and Conduct War; Raise and Support Armies and Navies
    - Relies on these enumerated powers to imply a power to incorporate a bank to the extent that incorporating a bank acts as a **means to the end** of executing these powers
    - The means Congress chooses have to be **incidental** to the ends that it is trying to accomplish
    - "a government entrusted with such ample powers...must also be entrusted with ample means for their execution." → Broad grant of power to Congress
  - Support for the Contention that the Constitution has Express AND Implied Powers
    - Expounding a CONSTITUTION; NOT a Legal Code – A constitution is a framework for government and can't be expected to list every minute power
    - Constitution lacks the limiting language of "expressly delegated" powers that the Articles of Confederation contained → Intent of the framers
    - Then again – isn't State sovereignty just as important and argue for a narrow construction of the Constitution?
  - Maclin and Notes: Were implied powers REALLY the intent of the Framers?
    - Constitutional Convention rejected a simple grant of broad authority; how is it still consistent with McCulloch? → rejected what Madison originally wanted
    - Fed. 44: "unavoidable implication"; whenever a power to do a thing is given, the power to enact the means for doing that thing is implied

- Thus, based on "means to an end" and "nature of the instrument" arguments; Marshall finds that Implied Congressional Powers ARE CONSISTENT WITH THE CONSTITUTION – then, and ONLY THEN does he begin to expound upon the Necessary and Proper Clause (N&P)
  - Only talks about N&P because MD argues that it is restrictive and thus precludes any implied powers that aren't absolutely necessary
  - Marshall rejects this argument
- The Necessary and Proper Clause
  - The ordinary use of the word "necessary" is not strictly limiting
  - Textual Argument: "necessary" here, COMPARED WITH "absolutely necessary" from Art. I, § 10 → not meant to be a limiting word
  - Clause is placed among the POWERS of Congress rather than among the limitations on those powers → it is an ADDITIONAL POWER, not a restriction; AND Congress would have implied powers to enact the means to facilitate the ends of their explicitly enumerated powers anyway...
    - Argues that it was put there to remove any doubts about the intent for implied powers
- The Scope of the Necessary and Proper Clause
  - "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional."
  - This has been said to be a "blank check" to Congress
  - Marshall didn't need to give this Blank Check: he could have adopted MD's narrow construction of N&P and then said that power was still implied as absolutely necessary under other powers of Congress
  - N&P Clause broadens the power of Congress AND the General Federal Government (look at text)
- Level of Judicial Discretion to Congress in Using its Powers
  - "where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, *to undertake here to inquire into the degree of necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground*."
  - Reserves right of judicial review when law is unconstitutional or is just a "pretext"
- Is the Blank Check consistent with Federalism?
  - Has the Court given the national government too much power?
- Wechsler and Choper Arguments against the Court invalidating federal laws in the name of federalism (p. 109-110)
  - Wechsler → The structure of the political process in the U.S. will naturally balance-out any Federalism issues of National vs. State power
  - Choper → Federalism concerns should be left to politics because politics is an effective check on national power; thus this Court should not even entertain Federalism cases because they are a waste of time

- **<u>MD Cannot Tax the Bank of the US – A Federal Entity</u>**
  - The Federal Government is supreme in their SPHERE OF ACTION

- Relies upon the structure of the constitution and structure of a representative democracy
  - Electoral accountability argument – the MD legislature, which fixes the taxes, is not accountable to anyone but MD citizens; the Bank of the US serves the PEOPLE of the ENTIRE United States; thus MD would be taxing people whom they don't represent and can't be held accountable to
  - Power to tax is power to destroy
- But, then how is it OK to tax bank's real property or holdings of MD citizens → why can government tax the land on which the bank stands?
  - We don't reach a conclusion; but I think the electoral accountability argument could have something to do with it

Federal Limits on the Scope of State Power

U.S. Term Limits v. Thornton (1995)

- Issue: Arkansas enacts Amendment 73 to its state constitution, which limits the number of terms one can serve as an AK Representative or Senator in the Federal Legislature; does this violate Qualifications Clause of Article I?
- Powel v. McCormack does not apply because it dealt with CONGRESS' power to alter the qualifications of its members – NOT a State's power to do so
- **Majority Position (5) → Amendment 73 is UNCONSTITUTIONAL** and a State cannot alter the qualifications for its own federal legislators
  - 10th Amendment does not "reserve" such a power to the States because the power to elect federal legislators DID NOT EXIST before the Constitution was written – you can't "reserve" what you didn't have in the first place; this was a NEW RIGHT, arising from the CONSTITUTION ITSELF
    - Even if they had any kind of power; constitution divested the states of the power
  - The Framers conceived of a Federal Government DIRECTLY RESPONSIBLE TO THE PEOPLE, possessed of direct power over the people, and chosen directly, not by States, but by the people
    - Ours is a government of the people, by the people, for the people
  - Allowing States to alter qualifications would result in a patchwork of State qualifications, undermining the **uniformity and the national character** of the Federal Government
    - Congressmen represent a State AND the U.S.
  - State-imposed restrictions are contrary to the fundamental principle of our representative democracy – the people should choose whom they please to govern them
  - States are not given the power in the Elections Clause – this Clause grants the States authority to create procedural regulations, not to provide States with license to exclude classes of candidates from Federal Office
- **Dissent: Thomas** (+Rehnquist, Scalia, and O'Conner)
  - "Default Rule" → When the Constitution is SILENT regarding a matter (i.e. nothing express or necessarily implied); the 10th Amendment instructs that the Federal Government lacks the power and the States enjoy it
    - Thus, Qualifications clause is a floor, not a ceiling

    - Answer to "Government of the People": The ultimate source of the Constitution's authority is the consent of the people OF EACH INDIVIDUAL STATE, not the consent of the undifferentiated people of the Nation as a whole
        - Ratification procedure of Article VII – conventions in each State
        - The notion of popular sovereignty that undergrinds the Constitution does not erase state boundaries, but rather tracks them
    - People of each State retain their separate political identities – putting a man in Congress is an act of the people of AN INDIVIDUAL STATE
        - (Answer to "uniformity and national character")
    - When the people of a State themselves decide to restrict the field of candidates whom they are willing to send to Washington as their representatives, they simply have not violated the principle that "the people should choose whom they please to govern them."
        - The right to choose may include the right to winnow
- Kennedy concurrence
    - State amendment interfered with federal right to vote in a congressional election
- What are implications of Term Limits?
    - What other qualifications are now unconstitutional? Can Cal. require candidates to be registered voters, live in jurisdiction, not be felons, etc.?
    - What is difference between Term Limits and these "qualifications?"
    - What is difference between barring felons/being a registered voter/living in jurisdiction and imposing term limits?
    - (most of these restriction would be unconstitutional, but politics keeps them on the books)

Cook v. Gralike (2001)

- Extends Term Limits decision
- State wanted to
    - Amend State constitution to instruct their federal representatives to vote for a federal term limits amendment; AND
    - As punishment for any who didn't or didn't pledge to vote for a federal term limits amendment, put a prejudicial phrase next to their name in the ballot
- Court held this UNCONSTITUTIONAL

Bush v. Gore (2000)

- Article II gives STATE LEGISLATURES the power to prescribe how presidential electors are to be chosen (plenary power)
- A significant departure from the state legislative scheme for appointing Presidential electors presents a federal constitutional question; here – FL Supreme Court's decision presented a significant departure from FL legislative scheme (ruling on recounts)
    - But wasn't FL S.Ct. just exercising its state constitutional power to review the acts of the legislature? That's a FL issue – NOT a Federal Issue
- Both Bush and Term Limits come out pro-Federal exercise of power; BUT
    - Respective positions of the judges Flip-Flop
        - Liberals (Stevens, Souter, Ginsburg, Brennan) go from pro-Federal to pro-States-Rights

- Conservatives (Scalia, Rehnquist, Thomas, O'Conner) go from pro-States-Rights to pro-Federal!
- Only Anthony Kennedy was pro-Federal in both issues, giving him the deciding vote in both

Commerce Clause

- Two fold impact
  - **Restraint/check on state action** – where state regulations and taxes are challenged under commerce clause, challengers rely on free trade argument – national commerce clause power was supposed to put an end to hostile state restrictions on trade and tariffs on imports from other states, etc.
  - **Source of Power for the Federal Government**
    - Very few judicially enforced checks on Congress' commerce power

As a Grant of National Power

Gibbons v. Ogden (1824)

- Marshall's definition of "Commerce"
  - It is "intercourse"
  - It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse
- The Scope of the Congressional Authority to Regulate Commerce
  - "among the several States"
  - This means Congress can regulate **INTER**STATE but not **INTRA**STATE commerce
  - Traditionally, Congress can reach local activities if they have an effect on interstate commerce; and in determining that effect, the judiciary will consider the **aggregate effect** of all similar instances
  - Can also reach intrastate when the regulation in part of a larger regulation of economic activity
- Limits on Congress' Commerce Authority
  - The power is plenary – when Congress is within its enumerated constitutional authority, the power of Congress is absolute
  - **Only Limits are**
    - **(1) The Constitution itself**: Congress may not make any law repugnant to other provisions of the Constitution
    - **(2) Politics**

United States v. Lopez (1995)

- Issue is whether the Gun-Free School Zone Act of 1990, which makes it a federal crime to possess a gun in a "school-zone," violates Congress' power under the Commerce Clause; Majority holds that it does (5-4)
- **Categories of commerce Congress can regulate** (p.155)
  - (1) Channels of interstate commerce
  - (2) Instrumentalities of interstate commerce, even though the threat may only come from a local source
  - (3) Activities that substantially effect or have a substantial relation to interstate commerce
  - We are in category (3) here
- Does the majority, sub silentio, overrule Wickard's aggregate effects rule?
  - NO; Wickard (home grown wheat case) still dealt with economic activity

  - This statute doesn't involve ANY commercial activity AT ALL; **Possession of a gun near a school is not a commercial activity** to begin with and, even when considered in the aggregate, does not become a commercial activity
  - AND, since it's not a commercial activity, it cannot be a local activity that has a "substantial relation" to interstate commerce!
- **Bottom-Line Holding is that Congress' Commerce Powers does not extend to local (intrastate) activities that are non-commercial in nature because if they are non-commercial in nature, they by definition cannot have a "substantial effect" on interstate commerce**
- Relevance of the Lack of Congressional Findings bolstering Congress' Act
  - Rehnquist: They would be helpful in evaluating the legislative judgment that possession of a gun near a school substantially affects interstate commerce
  - But how is this even relevant? Dissent:
    - **The Standard of Review is <u>"Rational Basis"</u> for Commerce Cases**; so the question is whether Congress could have RATIONALLY found that possession of a gun near a school substantially affects interstate commerce WHEN CONSIDERED IN THE AGGREGATE (this is supposed to be a deferential test)
    - There are a whole slew government and private studies that document the effect gun in school on the Education process, which directly effects national economic productivity
    - There was certainly a rational basis for Congress decision!
    - To look at the Congressional findings would be to inquire about the WISDOM of Congress' action and that is not within the purview of the Court: This would be looking at WHAT they found, not what they COULD HAVE RATIONALLY found
    - It is not the judiciary's job to second guess the policy decisions of Congress
  - Rejoinder (elaborated upon in <u>Morrison</u>, infra)
    - Rehnquist still acknowledges that the test for Commerce statutes is Rational Basis; but he invalidates it anyway
    - Suggests that the Rational Basis test ONLY BECOMES RELEVANT ONCE THE COURT FINDS THAT CONGRESS HAS ACTED WITHIN ITS COMMERCE AUTHORITY
    - Thus, when Congress uses the Commerce Clause as a pretext to regulate non-commercial intrastate activity, they have not acted within their Commerce authority and thus the Court does not even need to reach the Rational Basis question
- Majority Rejects the Argument that (1) violent crime and (2) the presence of guns in school affects interstate commerce
  - The argument for both is a slippery-slope argument; Focus is on (2) and how the presence of the guns in school handicaps the education process, which in turn ultimately will effect national economic productivity (in the aggregate) – Rehnquist REJECTS this argument
  - "If we were to accept the Government's [or the Dissent's] arguments, we are hard-pressed to posit any activity by an individual that Congress is without power

to regulate" – There is no logical end-point to these arguments and this is supposed to be a government of LIMITED and ENUMERATED powers
    - Violent Crime
        - Could regulate anything that has to do with crime – usually reserved for states
    - Education – national productivity
        - Could regulate anything down to family law, etc. – usually reserved for states
  - Rejoinder by Dissenters
    - Marshall himself said the only check on Congress' Commerce Power is supposed to be POLITICS!
    - So this isn't relevant to the Constitutional Analysis
- The Commercial vs. Non-Commercial Activity: It is a Useful Distinction?
  - Breyer Dissent: This formulistic distinction reeks of prior, discredited attempts to pigeonhole categories of local activity before the New Deal (i.e. "production," etc.) and "direct" vs. "indirect" effects on commerce
    - This creates legal uncertainty and that is not good
  - Rehnquist Majority: Concedes that this new distinction will create legal uncertainty; BUT
    - Congress's authority is limited and there will always be legal uncertainty on the outer fringes of Congressional power under the Commerce Clause
    - The Constitution MANDATES this uncertainty by withholding from Congress a plenary police power that would authorize the enactment of every type of legislation
- Kennedy Concurrence: The Importance of FEDERALISM
  - If feds were to take over traditionally state issues; it would blur the lines of political accountability between state and federal governments (This is not a very persuasive argument)
  - The absence of structural mechanisms to require officials to undertake the principled task of protecting the federal balance, and the momentary political convenience often attendant upon their failure to do so, argue against a complete renunciation of the judicial role
  - REJOINDER: What's wrong with letting the political process work and let the people vote the bastards out of office if they don't like what they're doing?
- Getting around the Lopez result (a la Bill Clinton)
  - Have Congress use powers under spending clause (Art. I) to link enactment of gun-free school zone laws to federal money being given to states for schools
  - Completely constitutional under South Dakota v. Dole, which authorizes congress to make conditional offers of funds to states – funds conditioned upon states making some kind of regulation congress wants – under the **"Spending clause"**
    - Regulating through the back door when you can't regulate through the front door.
    - PROBLEM: but doesn't this just make Lopez meaningless as a restraint on Congressional power? Is it just about semantics?
  - Congress re-enacted the statute as "a firearm that has moved in or that otherwise affects interstate commerce..." → has not been struck down by Circuits

- What's the best way to read Lopez?
    - (1) new approach to impose a serious balance between state and federal government's interests; prior to this decision, they had stopped scrutinizing commerce acts
    - (2) as a narrow decision that is easily remedied by congress; statute was poorly drafted and didn't have a jurisdictional requirement; it was put in and has been upheld by the Circuits since
    - (3) Lopez indicates a revival of categorical view of state autonomy
    - (4) Consider the impact of Lopez on question in Marbury on court's institutional role in our constitutional system: Does Lopez embrace the broad or narrow view of Marbury (incidental Judicial Review OR exclusive purview of the Court)?

Sabri v. U.S. (2004) – *Quick Foray into the Spending Clause*

- Challenge to a statute making it a crime to bribe a state, local, or tribal officials of entities that receive at least $10,000 in federal funds
- THERE IS ABSOLUTELY NO JURISIDICTIONAL NEXUS BETWEEN THE RECEIPT OF FEDERAL FUNDS AND THE PROHIBITION ON BRIBING
    - So, i.e. there is no link between the receipt of federal funds and the bribing
- Court upheld this on Rational Basis Review as permissible under the Spending Clause
    - How do we reconcile with reasoning of Lopez and the Commerce Clause?
- "We simply do not presume the unconstitutionality of federal criminal statutes lacking explicit provision of a jurisdictional hook, and there is no occasion even to consider the need for such a requirement where there is no reason to suspect that enforcement of a criminal statute would extend beyond a legitimate interest of cognizable under Art. I, § 8."
- "It is enough that the statutes condition the offense on a threshold amount of federal dollars defining the federal interest, such as that provided here, and on a bribe that goes well beyond liquor and cigars."
- What is the constitutional basis for this criminal statute?
    - Authority under spending clause to appropriate monies to promote the general welfare; AND corresponding authority under N&P clause to make sure tax dollars appropriated under that power are in fact spent for the general welfare
- But do the Spending and N&P Clauses really provide a basis for congressional action?
    - **"Spending Clause" is Art. I, § 8, cl. 1** → There is nothing about "spending" in it – it's just about laying and collecting taxes; but the traditional position is that the latter portion of this clause ("provide") gives Congress the general power to appropriate monies to provide for general welfare
    - Doesn't giving congress a "general welfare" power contradict the whole purpose of Art. I, § 8 to limit Congress' powers to those enumerated?
    - Not clearly reconciled with the text

U.S. v. Morrison (2000)

- Challenge to the Constitutionality of the Violence Against Women Act, 42 U.S.C. § 13981
- Of Lopez's categories of Economic Activity, Congress says this falls into category (3) – activities that have a substantial effect on interstate commerce

- Court strikes the Act as unconstitutional, addressing the following issues from Lopez:
    - Gender-motivated crime IS NOT AN ECONOMIC ACTIVITY
    - The Act contains NO JURISIDICTIONAL ELEMENT establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce
    - This Act CONTAINS CONGRESSIONAL FINDINGS that provide a rational basis for concluding that gender-motivated violence substantially effects interstate commerce...BUT the JUDICIARY determines whether Congress has acted within its commerce power
- So what's the deal with the Congressional Findings?
    - Majority: "the existence of Congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." → i.e. the judiciary decides what is proper under the Commerce Clause, not Congress
    - Dissent: Recitation of Rational Basis review and all the evidence in the legislative record to support such a rational finding by Congress
- So does Gender-Motivated Violence, CONSIDERED IN THE AGGREGATE, substantially affect interstate commerce?
    - Dissent: OF COURSE IT DOES; look at the evidence in the Congressional record; and furthermore this provides a rational basis
    - Majority: The reasoning that the government advances seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce.
        - Essentially: reasoning supporting gender-motivated violence as an economic activity is a slippery-slope – much like Lopez – and the argument has no logical end; thus congress could regulate anything and that was not the intent of the Framers
- A Per Se Rule?
    - "While we need not adopt a categorical rule against aggregating the effects of any non-economic activity in order to decide these cases, thus far in our nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature"
    - **"We accordingly reject the argument that Congress may regulate non-economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce"**
    - **So Majority's bottom line is that the Court will not apply Rational Basis scrutiny to non-economic intrastate activity → Congress PER SE cannot regulate this, no matter how rational their basis for thinking it is economic activity is**
    - The COURT determines what is and what is not economic activity, and if it is not economic activity, they we don't even reach traditional Rational Basis scrutiny because Congress has no power to regulate it under Art. I
        - (This is most sensible way to reconcile obvious rational basis that exists with the Court's holding – here and in Lopez)
    - **Souter Dissent**: Majority rejects the Founders' considered judgment that politics, not judicial review, should mediate between state and national interests

- "supplanting R/B scrutiny with a new criterion of review" (177)
- But, Majority is saying that we aren't even applying R/B test, we won't even apply it to non-economic activity that's intrastate in nature
- Key Dispute between Majority and Dissent

External Limits on the Commerce Power: State Autonomy

National League of Cities v. Usury (1976)

- Issue: Are there any restrictions on Congress's power to use the Commerce Clause to regulate PUBLIC, as opposed to PRIVATE businesses?
  - Phrased another way: Is an otherwise permissible use of the Commerce Power restricted because Congress is regulating a state-owned public business, instead of a private entity?
  - And another way: Is the defense of State Autonomy sufficient to invalidate the application to state and local governments of a federal law otherwise permissible under the Commerce Power?
  - This case dealt with the extension of the Fair Labor Standards Act to cover minimum wage and hour provisions for state and local government employees (held unconstitutional)
- This is the first case to answer YES
  - "When Congress seeks to regulate directly the activities of States as public employers, it transgresses an affirmative limitation on the exercise of its power akin to other commerce power affirmative limitations contained in the Constitution"
  - Federal legislation can't infringe on the sovereignty of the States
  - Rehnquist makes a STRUCTURAL argument: "The exercise of congressional authority does not comport with the federal system of government embodied in the Constitution"
- There's no textual basis for this – Isn't Congress' commerce power plenary and only held in check by politics?
  - Makes no sense to say that Congress can't regulate a local Fire Department under public control, but then can regulate it if the State contracts it out to a private company
- Interpreted to contain a 3-Part test (Hodel v. Va. Surface Mining & Recl. Ass'n (1981))
  - (1) The challenged statute regulates the "states as states"
  - (2) The federal regulation must address matters that are indisputably attributes of state sovereignty
  - (3) It must be apparent that the States' compliance with the federal law would directly impair their ability to structure integral operations in areas of traditional government functions

Garcia v. San Antonio MTA (1985)

- **Overrules National League of Cities**
- **Congress can once again reach public businesses with the Commerce Power just as they can reach private individuals**

- "Any rule of state immunity that looks to the 'traditional,' 'integral,' or 'necessary' nature of governmental functions inevitably invites an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes."
    - Rejects rule of state immunity from federal regulation that turn on judicial appraisal of whether a particular governmental function is integral or traditional
- State sovereign interests are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limits on federal power...the POLITICAL process insures that law that unduly burden the States will not be promulgated
    - Implicitly – **10th Amendment statement that all powers not delegated are reserved to the States is no bar or limit to Congress' delegated powers under Art. I** – i.e. here the Commerce Power: it is plenary and federal government is absolutely supreme in the sphere
    - Majority gives credit to Wechsler and Choper arguments to stop adjudicating federalism cases and leave it to politics
    - Majority gives a variety of examples of political checks working (p.183)
    - Note Powel's dissent: inconsistent with Marbury as judiciary being the authority of constitutional law to leave the check to politics; reduces the 10th Amendment to meaningless rhetoric when congress invokes commerce authority
- Rehnquist Dissent: What the majority is doing is ridiculous and my view from National League of Cities will eventually prevail again...

New York v. United States (1992)

- Can congress compel a state legislature to enact a regulatory scheme?
    - Short Answer: NO
- Low-Level Radioactive Waste policy Amendments Act of 1985 required states to provide for the disposal of such waste generated within their borders and gave 3 "incentives"
    - (1) "monetary" incentives allowing states to impose surcharges on waste from other states and a portion of these surcharged would be redistributed to states reaching certain milestones in developing waste sites
    - (2) "access" incentive: States could gradually increase cost of access by other states and ultimately deny access altogether
    - (3) "Take Title" provision: if state didn't have means to internally dispose of waste by certain date, they were required to Take Title to it and become liable for all damages resulting
- (1) is OK under Spending Clause and (2) is OK under Commerce Clause
- **(3) – Take Title Provision – is UNCONSTITUTIONAL**
    - ***Congress cannot commandeer the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program***
    - Congress can regulate individuals; but can't force state legislatures to enact legislation that regulates its citizens
- Congress can either
    - (1) enact spending incentives (i.e. (1) above) b/c this is "encouragement" that can be rejected if the state's citizens don't want it – state legislators and executives still remain accountable to their electorate for accepting or declining the incentives; OR

    - (2) DIRECTLY REGULATE this issue; BUT
    - (3) The "Take Title" Provision crosses the line from encouragement to coercion BECAUSE IT BLURS THE LINES OF POLITICAL ACCOUNTIBILITY
        - Forcing the State Legislatures to regulate a certain way would allow federal officials to "pass the buck"
- What about the CONTEXT of this Federal Legislation? – Dissent Point
    - Congress could have directly regulated this issue, but the STATES asked Congress to allow them to work-out a deal amongst themselves
    - The Take Title Provision was a product of COOPERATIVE FEDERALISM between the States and the Federal Government whereby the States agreed to the provision as a penalty for non-compliance with the negotiated agreement – agreement would have "no teeth" without the provision
        - The Provision is only coercive if the State doesn't live-up to its end of the agreement
    - So we must ask, "why is the Court allowing Gov. Cuomo to renege on his agreement?" → No answer to this – Cuomo gets away with it
    - Its illogical to declare a statute unconstitutional for imposing on State sovereignty when the States themselves requested the legislation
- Majority's (O'Conner) Interpretation of the 10th Amendment
    - O'Conner: The 10th Amendment is a Tautology and confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The 10th Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation of an Article I power.
    - O'Conner is talking about the 10th Amendment limiting Congress' Article I powers → This makes absolutely no sense
        - (1) It can't be reconciled with Garcia because Garcia disposed of any notion that the 10th Amendment limits Congress' Art. I powers; Garcia says the only limit on Congress' Art. I powers is politics
        - (2) It can't be reconciled with the text of the 10th Amendment because by its terms, the 10th Amendment only deals with powers NOT DELEGATED to Congress
            - The Commerce Power IS delegated to Congress, thus the 10th Amendment CANNOT place any limits on that power
            - Congress' delegated powers are plenary – so how is state sovereignty implicated by an exercise of the DELEGATED and PLENARY Commerce power?
    - This is important b/c 10th Amendment limitation of Congressional power is basis for Majority's entire decision!
- NOTE: Printz v. U.S. → extends these principles to State Executives as well

Reno v. Condon (2000)

- Clarifies the impact of New York and Printz
    - These cases established that congress may not compel the state to regulate their own citizens or enact certain laws

    - Congress may STILL regulate the States or State Activity DIRECTLY; Congress just cannot require States in their sovereign capacity to regulate their own citizens
- Reno left undecided whether, when congress does regulate the states, may it do so under only Generally applicable laws – laws that apply to states and private individuals

11th Amendment

- State Sovereign Immunity

Seminole Tribe v. Florida (1996)

- Holding: The Commerce Clause doesn't give Congress the power to abrogate 11th Amendment protection of States against lawsuits without their consent
- Does 11th Amendment bar this suit as a TEXTUAL matter?
  - Short Answer: NO
  - The 11th Amendment only bars "Citizen of X State v. Y State";
  - It does NOT bar "Indian Tribe v. State" or "Citizen of X State v. X State"
- So what the hell is going on?
  - The 11th Amendment Confirmed a PRESUPPOSITION that
    - (1) States are **sovereign entities** in our Federal System, and thus
    - (2) It is **inherent in the nature of sovereignty** that the sovereign in immune to suit unless he consent to it
  - Thus a State CANNOT be sued in Federal Court
  - This is a structural argument; Rehnquist rests his holding on the "background principle of state sovereign immunity embodied in the 11th Amendment"
- **Caveat: Congress MAY abrogate a State's sovereign immunity under 14th Amendment, § 5; Congress just can't abrogate a State's sovereign immunity using an Art. I, § 8 power**
  - Fitzpatrick v. Bitzer (1976)
  - The 14th Amendment was adopted well after the 11th Amendment and the original Constitution and was specifically designed to alter the balance of power between the State and Federal Governments
  - When talking about an Art. I, § 8 power (i.e. Commerce Clause) – we are talking about the ORIGINAL balance of power between the State and Federal Governments
  - Thus, Congress cannot use its Art. I, § 8 powers to expand the Court's Art. III jurisdiction (in order to allow Federal Courts to hear suits against States); but it CAN use its NEW powers under Amend. 14, § 5 to do so

Short History Lesson

- 11th Amendment originally enacted to overturn Chisholm v. Georgia (1793) where Court took original jurisdiction of a suit against Georgia by a South Carolina creditor seeking payment for goods purchased by Georgia during the Revolution
- Ex parte Young (1908)
  - Federal Courts can exercise jurisdiction over state officials in their individual capacity
  - Theory is that the Defendant is not really the State, but rather the official, acting beyond his constitutional authority
  - Makes the whole 11th Amendment thing kind of fictional → you don't sue the "State" – you sue the state OFFICIAL in his individual capacity

Alden v. Maine (1999)

- Holding: Congress cannot abrogate a State's sovereign immunity from suit in STATE court either (w/o the State's consent)
    - Case arose from someone suing the State in State court for a violation of federal law
- No Constitutional provision supports this holding → Kennedy:
    - This limitation on Congressional Power cannot be derived from the text of the 11th Amendment
    - The holding is rooted in "the Constitution's structure, and its history, which make clear that the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today."
- Is Kenney's historical analysis sound?
    - The Colonies did not enjoy sovereign immunity – that was reserved for the Crown (Souter dissent)
    - No State declared sovereign immunity as a right
- Planks of Kennedy's Reasoning
    - (1) The Federal government has sovereign immunity in both State and Federal court; thus, since both the Federal and States governments are independently sovereign, the States must also have sovereign immunity in STATE and Federal court (Federal court immunity from Seminole Tribe)
    - (2) If states legislatures and executives can't be commandeered by the Federal government, then it would be inconsistent for the State Judiciary to be commandeered to enforce federal law
- Does the 10th Amendment support this result?
    - Kennedy: It acknowledges the States as sovereign entities
    - Souter (Dissent): There is no evidence that the 10th Amendment constitutionalized a concept of sovereign immunity as inherent in the notion of statehood
- Why does the structure of the constitution bar the states from being subject to lawsuits in their own courts?
    - "Although the Constitution grants broad powers to Congress, our federalism requires that Congress treat the States in a manner consistent with their status as a residuary sovereigns and joint participants in the governance of the Nation"
    - "Private suits against non-consenting States present the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties regardless of forum"
- What impact does the Supremacy Clause have?
    - Once ME created courts to hear lawsuits, it was bound to follow and apply Federal Law per the Constitution
    - Let's take this Case
        - We have a citizen whose Federal rights have been violated by the State and he has brought suit in State court to vindicate those Federal Rights
        - Where there is a Right there must be a Remedy
        - There must be some kind of rule of law – Maine has been violating the Fair Labor Standards Act – they must be held accountable somehow!

        - What if the President directs the US Attorney not to bring a suit? How will the P's rights be vindicated?
- Do Seminole Tribe and its progeny signal that its time to overrule Garcia and return to the model of federalism announced in National League of Cities?
    - It is a curious model of federalism that permits the federal government to regulate the states as states, but bars private parties from enforcing these same federal regulations that are enforceable by the federal government
    - Why limit the remedial means by which Congress can enforce regulations on the states: Federal government can enforce the same statutes against the states that private individuals can't
    - Private individuals can't sue states – so why not just invalidate the statutes as inapplicable to the states?

Federal Maritime Commission v. S.C. State Port Authority (2002)

- Holding: extends the concept of state sovereign immunity to adjudications within federal administrative agency proceedings
- AGAIN – This holding is not supported by the 11th Amendment
    - This does not trigger 11th Amendment interests
    - "Even though the FMC does not exercise the judicial power of the United States, so as to trigger the 11th Amendment, the adjudication of a private complaint nonetheless offends the sovereign immunity embedded in our constitutional structure and retained by the States when they joined the Union."
- So – none of these decisions are supported by the text of the 11th Amendment – not this one, not Seminole Tribe, not Alden – all rest on structural principles

The Bill of Rights and Reconstruction Amendments

Barron v. Baltimore (1833)

- Holding: The Bill of Rights is a limitation upon FEDERAL – NOT STATE – Power (i.e. the Bill of Rights does not apply to the States)
    - Based on a literal and historical reading of the Bill of Rights and the Constitution
    - Original Intent of Framers was to Limit FEDERAL, not STATE power
    - Also relies on Art. I, § 9-10; explicit grants and limitations on powers on state governments – if framers had wanted to restrict the states, they would have explicitly said so in the Bill of Rights
        - But the text of the Bill of Rights is phrased only in general terms – why only apply them to US? (448)
- Two Philosophies
    - Interpretivism: Judges should confine themselves to enforcing norms and values that are found in the constitution
    - Non-Interpretivism: Judicial Activism – should enforce norms and values not explicitly within the constitution
- Each state has established a constitution for itself and the states themselves have limits on their own governments to protect liberties of citizens

Slaughter House Cases (1873)

- Court's Interpretation of the 14th Amendment's Privileges or Immunities (PoI) Clause
    - 14th Amendment PoI Clause protects your P&I as a Citizen of the UNITED STATES, NOT as a Citizen of a State (see list of P&I as a Citizen of the U.S. on p. 454 top)
    - Textual Argument
        - Citizenship Clause of 14th Amend. explicitly states that you have a dual citizenship
        - Then PoI clause explicitly states that no State shall abridge the Privileges or Immunities of Citizens of THE UNITED STATES
    - Your fundamental civil rights – including the right to chose your employment and free labor, etc. (rights claimed here)– are part of your P&I as a Citizen OF A STATE
        - Cites Corfield v. Coryell
        - The State governments were created to preserve your fundamental civil rights
        - Why would we transfer protection of civil rights to the Feds? – so can't be part of P&I as a U.S. Citizen
- Is this definition of "P&I" (p.454 listing) redundant?
    - Yes – aren't they already protected by the Federal Supremacy Clause and the Federal Structure?
    - Field's Dissent: "If this inhibition [of States against abridging the PoI of citizens of the U.S.] has no reference to P&I of this character [meaning fundamental civil rights of citizens of all free governments], but only refers, as held by the majority, to such P&I as were before [the 14th Amendment's] adoption specifically designated in the Constitution or necessarily implied as belonging to citizens of

the United States [such as listed on p. 454], it was a vain and idle enactment, which accomplished nothing."

- According to Majority – what would be adverse consequences of broad interpretation of the 14th Amendment PoI Clause?
    - It would give Congress the broad power to strike down laws it thinks are unconstitutional using its power under § 5 of the 14th
    - It would set-up the Court as a perpetual censor on all state legislation
    - Would degrade the State governments by subjecting them to the control of Congress
    - This would be a radical change in our federal system of government
- Alternative way to interpret 14th PoI Clause: Field Dissent
    - The P&I designated are those which of right belong to the citizens of all free governments – otherwise the phrase is simply redundant (see above)
    - Art. IV, § 2 P&I Clause prevents States from legislating to discriminate against out-of-staters; 14th Amendment PoI Clause similarly prevents States from legislating to discriminate against its OWN citizens!
    - Obvious drawbacks of this position are in the preceding heading
    - Another drawback: Where does the argument end? How are we going to define rights that belong to citizens of all free governments? Where in the Constitution does it say you have a right to be an economic member of society (right Butchers are claiming here)?
- Purpose of the Reconstruction (13-15) Amendments
    - Majority (Interpretivist View) → The only purpose behind the Reconstruction Amendments was to ensure the liberty and the protection of the freed slaves – and nothing else; THUS
        - 13th "involuntary servitude" only means "slavery"
        - 14th "due process" only means "procedure"
        - 14th "equal protection" only meant for freed slaves
    - Alternative view: Reconstruction Amendments as altering the balance of State and Federal Power
        - The Civil War was also fought to preserve the Union – not just about slavery
        - Wanted to remedy the spirit of insubordination and disunity in southern states
- Majority's interpretation of Art. IV, § 2 P&I Clause
    - Doesn't create the rights and privileges that the states afford their citizens
    - It only protects out-of-staters against discrimination → State has to treat citizens of other states the same way as it treats its own citizens → butchers are not out-of-staters
- Did the 14th Amendment overrule Barron v. Baltimore?
    - Majority: "we do not see in [these] amendments any purpose to destroy the main features of the general system." (i.e. – NO)
    - Bradley Dissent: "It was the intention of the people of this country in adopting the 14th amendment to provide National security against violation by the States of the fundamental rights of the citizen."
    - Any room in Slaughterhouse Majority to say that the 14th overrules Barron?

        - Top of P. 454: If the right owes its existence to the Federal government, its National character, its Constitution, or its laws, its protected by P&I in 14th – doesn't this INCLUDE the Bill of Rights?
        - Barron said Bill of Rights only protects those rights against the Federal Government; thus we could say that the Bill of Rights embodies your P&I as a citizen of the U.S. as well and now "No State" can abridge them – thus Barron is overruled
    - Congressman Bingham (drafter of 14th) – intended it to overrule Barron

Right to Travel Cases

Shapiro v. Thompson (1969)

- Court invalidated a law that denied welfare benefits to new state residents until they had resided in the state for a year
- Court doesn't decide what a "bona fide" resident/citizen is
- State's justifications for the law
    - (1) Interest in preserving **fiscal integrity** of welfare programs – durational residency requirement would deter poor from entering as an initial matter and reserve money for long term residents
    - (2) Deter those entering solely to gain **larger benefits**
- Court's Holding
    - The purpose of inhibiting the migration by needy persons into the state is constitutionally impermissible because of the Right to Travel
        - Only constitutional basis for this right offered by the Court is a structural one: "the nature of our Federal Union and our constitutional concepts of personal liberty"
    - But is the right violated?
        - Hasn't deterred people from moving – the travel has already been completed when this law takes effect
        - Can still move to the states unimpeded
        - Few have been deterred by the durational residency requirements
- Interpretation: Laws that impose a severe penalty on exercising your Constitutional Right to Travel cannot stand
    - Here: penalty resulted in a denial of a family's very means of subsistence
    - Court applied Strict Scrutiny

Memorial Hospital v. Maricopa County (1974)

- Court relied on Shapiro to invalidate an AZ law requiring a year's residence in a county as a condition of an indigent's receiving free nonemergency hospitalization or medical care
- All laws having an impact on the Right to Travel are NOT per se unconstitutional
    - **SS is only required when the law PENALIZES Traveling**
    - **Whether the penalty invalidates the law as unconstitutional depends on**
        - **(1) the impact of the requirement; and**
        - **(2) the nature of the benefits affected**
    - Here: Necessity of medical care to life is just as great as necessity of welfare assistance

Sosna v. Iowa (1975)

- Upholds a 1 year citizenship requirement for DIVORCE
- The rule doesn't result in outright denial, but delays access to divorce court
    - Divorce decree will usually involve more than the litigants at hand – custody of children (e.g.)
    - Avoids meddling in an issue that another states may have a greater interest in
    - Supported by more adequate reasons than other travel cases – portability of the benefit is greater than with welfare or medical care

Saenz v. Roe (1999)

- Invalidated a CA law limiting the maximum welfare benefits available to newly arrived residents (those with less than 12 months of citizenship) to the amount payable to them by their previous state of residence
- Three Different Components to the Right to Travel
    - (1) protects the right of a citizen of one State to enter and to leave another State
    - (2) the right to be treated as a WELCOME VISITOR rather than an unfriendly alien when temporarily present in the second State; and
    - (3) for those travelers who elect to become permanent residents, the right to be treated like other citizens of the State
- This case implicates (3)
- Does not decide what a "bona fide" resident is or what constitutes a "bona fide" resident – assumes the P is for purposes of analysis
- Do the holding and reasoning in Shapiro support Saenz?
    - Penalty Theory
        - A discriminatory classification between long time and short time residents is itself a penalty
        - But, it doesn't impair right to interstate movement – have completed interstate travel
    - Has Court gone beyond Shapiro?
        - This talks about right to be treated equally, rather than denying means to desist
        - Court not assessing the degree of a penalty, they are saying the state may not discriminate
        - The Court prohibits all classifications that burdens bona fide residents on the basis of their length of residence – **per se rule for no discrimination of bona fide residents based on length of residence**
        - DIFFERENT FROM SHAPIRO → Shapiro would only invalidate laws that impose a severe penalty on interstate travel; HERE → once you are bona fide resident – state is barred from drawing distinctions or classifications between old and new residents
- What is Court's basis for their Holding?
    - (1) Right to Travel (essentially a structurally-implied right)
    - (2) Part of your P&I as a citizen of the U.S. under 14th Amendment

        - Slaughterhouse: "a citizen of the U.S. can, of his own volition, become a citizen of any State of the Union by a bona fide residence therein, with the same rights as other citizens of that State"
    - (3) Citizenship Clause of the 14th Amendment
        - Citizenship clause does not allow for degrees of citizenship based on length of residence
        - The State's interest in fiscal conservation (the end) is legitimate, but it is not a justification for discriminating against citizens based on length of citizenship (means not narrowly tailored – SS)
- Why don't in-state tuition breaks and divorce requirements violate the Citizenship Clause?
    - According to Court: These are portable benefits
    - CA is not required to provide welfare as a constitutional matter.
        - So how is P&I implicated?
        - Citizenship clause argument could go too far (i.e. tuition breaks could be unconstitutional under this reasoning too)
- Dissent:
    - (1) Right to travel and (2) right to become citizen of another state are different and latter isn't a component of the former
    - We shouldn't conflate the two like Stevens has done
    - The portable benefit concern is legitimate – Welfare no different from in-state tuition and divorce
- Do any of the majority's 3 bases provide support for their holding?

14th Amendment Substantive Due Process

Common Themes

- Where does court derive fundamental rights from?
  - Text?
  - Intent?
  - History?
  - Structure of Government?
- Should the Court even be in the business of relying upon unenumerated rights?
- Do these values represent a national consensus or just the views of the court?
- Can we articulate these values in a principled manner not involving judicial law making?
- Any justification for SS with personal liberty interests and RB with economic interests?
- In debate between Chase and Iredell in Calder v. Bull, whose views ultimately prevail?

Calder v. Bull (1798)

- Justice Chase: NATURAL LAW ARGUMENT
  - The written constitution is not the initial source of government, but a re-affirmation of a pre-existing social compact enforcing pre-existing rights
  - Broad Reading of the 9th Amendment suggests that natural law concepts were embraced by the Constitution
  - Traditionalist View of the 9th Amendment
    - 9th Amendment was inserted to negate the theory of the existence of congressional powers beyond Art. I Sec. 8 – to reaffirm the notion that our federal government was one of limited and enumerated powers
  - Anti-traditionalist View of 9th Amendment
    - Professor Barnett
      - (1) It is wrong to interpret the 9th Amendment as nothing more than the 10th Amendment
        - 9th Amendment talks of RIGHTS
        - 10th Amendment talks of POWERS
      - (2) No provision of the Constitution should be interpreted to be superfluous
    - The Traditionalist view makes no sense in light of the 10th Amendment; the 10th Amendment fills the function claimed of the 9th Amendment under the Traditionalist view – If we accept the Traditionalist view – the 10th Amendment simply becomes redundant
  - But then...How do we define the "rights retained by the people?"
    - Doesn't it invite judicial activism?
- Justice Iredell
  - Reasonable persons will often disagree on the meaning of natural justice
  - No fixed standards for natural justice means people won't be able to agree on fundamental rights
  - Isn't taking the 9th Amendment seriously mean that there are no checks on judges?
    - Traditionalists have won out for the most part because of this reason

- Judges are not accountable to anyone – so we don't want them to engage in judicial activism

How should we interpret the Due Process Clause?

- Historically – "DP" only implicated PROCEDURE
- Blackstone – "liberty" only means freedom from physical restraint
- Ely: SDP is a contradiction in terms and DP is about procedure

Economic Rights

Lochner v. New York (1905)

- The Court strikes down a law regulating the hours a baker can work
  - So, right of individual to labor for as long as he chooses vs. state interest in regulating this right
- What Constitutional provision does the Court rely upon?
  - The "liberty" part of the 14th Amendment's Due Process Clause
  - **The Court says that the right to make a K – here a K for employment – is part of your liberty that is protected by the Due Process Clause of the 14th Amendment**
  - Right to K should not be confused with Art. I, § 10 (which deals with existing Ks – can't undo an existing K); it is Indept of Right to K protected by LDP
- What Level of Review Does the Court Apply?
  - "Is this a fair, reasonable and appropriate exercise of the police power or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty..."
  - Court DOES NOT SAY
    - (1) That right to K can't be regulated;
    - (2) That the right to K is a "fundamental right;" or
    - (3) That they are applying strict scrutiny
- **State Justification #1: Labor Law**
  - Goal of the State is to equalize the bargaining power between baker and owner, which they perceive as unequal
  - Court says NO to this pretty quick – THIS IS AN IMPERMISSIBLE END (GOAL) OF STATE LEGISLATION
    - Bakers are smart and can look out for themselves
    - End doesn't involve HSW
    - Alludes to corrupt political motives of the legislature
  - Why is the equalization of bargaining power an impermissible end?
    - What is so unreasonable about this end? – the Court is purporting to apply rational basis; so, what's irrational here?
    - How is the political judgment that bakers need some help in the bargaining area irrational or unreasonable
    - Court distinguishes Miners for Bakers, the former of whom can be subjects of state regulation in regards to their Employment contracting power – more health issues and safety issues with Miners
  - Holmes Dissent: Majority is endorsing a laissez faire economic theory here and that is an impermissible exercise of judicial power

- **State Justification #2: Health Law**
    - Regulating in the name of health is a permissible legislative end (goal), but the means it has chosen – regulating the hours of bakers – is not directly related enough to that end
        - Hours don't contribute to healthful quality of the bread
        - Health argument is just a pretext for a Labor Law
        - Nexus between health and hours worked just not strong enough for us
    - If this is a rational basis review – how is this law not rational?
        - Institutional Competence Argument (Harlan) – not the judges' job to decide HOW (i.e. the means) the legislatures should use to exercise their police powers
        - Empirical Data showing health relationship (Harlan)
- Holmes: "I think that the word liberty in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would **infringe fundamental principles** *as they have been understood by the traditions of our people and our law*."
    - Use a RB review for "regular" liberties – like the right to K
    - Use SS review for "fundamental" liberties, which are defined in *italics*
    - What the majority is doing is actually a form of strict scrutiny no matter what they call it because a rational person could find a relation between hours and health – majority is asking that the statute be **narrowly tailored** to serve the governmental interest (i.e. the BEST possible statute)

Problems with Lochner

- (1) "Liberty" does not include a substantive component, neither does "due process of law"
- (2) The Court was setting ECONOMIC policy and that's beyond their power
- (3) The Court erroneously decided that the Right to K was a "fundamental" right and afforded it Strict Scrutiny Review (even though they called it Rational Basis)
- Most people buy (3)

The Downfall of Lochner

Nebbia v. New York (1934)

- Upheld legislation fixing the price of Milk
- Standard of Review: **RATIONAL BASIS**
    - Nebbia: The fixation of prices by a state is forbidden unless the business is affected with a public interest (like a public utility) or is a natural monopoly
    - Court: You are absolutely right, but the **Milk industry is affected with a public interest** and there is no closed class of business that can be defined as affected with a public interest
- "A state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose."
- "If the laws passed are seen to have a REASONABLE RELATION to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process of satisfied."

- Price Controls fall under this test
- RB upholds these regulations

West Coast Hotel v. Parrish (1937)

- "The switch in time that saved the Nine." – Justice Roberts' vote
- Overruled the Lochner-era Adkins v. Children's Hospital (1923) and upheld a state minimum wage law for women
- The health of women and their protection from unscrupulous employers is will within the public interest – thus the legislative end of equalizing women's economic bargaining power is legitimate
  - (directly contra to Lochner reasoning)
- Mantra of "trust the legislature" in realm of economic regulation

U.S. v. Carolene Products Co. (1938)

- Filled-Milk Case – upheld FEDERAL prohibition of interstate shipment of filled-milk
- Solid Rational Basis Review for Economic Legislation
  - "the existence of facts supporting the legislative judgment IS TO BE PRESUMED, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in light of 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"
  - As long as the rationality of the means chosen by the legislature is debatable – we're going to uphold it
- The Famous FOOTNOTE 4
  - "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to MORE EXACTING JUDICIAL SCRUTINY under the general prohibitions of the 14th Amendment than are most other types of legislation."
  - "Nor need we enquire...whether prejudice against DISCRETE AND INSULAR MINORITIES may be a special condition, which tends to SERIOUSLY CURTAIL THE OPERATION OF THOSE POLITICAL PROCESSES ordinarily to be relied upon to protect minorities, and which MAY CALL for a correspondingly MORE SEARCHING JUDICIAL INQUIRY."
  - This is widely read to authorize Strict Scrutiny in race cases and plays a part in the SDP Abortion and sexuality cases too

Day Bright Lighting v. Missouri (Maclin side-bar)

- Upheld regulation requiring employers to give employees 4 hours of paid time to go vote on Election Day
- Court compared this to a minimum wage law
- The State obviously has a legitimate interest in the goal (end) of encouraging its citizens to vote – but is this regulation a reasonable means?
  - It's debatable so it's not for the judiciary to engage in determinations regarding the wisdom of legislation

- Reveals a willingness to gloss over the legislative means in economic regulations so long as the end is legitimate

Williamson v. Lee Optical (1955)

- Court upheld blatant special interest economic legislation that was designed to benefit optometrists and ophthalmologists over opticians → opticians could fit lenses for glasses w/o a prescription
- Court holds that the legislature MIGHT HAVE concluded about 5 or 6 different things, thus the means were rationally related to the ends
- Why aren't the opticians a "discrete and insular minority" not protected by the political process as FN4 of Carolene Products might suggest?
  - They are a minority that lost in political process because of their political disadvantage vis a vis the Eye DOCS – who have more $, power, and political clout
  - Why isn't this was FN4 was talking about?
- Bottom Line: Court doesn't want anything to do with economic legislation – means and end are always going to be rational and legitimate
  - Note Ferguson v. Skrupa (1963) → Economic policy is for the legislature, not the courts

Non-Economic Rights: Personal Liberties

Antecedents to Modern SDP for Personal Liberties

Meyer v. Nebraska (1923)

- Reversed the conviction of a teacher convicted of teaching German in violation of State Law
- "Liberty" Definition: "Without a doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."
- Legislative goal here – to foster a homogenous people – is not longer legitimate now that WWI is over
- Is it for the judiciary to determine whether and when goal was permissive? What's unreasonable about this law? Want kids to learn English.
- Court concedes that this law may have been OK in wartime, put the time for it has come and past
- See also Pierce v. Society of Sisters

Skinner v. Oklahoma (1942)

- Invalidated state's Habitual Criminal Sterilization Act
- Why is this law unconstutitonal?
- State law ran afoul of Equal Protection Cause b/c it ran afoul of marriage and procreation and survival of the race

    - Marriage and procreation are fundamental to the very existence and survival of the race
    - Violates basic civil rights of individuals
    - Applying the law to chicken thieves and not embezzlers is an unconstitutional classification
- But, broadening the scope of the law probably wouldn't make it constitutional (Maclin reading the full opinion)
    - This is readily apparent under the broad view of SDP
    - So are we now talking about a fundamental right to marriage and procreation?
        - NO personal contact for lifers vs. chemical castration: is there a principled distinction? Does one go to far under Due Process?
        - Both accomplish the same result – no procreation

Privacy: Contraception
Griswold v. Connecticut (1965)

- Holding: Criminalizing the USE of contraceptives by MARRIED COUPLES is UNCONSTITUTIONAL
- 3 State Interests that CT argues
    - (1) to prevent promiscuous sexual behavior
    - (2) to protect the moral welfare of its citizens (i.e. practice of using contraception itself is immoral)
    - (3) promoting marital fidelity
- Majority (Douglas) DOES NOT RELY ON SDP – why?
    - Explicitly repudiates using Lochner as a guide for his opinion
    - "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."
- Where does Douglas get his **Right to Privacy**?
    - Peripheral rights implied in the Bill of Rights
    - The "specific guarantees in the Bill of Rights have **penumbras, formed by emanations from those guarantees** that help give them life and substance."
    - Various guarantees create zones of privacy
        - 1st, 3d, 4th, 5th Amendments have penumbras
        - Legitimacy of penumbras confirmed by 9th Amendment guarantees
        - Lifts quotes from cases interpreting these amendments that have the word "privacy"
- Why does the marital relationship fit within the Right to Privacy?
    - Not much detail for this – but its in the history and structure of the constitution and lies within the zone of privacy created by the penumbral guarantees
    - The MEANS employed to effectuate the State Interests (which are legitimate) are no good because they sweep too broadly
        - Distinguishes outlawing the USE vs. the SALE/MANUFACTURE of contraceptives
        - Would we allow police to search a marital couples' bedroom looking for evidence of USE of contraceptives? → Idea is "repulsive to the notions of privacy surrounding the marriage relationship"
        - How is CT going to enforce this law?

        - **Concerned about the privacy of the marital household**
        - BORK: **statutes are usually judged by way they are enforced; not the worst thing that could happen with the statutes**
    - "We deal with a right of privacy older than the Bill of Rights."
        - BORK: what does the fact of the "age" of the right have to do with anything?
    - Isn't this just Lochnerizing?
        - Why is personal privacy a fundamental right and the right to K not?
- Goldberg, J., Concurring
    - Goldberg's view of 14th Amendment Liberty
        - **The concept of liberty protects those personal rights that are fundamental, and is not confined to the specific terms of the Bill of Rights**
        - Uses 9th Amendment to support his position, and the position that the right of MARITAL PRIVACY is embraced by the 14th Amendment
        - IMPORTANT: not saying that 9th Amendment stands on its own – just saying that it SUPPORTS his reading of 14th Amendment; not incorporating 9th Amendment either
    - Level of Scrutiny Goldberg Applies
        - STRICT SCRUTINY → Fundamental Rights get SS
        - State must show (1) a **COMPELLING INTEREST OR REASON** for enacting the law and (2) that the legislative means are **narrowly drawn** to achieve that interest
            - Here – could achieve the compelling interests with less intrusive statutes
            - See direct criminal prohibition of adultery, fornication, etc.
            - All the state has articulated is a rational basis – not good enough here
        - If no fundamental right is implicated – RB test is OK
- Harlan, J., Concurring
    - Solid reliance on 14th Amendment DP Clause
        - This law "violates basic values implicit in the concept of ordered liberty" – which is what is implicated by the Due Process Clause
        - "The Due Process Clause stands, in my opinion, on its own bottom" (no penumbras here)
        - Court should look to the traditions of the nation for determining what rights are fundamental
    - Judicial self-restraint will be achieved only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise application of the great roles that the doctrines of federalism and separation of powers have played in preserving American freedoms
        - Harlan's test for what is covered by 14th Amendment "liberty"
        - DP has represented the balance that our nation struck between that liberty and the demands of organized society. The balance of which I speak is the balance struck by this country, having regard for what history teaches are

the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing.

- Protecting the intimacy of the marital relationship is DIFFERENT from regulating citizens' morals – i.e. certain sexual intimacies
  - Adultery/fornication/homosexuality can all be forbidden by the State because of police power to regulate morals
  - Forbid them directly and it's OK
- "If the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within."
- Look not only at moral end of the law; but also at the means chosen by the legislature
  - Immoral Sexual Activites can be prohibited all together – but marital intimacy has always been an accepted part of that institution and the state encourages it
  - Using full power of the criminal law to invade marital bedroom is no good in terms of means

- Key question: What is the scope of Privacy under Griswold?
  - Personal autonomy?
  - Prevent intrusion into home?
  - Personal info?

Eisenstadt v. Baird (1972)

- A Mass. ban on the distribution of contraceptives is struck down
- Broader Standard of Privacy
  - "If the right of privacy means anything, it is the **right of the individual**, married or single, to be free from unwarranted governmental intrusion into **matters so fundamentally affecting a person** as the decision whether to bear or beget a child."
- Purports to rely on the equal protection clause and rational basis review (classification = married vs. single people)

Privacy: Abortion

Roe v. Wade (1973)

- Decision is based upon the right to privacy, "whether it be found in the 14th Amendment's concept of personal liberty as we feel it is, or, as the District Court determined, in the 9th Amendment..."
  - Wherever it is – it is broad enough to encompass a woman's decision whether or not to terminate her pregnancy
- Only PERSONAL rights can be recognized as fundamental and have SS applied to them (cites Griswold string of cases and Meyer string of cases); has Court adequately distinguished between economic and non-economic rights since Lochner has been discredited?
  - Is the Court setting a double standard?
  - Ely article

        - SS under Carolene Products FN4 was clearly intended to apply only to those interests which, AS COMPARED WITH THE INTEREST TO WHICH THEY HAVE BEEN SUBORDINATED, constitute minorities unusually incapable of protecting themselves
        - Compared with men, woman may constitute such a minority; compared with the unborn, they do not
        - FN4 is about giving SS to discrete and insular minorities that didn't get a fair shake in the political process and thus have had their rights invaded – women are not such a minority when compared with the unborn
        - Fetus' status as "not a person" is irrelevant to his analysis
- Detriments imposed by Abortion Laws
    - (1) Specific and Direct harm medically diagnosable even early in pregnancy may be involved
    - (2) Motherhood and Kids my force a distressful life and future upon a woman
    - (3) Psychological harm
    - (4) Mental and Physical health taxed by child care
    - (5) Distress associated with an unwanted child; stigma
    - Do these detriments sound like PRIVACY or more like EQUAL PROTECTION?
        - Many have argued that this is a case about sex equality and NOT SDP
        - P.566 n.4: "laws governing reproduction implicate equality concerns and restrictions on access to abortion plainly oppress women"
        - Forced motherhood is forced sex inequality
        - What would the classification be?
- The Right to Abortion is NOT ABSOLUTE
    - **State's interests become compelling on a continuum**
        - **(1) Health of Mom**
        - **(2) Interest in protecting potential life**
    - Why is the right not absolute?
        - "A pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus." – This is different from possession of obscene material or contraception
        - "It is reasonable an appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly."
- If the State has a compelling interest in protecting fetal life – must not the court at least determine when the potentiality of life becomes so pertinent that a state can properly subordinate a woman's interest?
    - Court says it doesn't have to decide when "life begins" – shouldn't the lack of consensus on this question force the court to defer to the legislature?
    - If court is unwilling to decide when life begins – why should the competing right to privacy always win?
    - Note FN2 – if fetus is a person- it is protected by DP to life, etc. – and then health of mom abortions would be impermissible
    - ME: But don't they make this decision de facto with the Trimester System?

- If state's interest in potential life is compelling – why is it the court's purview to second guess the legislature's determination of when that interest becomes compelling?
    - Legislature can hold hearings, are accountable to the people, etc.
    - Trimester System is just judge made structure → so why does/should the state's interest in potential life depend on the trimester system?
    - O'Conner believes that the interest in life is compelling throughout the pregnancy and doesn't depend on the trimester system and states can assert this interest throughout the pregnancy (see Akron, and later, Casey)
- What is the character or nature of the right at stake here?
    - It certainly isn't based on the logic of Griswold → at the end of the day the judges were concerned about the protection of the home as a private place and about protecting marital relationships → NOT APPLICABLE HERE
    - Further, this case is NOT about individual autonomy in the Absolute sense b/c you have NO ABSOLUTE RIGHT to an abortion – the state's interests become compelling at a point and outweigh your right to get an abortion on demand
- **Summarizing the Holding of Roe**
    - This criminal abortion law, which proscribes abortion in all cases except when the life of the mother is at stake, violates the Liberty component of 14th Amendment Due Process
    - 1st Trimester
        - A woman has unfettered access to an abortion if she wants to get one
        - The decision is wholly up to her and her physician
        - Any State attempt to regulate abortion in the 1st Trimester will get SS and will be struck down
    - 2d Trimester
        - The State may regulate abortion in ways reasonably related to maternal health
        - i.e. can assert interest in the health of Mom; still can't proscribe abortion
    - 3d Trimester – the place where "**viability**" is generally placed (i.e. at 7 months)
        - The State may regulate or, if it wishes, proscribe abortion, EXCEPT where it is necessary for the preservation of the life or health of the mother
        - i.e. can assert interest in potential life of the fetus

Maher v. Roe (1977)

- Court sustained a CT regulation granting Medicaid benefits for childbirth but denying them for NONTHERAPEUTIC, medically unnecessary abortions
- Unequal treatment of abortions and childbirth in this scheme does not interfere with the fundamental right recognized in Roe v. Wade
- Roe implies no limitation on the authority of a State to make a value judgment favoring childbirth over abortions, and to implement that judgment by the allocation of public funds
- Direct distinction between state INTEREFERENCE w/ right to abortion and state ENCOURAGEMENT of childbirth
- The indigency that may make it difficult – and in some cases, perhaps, impossible – for some women to have abortions is neither created nor in any way affected by the CT regulation

  - i.e. funding restrictions place no NEW affirmative obstacle in the way of a woman seeking an abortion – she is no worse off than if the state had decided not to enact the welfare program – she is still reliant on private funding sources to pay for the abortion
- The state doesn't have to subsidize abortion

Harris v. McRae (1980)
- The Court upheld the Hyde Amendment, which barred federal funding for even medically necessary abortions
- Follows the logic of Maher and says that the government has still not put any affirmative obstacle in the way of a woman seeking an abortion
- "It simply does not follow from Roe that a woman's freedom of choice carries with it a CONSTITUTIONAL ENTITLEMENT to the financial resources to avail herself of the full range of protected choices"
- Indigency is an obstacle created by the woman herself and not the government, thus the government need not remove obstacle not of its own making
- Again, a poor woman is still in the same position that she would have been in had the government not enacted the welfare program
- Government may express its value judgments by deciding what to fund and what not to fund
- Maybe the Hyde Amendment violates Roe because a state may prohibit access to abortions during the 3d trimester EXCEPT where life or health of mom is in danger; here, life or health of Mom is implicated with medically necessary abortions
  - Medically necessary abortions implicate the Woman's right to life under DP – denying this medically necessary procedure could deprive the Woman of this right
- Dissent: Forces poor women to choose childbirth over abortion
  - But then logic of dissent is that Government, by enacting social welfare programs, creates an affirmative obligation – a new fundamental right – of the government to provide an abortion: that is not a rational argument
- Tribe article in 1985 in Harvard Law Review: Abortion Funding Conundrum
  - Right belongs to woman as individual, but also to subordinate place of women
  - Not about privacy – it's about structures of power
  - Operates in effect as a waiver of right she would have otherwise had
  - Requires poor women to sacrifice their liberty for others to survive
  - Parallel between woman's right not to be pregnant and right not to be enslaved
  - This case is particularly offense as a subordination of women – taking advantage of their special vulnerability (Maybe Roe as a case about equality rather than privacy)

Other Regulations Upheld and Struck under Roe v. Wade
- Planned Parenthood of Central Missouri v. Danforth (1976)
  - Spousal consent requirement unconstitutional
  - Unqualified absolute requirement for parental consent is unconstitutional
- Parental Consent is Constitutional if the Statute Provides a Judicial Bypass Procedure
  - Bellotti v. Baird (1976, 1979) → two cases with same name

    - Planned Parenthood Assn. of Kansas City v. Ashcroft (1983)
- Can't require that BOTH parents be notified → Hodgson v. Minn. (1990)
- 24-Hour Waiting Period Unconstitutional → Akron v. Akron Center for Reporductive Health (1983) (Akron I)

Planned Parenthood of Southeastern Pa. v. Casey (1992)

- Holdings
    - (1) Before viability, the State's interest is not enough to support a prohibition of abortion
    - (2) The State has the power to restrict abortions and proscribe them after fetal viability as long as there is an exception for the health and life of Mom
    - (3) The State has and interest throughout pregnancy in the health of woman and the potentiality of life and can regulate pursuant to those interests with the restrictions of (1)
- Talking about what "liberty" entails in the 14th Amendment's DP Clause
    - "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to **personal dignity and autonomy**, are central to the liberty protected by the 14th Amendment."
    - "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."
    - This shit comes back at the Court in Lawrence and Glucksberg
- The two state interests are in conflict: Roe as a decision at war with itself
    - Viability keeps getting earlier; and
    - Abortions keeps getting safer at later and later stages of pregnancy
- Case principally deals with whether or not the Court should overrule Roe
    - Court claims to retain the central holding of Roe
    - Court gives a stare decisis rationale for not overruling Roe
        - The facts and understanding of the facts underlying the Roe decision have not changed; only the personnel of the Court has changed → this is the critical difference between (1) Roe/Casey and (2) Lochner/West Coast Hotel and Plessy/Brown decisions
        - To overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious doubt
        - Liberty finds no refuge in the jurisprudence of doubt
- But what is left of Roe?
    - Nowhere in plurality do they describe the right to choose as "fundamental"
    - Used SS in Roe; here have "undue burden" standard
    - Roe used Trimester, this is overruled
    - Hasn't it been overruled?
    - But wouldn't the court be seen as more legitimate if it acknowledged that it was overruling Roe and announcing a new rule?
    - Scalia is heavily critical of stare decisis rationale → Roe was not a great social decision – it made a state issue a national issue and inflamed national politics ; also gives majority grief for saying that they are adhering to Roe in face of

overruling much of it ("Liberty finds no refuge in the jurisprudence of confusion")

- Abortion is a "liberty interest" rather than a "fundamental right"
  - Fundamental rights get SS
  - They don't give SS here – they announce a new standard of review → "undue burden"
- The basis for the "liberty interest" in abortions is the "liberty component" of the 14th Amendment Due Process Clause
  - Reasoned Judgment is the check on judicial power to decide what is included in 14th Amendment liberty
  - Scalia: The reasoned judgment is just a value choice p. 586
- Why does the court reject Roe's Trimester System?
  - (1) the formulation misconceives the nature of the woman's interest
  - (2) in practice, it undervalues the state's interest in potential life
  - Further, they say the Trimester System was not essential to Roe's holding and it is not necessary to protect the right to choose
  - If state has an interest in potential life all throughout the pregnancy, how can we square this with a right to choose an abortion before viability?
    - Doesn't any regulation that limits a right to choose interfere with that right before viability?
  - Give no reason for why the Trimester system "misconceives" the nature of the woman's interest
- **"Undue Burden"** → The NEW Standard of Review
  - A State may not place a SUBSTANTIAL OBSTACLE in the path of a woman seeking an abortions of a nonviable fetus
  - Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose
  - **A state measure designed to persuade a woman to choose childbirth over abortion will be upheld if **reasonably related** to that goal**
    - NOTE: this is so even in the first trimester!
    - Under Roe's SS review for any regulations in the first trimester, most regulations in this category got struck down
    - Now its different
  - The Constitutional line is still drawn at viability, but the states can take steps to make sure the decision is informed, etc.
  - Is this a principled standard?
  - Is it standard-less like Scalia charges? Manipulative?
- What is constitutionally objectionable about the State persuading woman to give birth?
  - To make sure she's thought about it? Isn't this condescending?
  - So she knows that the State has a profound respect for life?
  - Isn't it just an end-run around the right to choose? But she can still get one...
  - Stevens: govn't shouldn't even be in business of trying to persuade a woman's decision because it allows state to inject their own views into the woman's decision – which is private

    - This is a FACIAL challenge – heavier burden – have to show there is no way this law can be applied constitutionally
    - Is persuasion going to cross the line to coercion?
- The "informed consent" 24-hour Waiting Period is Constitutional
    - Overrules Akron and Thornburgh, which found similar laws unconstitutional under Roe
    - Insures important decisions will be well thought out and deliberate
        - Is this condescending to women? (Stevens) – outmoded way of thinking about women's decision making capacity
    - Why are double clinic visits not an undue burden
        - Record describes it a "particularly" burdensome
        - **A particular burden is not of necessity a substantial obstacle [i.e. "undue burden"]. Whether a burden falls on a particular group is a distinct inquiry from whether it is a substantial obstacle even as to the woman in that [indigent] group**
- Spousal Notification Requirements are Unconstitutional
    - State argues that only 1% of women are likely to suffer violence as a result of the notification
    - **The analysis does not end with the one percent of women upon whom the statute operates; it begins there. Legislation is measured by its impact on those whose conduct it affects.**
    - Why doesn't this apply to the 24-hour waiting period? Why is that OK and this is NOT (indigent ok vs. battered not); the **bold** statements are at odds
        - NOTE: NY TIMES editorial about 24-hour waiting period (your grandchild is about to be murdered phone calls)
- If a facial challenger is unable to show the law constitutes an undue burden – what is standard of review?
    - Rational Basis (** quote above is support for this)
    - 24-hour waiting period is not unreasonable
- Court also re-affirms the rule regarding Minors and Parental notification noted above
- Note: Stenberg v. Carhart (2000) → Struck down a ban on "partial-birth abortions"
    - Statute too vague and could be construed to ban D&E rather than just D&X procedure
    - No health of mom exception
    - Legislative choosing of the procedure makes no medical sense in the context of exercising one's liberty right

Privacy: Family Relationships

Zablocki v. Redhail (1978)

- Invalidated Wisconsin Law: "any resident having minor issue not in his custody and which he is under an obligation to support by any court order can not marry without obtaining court approval, which depends on proof that the applicant's support obligation

has been met and that the children covered by the support order are not then and are not likely thereafter to become public charges"
    - i.e. You can't marry without court approval if you're paying child support, and that approval turns on whether you've been meeting your monthly payments and whether you will continue to be able to meet them
- Standard of Review: Strict Scrutiny
- SS not satisfied because
    - (1) means not narrowly tailored to the ends
    - (2) Less intrusive means were available that didn't impact as much on the **fundamental right to marry**
- But, the fundamental right to marry is not an absolute right
    - Reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship are OK
    - Traditional state regulations of marriage are OK
- Basis: "If the right to procreate means anything at all, it must imply some right to enter the only relationship in which the State allows sexual relations legally to take place"
    - Extending Griswold line of decisions
- Turner v. Safley (1987): Can't limit a prisoner's right to marry

Moore v. East Cleveland (1977)

- Invalidated statute limiting occupancy of a dwelling to members of a single "family," narrowly defined as including only "a few categories of related individuals."
- Invalidated AS APPLIED to a grandmother living with two grandsons who were first cousins rather than siblings
- What was the purpose of this ordinance?
    - Preventing overcrowding
    - Minimize traffic and parking congesting
    - Avoiding undue finance on the school system
- Anything else going on here?
    - Law was designed to promote a "middle-class" lifestyle
    - Brennan concurrence plays on this (FN2) and intimates that it's a racial thing
- Why was Moore entitled to constitutional protection of her living arrangements?
    - SDP protects the "sanctity of the family" because its rooted in "traditions and history of nation"
    - History imposes more limits on judges than stuff that is "implicit in the concept of ordered liberty" (Powell responding to White dissent)
    - History is enough to encompass extended family in protection of this substantive right
    - In full opinion, Powell intimated that analysis may be different if not living with a blood relative → is this different?
- Note Belle Terre v. Boraas (1974)
    - Statute was to prevent frat boys from living together at SUNY Stony Brook
    - Court upholds this law – just like a zoning case
        - No constitutional violation of associational freedom
    - This only affected unrelated individuals – how Powell distinguishes this case in Moore

- Marshall dissent – right to live with who you want is part of privacy and no legitimate interest for state
- Tension between this result and result in Moore?
  - Note FN2 – highlights tension

Troxel v. Granville (2000)

- Court held that a state court decision granting grandparents visiting rights to their grandchildren over the objections of the sole surviving parent – a "fit custodial mother" – violated the mother's SDP rights
  - Important: Mom allowed visitation, but grandma wanted more and Court gave it to her over Mom's objections
  - Grandma was Dad's mom and Dad had recently died after splitting up with Mom
- **The Due Process Clause of the 14th Amendment protects the *fundamental right* of parents to make decisions concerning the *care, custody, and control of their children***
- So long as a parent adequately cares for his or her children, there will normally be no reason for the State to inject itself into the private realm of the family to contradict a fit parent's decisions concerning childrearing → need extraordinary circumstances
- If a fit parent's decision of the kind at issue here becomes subject to judicial review, the court must accord at least some special weight to the parent's own determination
  - So, under the DP Clause, there is a **presumption that fit parents act in the best interests of their children**
  - Problem is trial court presumed that grandma should get what she wants so long as it doesn't adversely affect the kids
  - So, HOW MUCH weight should the court give the parent's decision?
    - S.Ct. leaves this question open
    - Why not adopt an irrebuttable presumption that if a parent is fit, and there will be no harm to the child, that the Court can't second guess the parent's decision? Why not say the Court can't interfere?
- Court also noted that there was no allegation that mom sought to cut off visitation entirely → Granville just asked that duration be shorter than requested by grandma
  - Again, trial court gave no weight to Granville's decision to allow visitation before any filings of papers
  - Court should only step in when there is an unreasonable denial of visitation
  - But what if Granville denies visitation altogether? → why should the court even step in here? Why should this be held against her if there will be no harm to the kids and she is a fit parent?

Michael H. v. Gerald D. (1989)

- The biological father of an adulterously conceived child is seeking visitation rights to the child, which the wife and husband have embraced as their own
  - Blood tests showed 98% probability that P was the biological father
- California Law establishes a presumption that a child born to the wife is legitimately a child of the marriage, and such a presumption is rebuttable only under limited circumstances
- Question: Does the presumption, in California Law, violate the Due Process rights of the biological father and his biological child?

    - Michael H. argues that Biological Parentage + Established Relationship with the Child = 14th Amendment Liberty Interest (Michael H. had had limited previous contact with the child)
    - Scalia says HELL NO and rejects Michael H. argument
- Scalia's Reasoning
    - Resorts to **History and Tradition** to answer this question and couches the alleged fundamental right at issue in NARROW terms: "The right of an adulterous father to come in, interfere, and disrupt a marital relationship that embraces the adulterously conceived child"
    - "**Our traditions have protected the marital family against the sort of claim Michael asserts**"
    - Michael could not find ONE CASE awarding visitation to the natural father of and adulterous child embraced by the married couple
    - To provide protection to the adulterous natural father would be to deny protection to the marriage relationship, which the state has a compelling interest in preserving, and would destroy the "historic respect traditionally accorded to the relationships that develop within the unitary family"
    - Either way, Michael or Gerald loses; so we leave it to the state to make the determination → **California's presumption must be allowed to stand**
- Brennan Dissent
    - If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result (Griswold, etc.)
    - Where would fundamental right have come from?
        - The biological nature of fatherhood?
        - Would we ignore the nature of the adultery?
- Scalia vs. Brennan on the Level of Specificity at Which to Define the Alleged Right When Looking at History and Tradition
    - Scalia: "We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified"
    - Brennan: "If we had looked to tradition with such specificity in past cases, many a decision would have reached a different result"

Sexuality

<u>Bowers v. Hardwick</u> (1986)

- Framing the Issue: "Is there a fundamental right to engage in homosexual sodomy?"
    - Note NARROW definition of the right at stake
    - Blackmun Dissent → right has been defined TOO narrowly → "right to be let alone"
        - Court has refused to recognize the fundamental interest all individuals have in controlling the nature of their intimate associations with others
- This is an APPLIED Challenge to a NEUTRAL Georgia anti-sodomy law → since it was gays who were convicted; Court only decided the case AS APPLIED to homosexual sodomy (FN1)
- NO Constitutional right to engage in Homosexual Sodomy

- Reviewing Griswold, Roe, and Meyer line of cases → "No connection between family, marriage, or procreation on the one hand and homosexual activity on the other hand has been demonstrated"
- Proscriptions against sodomy have ancient roots... "against this background, to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, as best, facetious."
- Previous privacy cases CANNOT be read to protect ANY private sexual conduct between consenting adults
  - "Illegal conduct is not always immunized whenever it occurs in the home"
  - Surely we're not prepared to strike down proscriptions of other sex crimes (prostitution, bigamy, adultery, incest, etc.)
- R/B Review → Morality in itself IS a rational basis for legislation
  - State interest in promoting morality is a sufficient rational basis for legislation
  -

Lawrence v. Texas (2003)

- Texas statute explicitly banning ONLY homosexual sodomy
- "Bowers v. Hardwick should be and now is overruled"
  - But Court DID NOT overrule ALL aspects of Bowers
  - Court NEVER SAID
    - (1) that there was a fundamental right to engage in homosexual sodomy
    - (2) that they were using Strict Scrutiny (thus they must be using Rational Basis)
    - Both of these are a product of Scalia's Dissent
  - Court DID SAY
    - (1) "The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual" (ultimate reason for result)
    - If we take Scalia's observation in Dissent literally, the majority is saying that moral disapproval alone is not a sufficient rational basis for legislation → i.e. this state interest is not enough to survive rational basis scrutiny
  - Scalia Dissent
    - Majority's decision effectively ends ALL moral legislation and this is no good
    - Now State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity ("the litany") are called into question because they rest their authority on the legislative belief that the conduct in immoral
    - Furthermore – regulation of morality has ALWAYS been within the police power! The majority subverts this.
- The Court DOES NOT rely on the so-called right to privacy to strike down this law
  - Give Griswold, Roe, and Eisenstadt as a good starting point

  - "Liberty presumes an **autonomy of self** that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves **liberty of the person both in its spatial and more transcendent dimensions**."
  - This is decision is based on the "liberty" component of the 14th Amendment's Due Process Clause, but NOT SPECIFICALLY on the right to privacy announced in previous decisions
- Bowers was wrongly decided
  - The definition of the right at stake was TOO NARROW: "the Court failed to appreciate the extent of the liberty at stake"
  - "To say that the issue in Bowers was simply the right to engage in certain sexual conduct **demeans the claim** the individual put forward..."
  - Sodomy statutes ("the laws involved in Bowers and here") – dicta says ALL Sodomy statutes – are too broad and "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."
  - "The statutes do seek to control a personal relationship that, *whether or not entitled to formal recognition in the law*, is within the liberty of person to choose **without being punished as criminals**."
- Kennedy's (for the Majority) General Rule
  - "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."
  - But this begs the question: What sexual conduct ISN'T protected by this general rule? → Scalia and his litany
- Two Decisions since Bowers have undermined its applicability
  - Casey
    - "The Casey decision again confirmed that out laws and tradition afford **constitutional protection** to personal decisions relating to **marriage**, procreation, contraception, family relationships, child rearing, and education involving the most intimate and personal choices a person may makes in a lifetime, **choices central to personal dignity and autonomy**."
    - "*Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do*."
    - Doesn't such an application sanction constitutional protection for gay marriage? (note below)
  - Romar v. Evans
    - Court struck down class-based legislation directed at homosexuals as a violation of the Equal Protection Clause
- Kennedy refuses to use Equal Protection to strike the law
  - "Equality of treatment and the due process right to demand respect for conduct protected by the substantive guarantees of liberty are linked in important respects, and a decision on the latter point advances both interests."
  - "When homosexual conduct is made criminal by the laws of the State, that declaration is and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."

- Scalia's Dissent: A Closer Look
    - Court didn't say "fundamental right" or "strict scrutiny", thus the Court must have used Rational Basis; TX asserted an interest in the promotion of morality, the Court stuck the law using RB, thus Morality must not be a RB for legislation anymore, thus all "morals" legislation is unconstitutional, thus all laws involving the litany are now in question
    - Is this correct?
    - Assuming the Court DID use RB (see below for contra view), what is the principled distinction between Scalia's litany and homosexual sodomy, if any?
- O'Conner Concurrence (Note – we don't need her for a majority – this is really just her opinion)
    - Refuses to "overrule" Bowers
    - Relies on the Equal Protection Clause to strike this law
    - Moral disapproval is NOT a legitimate state interest to justify, by itself, a statute that bans homosexual sodomy, but not heterosexual sodomy under the Equal Protection Clause
        - "We have never held that moral disapproval, *without any other asserted state interest*, is a sufficient rationale under the Equal protection Clause to justify a law that **discriminates among *groups of persons***."
    - The Unequal Impact
        - "TX's sodomy law **brands all homosexuals as criminals**, thereby making it more difficult for homosexuals to be treated in the same manner as everyone else, including in the areas of employment, family issues, and housing."
    - Does not reach the issue of whether a neural sodomy law would be constitutional or not → Would O'Conner uphold such a law?
        - She doesn't think it will stand in a democratic society
        - Would it become a Due Process issue then?
            - Sodomy statutes ("the laws involved in Bowers and here") – dicta says ALL Sodomy statutes – are too broad and "have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home." → From Majority Opinion; but Bowers was decided as an "applied case"
            - If moral disapproval alone is no longer a legitimate state interest, it certainly wouldn't stand → under RB or SS (whatever they're using – simple moral disapproval isn't enough to sustain the law)
- Are laws that ban same-sex marriage unconstitutional under Lawrence?
    - NO Arguments
        - Majority specifically emphasizes the CRIMINAL nature of the statute in issue – marriage laws are CIVIL laws
            - State can't express their moral disapproval by means of Criminal Statute, but Civil statute may still be OK
        - Explicit Statement by Majority: "[this case] does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter"

        - NARROW RULING
    - YES Arguments
        - Discussion of Casey (above)
        - "Autonomy of the Self" language
        - Under Due Process
            - Whatever level of review the majority is using – RB or SS – bottom line is moral disapproval is not enough of a state interest to sustain the law → thus state will have to come up with something else to survive constitutional scrutiny
        - Under Equal Protection
            - Same thing – look at O'Conner's opinion
            - Moral disapproval, standing alone, isn't enough to justify a law discriminating against a group of persons → state will have to come up with something else to sustain the law
- Can a state ban gay adoption after Lawrence?
- Can military bar gays from getting high level security clearances or bar them from serving – based on Lawrence?
- Does Lawrence take a broader view of the liberty component than previously announced?
    - "autonomy of self;" "spatial and more transcendent dimensions"
    - BUT → they never call it a "fundamental right"
        - It is a "liberty interest"
        - Only FUNDAMENTAL RIGHTS are supposed to get SS; thus this must be RB – so how can the Court be taking a broader view of "liberty?"
- Did the Court REALLY use RB or was it SS? → Tribe Article
    - "The strictness of the Court's standard in Lawrence, however articulated, could hardly have been more obvious"
    - "To search for the magic words proclaiming the right protected in Lawrence to be 'fundamental,' and to assume that in the absence of those words mere rationality review applied, is to universalize what is in fact only an occasional practice."
    - "Moreover, it requires overlooking passage after passage in which the Court's opinion indeed invoked the talismatic verbal formula of substantive due process"
    - Perhaps Court meant to be vague by not explicitly stating the standard of review and the status of the right at stake
    - Don't forget – "rational basis" is no where in the opinion either

Right to Die

Cruzan v. Director, Missouri Dept. of Health (1990)

- Cruzan was a vegetable and mom and dad wanted to pull the plug (discontinue tubal feeding); Missouri S.Ct. insisted that mom and dad present "clear and convincing evidence" of Cruzan's wishes; they found that such evidence was lacking and denied mom and dad's request to pull the plug
- Issue: Whether the Constitution prohibits Missouri from choosing the rule of decision which it did
- Initial Matter: "**We assume that the Constitution would grant a *competent person* a constitutionally protected right to refuse lifesaving hydration and nutrition**"

  - Basis: Common law tort of battery → It is a battery to forcibly treat or medicate someone
  - O'Conner's formulation: " a liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions, and that refusal of artificially delivered food and water is encompassed within that liberty interest"
  - Scalia (concurrence) : "the federal courts have no business in this field"
    - Essentially – it's a state issue – right to refuse medical treatment AND to prescribe an evidentiary rule to determine to intent of an incompetent patient
- BUT...an INCOMPETANT person is in a Different Constitutional Position
  - A surrogate must act in the place of the person whose constitutional rights are at issue
  - Missouri has done nothing but establish a PROCEDURAL safeguard to ASSURE that the action of the surrogate conforms as best it may to the wishes expressed by the patient while competent
  - **Missouri's "clear and convincing evidence" standard is not forbidden by the Constitution**
- Rationale
  - State's interest in the protection and preservation of human life
  - There will be some unfortunate situations in which family members will not act to protect a patient → state can act to guard against the potential abuses
  - Error Cost Argument supports Missouri's choice of the "clear and convincing evidence" standard
    - An erroneous decision to keep someone alive can be corrected (FN)
    - An erroneous decision to let someone die cannot be corrected (FP)
    - Missouri wanted to reduce the False Positives to almost nothing at the cost of raising False Negatives – there's nothing constitutional wrong with this decision
  - Missouri's decision is only governed by RB review
  - "We think a state may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interest of the individual"
    - Note the focus on the INDIVIDUAL'S rights – not the surrogate's
    - Treating the surrogate with skepticism
- IMPORTANT: Only holding is that Missouri is free to choose whatever evidentiary standard they would like for pulling the plug since they have an interest in the preservation of human life; Court is NOT saying that Missouri's evidentiary standard is the only constitutionally permissible one
- Brennan Dissent
  - "The State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choice to avoid medical treatment"
  - Brennan thinks there is a fund right here to refuse unwanted medical treatment – but he doesn't have 5 votes
  - Scalia Concurrence

- What is the distinction between accepting death by means of suicide by CO in your garage vs. by means of refusing food or medical treatment?
- It accomplishes the same result

Washington v. Glucksberg (1997)

- Facial challenge to Washington's law making suicide and assisted suicide illegal → Facial challenge, so controlling question is whether there is ANY way the state can be applied constitutionally
  - 9-0 decision that there is no general right to commit suicide or assist someone in committing suicide, but 5 concurrences (more on that later)
- Basic Issue: Whether the Constitution includes a right to commit suicide, and by inclusion, a right to assist someone in committing suicide (physician-assisted or otherwise)
  - Answer: NO
  - History and Tradition of the Nation does not support it
  - Cruzan does not support it
    - "The right assumed in Cruzan, however, was not simply deduced from abstract concepts of personal autonomy."
    - "Given the common-law rule that forced medication was a battery, and the long legal tradition protecting the decision to refuse unwanted medical treatment, our assumption was entirely consistent with this Nation's history and constitutional traditions"
  - Casey does not support it
    - "The language in Casey suggesting that many of the rights and liberties protected by the Due Process Clause sound in personal autonomy does not warrant the sweeping conclusion that any and all important, intimate, and personal decisions are so protected, and Casey does not suggest otherwise."
- Rationale
  - "The asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause"
  - But, the law still has to meet the RB test: It does
  - State Interests which this statute is rationally related
    - "unqualified interest in the preservation of human life." Cruzan.
    - Regulation of a public health problem
    - Interest in preserving the ethics of the medical profession
    - Interest in protecting vulnerable groups (i.e. elderly, disabled, and poor from abuse and coercion)
    - Preventing the Slippery Slope to euthanasia that hasn't been all too well received or implemented in the Netherlands
  - Weighing the relative strengths of these interests isn't required – together, they're enough to rationally support a ban on assisted suicide
- BUT... There are potentially 5 votes for the position that states must allow "terminal sedation" as a constitutional matter
  - "terminal sedation" → hastening death by prescribing lethal doses of morphine to keep people knocked-out because they are in so much pain

    - All 5 also leave open the possibility of an applied challenge to assisted suicide laws as well
    - Breyer
        - Broadly define the right: "right to die with dignity"
    - Stevens and Souter → suggesting a fundamental interest in alleviating pain and accelerating death
- Isn't allowing "terminal sedation" a BIG LEAP from Cruzan, which based it's assumed right on common-law tort of battery?
- Is there a clear and logical line between ending life-support and intervening to advance death? Where is the constitutional protection for terminal sedation found?
    - Abortion? Contraception? Marriage?
    - Casey's "concept of existence" language?
    - The 5 concurring justices are going way beyond Cruzan

Procedural Due Process (5th and 14th Amendments)

- What is the difference between Procedural and Substantive DP?
  - SDP → Court often assumes the existence of a constitutional right and the court is typically focused on what amount of judicial scrutiny to give the rights or how much justification a state must put forth to sustain a challenged law
  - PDP → initial focus is on whether a constitutionally protected interest exists
- Where does the court look to for a constitutionally protected interests and how does that differ from SDP?
  - Early cases and in PDP → state law or federal legislation is looked to as opposed to the constitution itself
  - SDP → always look to constitution and its history and traditions
- Goldberg v. Kelly → focus on legitimate and subjective expectations to an entitlement
- Board of Regents v. Roth → interpretation of state legislative intention **to create** an entitlement or property interest

Board of Regents v. Roth (1972)

- Roth signed a one year teaching contract with Wisconsin State University and was not re-hired
- Issue: Whether Roth had a constitutional right to a statement of reasons and a hearing before his dismissal?
- Held: "To determine whether due process requirements apply in the first place, we must look not the 'weight' but to the *nature* of the interest at stake."
  - The range of interests protected by DP are not infinite; liberty and property must be defined and given certain boundaries
  - If only focus were on weight, then many asserted claims might suddenly become constitutional cases depending on the importance of interest to the party
- Framework
  - (1) Determine if a constitutional interest is at stake – is "liberty" or "property" implicated?
    - States, by entitlements, or Judges, by constitutional interpretation, creates liberty or property interests
    - Here, case is about an alleged property interest – that's why we're reading it
    - Roth is claiming he had a property interest in employment created by the state
  - (2) If a Constitutional interest is at stake, THEN decide how much process is due with the Mathews v. Eldridge formula
    - This question not reached here
- Mohaghan Article Explaining Roth Decision
  - Court's emphasis is on STATE LAW in determining the content of "property"
  - (1) The State must create the entitlement
  - (2) The Court then decides if there is a constitutional "property" interest

    - The property right is created by State law and the Court then determines if it is a constitutional "property" interest
- Application → Roth had no constitutional property interest in being rehired
    - Here, the property interest was limited to ONE YEAR by the terms of the contract, which had no provision for renewal whatsoever
    - Roth "surely had an abstract concern in being rehired, but he did not have a *property* interest sufficient to require the University authorities to give him a hearing when they declined to renew his contract."
    - Bluntly, Roth got all the property he was entitled to
- NOTE: Roth also argues that he had a LIBERTY interest in being rehired
    - Roth alleges that the decision not to rehired tarnished his reputation and name and thus violated his "liberty" without due process
    - It stretches the concept of "liberty" too far to say that person is deprived of liberty when he is simply not rehired in one job but free to take another job in the state university system
    - Why isn't Roth in same position of the poor 2L who didn't get hired out of his summer associateship?
    - Has his good name or reputation been infringed by failure not to re-hire?
    - It's arguable

Cleveland Board of Education v. Loudermill (1985)

- Overrules Arnett v. Kennedy's "taking the bitter with the sweet" language, which isn't adopted in Bishop v. Wood either
- Property cannot be defined by the procedures provided for its deprivation anymore than liberty or life
- Once there is a property right, the state can't define the procedures for depriving you of that property right – that's governed by the DP Clause

Paul v. Davis (1976)

- The police had named Davis as an "active shoplifter" in flyers distributed to local merchants, but the charges were later dropped
- Held: Paul suffered **no deprivation of liberty** resulting from injury to his reputation
    - (1) If the same allegations were made against a private individual, this lawsuit would not be a federal issue; it would be a state tort issue.
        - But since it's against a governmental entity – the cops – it implicates the DP clause
    - (2) 14th Amendment DP Clause should not be read to extend to Davis or other citizens a right to be free from every injury received from a state actor (a person acting under color of state law)
        - It would make the 14th Amendment a "font of tort law"
        - If we allowed such a broad theory, every time a state actor becomes a tortfeasor, you would get a constitutional claim, imposing a second layer of law on top of the state tort law
        - There would be a Federal layer of tort law superimposed on state tort law
        - This creates a Federalism Issue b/c federal law would be interfering with a state law interest

- Distinguishing prior cases and making a framework for these type of claims
    - The interest in reputation ALONE is not enough to implicate a constitutional "liberty" interest
    - You Need:
        - **Stigma + some other tangible interest (like employment)**, in order to state a 14th Amendment Claim for depravation of "liberty" on the theory that your reputation or name has been tarnished by someone acting under the color of state law
- KY law doesn't extend to Davis any legal guarantee to present enjoyment of reputation which has been altered as a result of petitioner's actions. Rather his interest in reputation is simply one of a number which the State may protect against injury by virtue of its tort law
- What about Meyer definition of liberty? → "common law" language

Equal Protection Clause (14th Amendment)

- Traditionally focused only on means implemented by the legislature and whether those means had a reasonable relation to the legislative purpose
- Doctrine originally was not concerned with protecting fundamental values or with scrutinizing legislative ends
- The Court has wholly applied Rational Basis scrutiny for economic legislation challenged under equal protection
- Questions to Think About
    - What is the central meaning of the Equal Protection Clause?
    - Does it makes sense to have 2 or 3 levels of review for Equal Protection?
    - Is Justice Marshall correct when he insists that the court is actually imposing a sliding scale level of review? (p. 642 – look at it)
    - Is the Court's fundamental rights/interest doctrine under Equal Protection another way for the Court to impose its own social and policy views on an unwilling populace – is this just more Lochnerizing?
- We give heightened scrutiny to classifications where the base rate reason for employing them is invidious discrimination and we don't like "moral disapproval" as a rational basis for legislation
- [Put in traditional indicia of suspectness test]

Two Conceptions of Rational Basis Review

McGowan v. Maryland (1961)

- Challenge to state's Sunday blue laws, which didn't apply equally to all businesses
- "The constitutional safeguard is offended **only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective**. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A state statutory discrimination **will not be set aside if <u>any state of facts reasonable may be conceived</u> to justify it.**"
- Ultra-deferential review

F.S. Royster Guano Co. v. Virginia (1920)

- "The classification must be reasonable, not arbitrary, and must rest upon some ground of difference having **<u>a fair and substantial relation</u>** to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
- Stricter conception of rational basis review: Rational Basis 'with bite'

Rational Basis Review of Economic Legislation

Railway Express Agency v. New York (1949)

- NYC traffic regulation prohibiting people from selling advertising space on their trucks and cars – they could advertise their own business on their vehicles engaged in the normal operation of the business – but they could not sell advertising space on their vehicles.
- Railway Express made a lot of money by selling advertising space on its trucks – so they sued under Equal Protection

- This is a good example of **underinclusive legislation** and **deferential review** of economic legislation under Equal Protection
- State Purpose: To make the streets safer (reduce traffic congestion and distractions to drivers and walkers)
- Classification: law draws a line between advertisements of products sold by the owner of the truck and general advertisements
- Justice Douglas, for the Majority
    - "The local authorities **MAY WELL HAVE** concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case."
    - Underinclusive legislation is not constitutionally fatal because legislature may attack a problem case-by-case, or bit-by-bit (piecemeal)
- Justice Jackson concurrence
    - Worried that underinclusive legislation has the potential to unfairly discriminate against political minorities
    - Under-inclusion allows those with political clout to escape the effects of a regulation (i.e. big NY newspapers that advertise themselves on the sides of their delivery vehicles...)
    - Why doesn't he dissent and strike the law?
        - Doing for self-interest vs. doing for hire is fundamentally different
        - It's one thing to tolerate action from one but not another

Lee Optical and McGowan and McDonald Cases

- The criticism of these cases was the exercise of judicial imagination to come up with reasons/objectives that the state **may have** had
- Any CONCEIVABLE BASIS is all that it is required for legislation to be OK, unless the classification is invidious (650-651)
- Defer to the legislature

USDA v. Moreno (1973)

- Amendment to the Food Stamp Act creating the following classification:
    - (1) households whose members were are all related
    - (2) households whose members are not all related
- Congress denied benefits to (2), and the Court struck the classification
- Stated Purpose: to raise nutritional levels and help out farmers
    - **The OTHER Purpose** from the Legislative History: to prevent "**hippies**" and "**hippie communes**" from participating in the Food Stamp program
- Brennan: "*A bare desire to harm a politically unpopular group cannot count as a legitimate governmental interest*"
    - Isn't this more scrutiny than any CONCEIVABLE basis? The nutrition justification IS a conceivable basis.
    - What's wrong with congress not approving of the hippie lifestyle and allocating funds for an entitlement that they don't even have to provide the way they see fit?
- Is this result consistent with Belle Terre?

- It's OK to keep Frat boys from living together on the rational that we don't want this type of group living in our community
- Here, Congress is just saying that they don't want to give food stamps to hippies because we disapprove of them
- So how are the results consistent?
- We can draw lines at smokers and renters and dog owners, etc. etc. – these lines are constitutional – why is drawing the line at Hippies not OK?

NYC Transit Auth. v. Beazer (1979)

- Upheld the exclusion of all methadone users from any Transit Authority employment
  - 75% were illicit drug-free within a year
  - Dealt with non-safety related jobs (i.e. janitors)
- Example of an OVERINCLUSIVE Law
  - Less danger in terms of political accountability
  - But, it might burden a politically powerless group that might have otherwise had enough political clout to get an exception
- Held: This law satisfies RB scrutiny
  - The exclusionary policy was "supported by the legitimate inference that as long as a treatment program (or other drug use) continues, a degree of uncertainty persists"
  - TA stipulated that one of the reasons for the no drug policy was the possibility of negative public reaction – RB is satisfied even in face of this
- White Dissent
  - Poor and racial minorities are on methadone maintenance
  - Bare desire to harm a politically unpopular group can't be a legitimate governmental interest
    - Just look at the TA's stipulation
    - How can this be a rational basis for legislation?
- Stevens for Majority
  - Doesn't encompass a politically unpopular group
  - Drug users aren't a politically unpopular group, thus the Moreno rule doesn't apply here
- Are there any other reasons not to have methadone users picking up dead rats?
  - Besides the stipulation?
  - Aren't the drug users just an unpopular group?

U.S. Railroad Retirement Bd. v. Fritz (1980)

- Federal law used to permit retirees who has worked in RR and non-RR jobs to get dual benefits under Social Security and RR pension; Congress eliminated this, but included a grandfather provision that expressly preserved windfall benefits for some classes of employees
- Main point: Whether a differentiation based solely on whether an employee was active in RR industry during 1974 was rationally related to the congressional purpose of securing benefits for long time railroad employees
- Rehnquist Majority
  - (1) "the plain language marks the beginning and end of our inquiry"

  - "Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits."
  - (2) "Where, as here, there are plausible reasons for Congress' action, out inquiry is at an end."
  - The court has never required a legislature to articulate its reasons for legislation
- Brennan Dissent
  - Congressional stated purpose was to preserve dual benefits for those in the system in which dual benefits has already vested → There is no RATIONAL way to achieve this purpose by cutting off those who weren't active in the RR industry in 1974
  - The classification is irrational if Congress is trying to preserve dual benefits for those who have already vested them (i.e. those who had worked on RR, but had yet to actually retire)
  - (1) "the 'plain language' of the statute can only tell us what the classification is; it can tell us nothing about the purpose of the classification let alone the relationship between the classification and that purpose"
  - (2) We have to judge justifications by the ACTUAL objectives of Congress and not post-hoc justifications made-up by government lawyers
- Majority is SUPER Deferential to Congress
  - See it in FCC v. Beach Communications (1993) too in a Thomas opinion
    - The absence of legislative facts has no significance in RB review
    - RB satisfaction can be based on rational speculation unsupported by empirical data or evidence
- Is there a doctrinal conflict between Fritz and Lopez?
  - Lopez – talked about no legislative findings given as significant to the RB test
  - Here – the absence of legislative findings in Equal Protection context doesn't matter in the RB test
  - Can we reconcile this tension?
    - Lopez – want to know if its within Congress' power to do something – legislative findings are significant
    - Here – action is already within Congress' power, now we're asking if it violates another clause of the constitution – legislative findings are not significant here
- Stevens Concurrence
  - "if any 'conceivable basis' for a discriminatory classification will repeal a Constitutional attack on a statue, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do"
    - i.e. need a little bit more teeth in RB than Rehnquist gives it
  - "I therefore believe that we must discover a correlation between the classification and **either the actual purpose of the statute or a legitimate purpose** that we may *reasonably presume to have motivated an impartial legislature*"
    - i.e. don't give too much weight to post-hoc justifications by government lawyers – if no actual purpose can be ascertained, go to a "legitimate purpose" that we may "reasonably presume" to have motivated an "impartial legislature"

Nordlinger v. Hahn (1992)

- Upheld California's Prop. 13 that imposed an acquisition-value property tax system, thus benefiting long-term property owners at the expense of newer property owners
    - Amount to property taxes you paid were based upon the value of your property WHEN YOU PURCHASED IT – thus favoring long-term owners
- Upheld on rational basis test because it was the precise purpose of the legislature to implement an acquisition-value property tax system – a policy choice that was within the purview of the legislature
    - As opposed to Allegheny Pittsburgh, where the Court struck down a law with the exact same effect because it was NOT enacted for the purpose of achieving the benefits of an acquisition-value property tax system (called "the rare case where the facts precluded any plausible inference...etc.")
- Should this be reversed in light of Saenz v. Roe?
    - Saenz – per se rule against discrimination against any bona fide residents
        - State can't draw lines based on length of residency on the state
    - How is this case consistent with Saenz?
        - It's applied to everyone?
        - But, still, a de jure distinction is drawn
- Does Prop 13 violate the citizenship clause or the right to travel?
    - Citizenship Clause suggests that the only distinction a State can make is whether you are a citizen or not
    - State can't make distinctions among its citizens
    - What about income tax brackets? How is that not distinguishing?

Village of Willobrook v. Olech (2000)

- A person state a claim within the Equal Protection Clause even though the complaint merely alleges intentional discrimination against a single individual as opposed to a class of individuals
- Does this reverse the traditional rule that if a court can identify a conceivable or plausible reason for government conduct that such a plausible basis outweighs any evidence that the motive was ill-will toward an individual?
    - Real motive was maliciousness – but we don't need ACTUAL reason – just a conceivable basis come trial → traditional RB review in equal protection
    - Does this case do away with this?
- But here – there was NO OTHER conceivable basis – that's why the town lost
- Breyer just wants to make sure every zoning decision doesn't become a constitutional issue

Suspect Classification: Race Discrimination – Strict Scrutiny Review

Facial Invidious Classifications Based-On Race

Korematsu v. U.S. (1944)

- About discrimination against American Citizens of Japanese ancestry during WWII – exclusions from the West Coast
    - This case DID NOT rule on the issue of confinement in "relocation" camps

    - Korematsu violated the exclusion order and was convicted as a criminal; he was NOT interned and her did NOT bring a habeas corpus petition
    - Did not rule on issue of racial or ethnic classification being permissible for confinement
- At the time of the decision, it was a war powers case and not an equal protection case
- Announced that all race-based classification would receive strict scrutiny
    - "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect...the courts must subject them to the most rigid scrutiny."
    - "Pressing public necessity may sometimes justify the existence of such restriction; racial antagonism never can."
    - Court did NOT apply the compelling interest/narrowly tailored means test that we know as SS today – NO discussion at all in the opinion of the narrowness of the means
- Does not rely upon Carolene Products FN4
    - No discrete and insular minority discussion
    - More evidence for not applying SS test we know it today
- Ironically, this is the first case to articulate "SS," but it is the ONLY case to survive it – Korematsu's conviction was upheld
- First, this classification is OVERINCLUSIVE (of loyal Japs) and UNDERINCLUSIVE (of disloyal Germans and Italians)
- "The judgment that the exclusion of the whole group was a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin."
    - Saying that the issue was that we were at war with the Japanese Empire – THAT justified the exclusion – NOT racial antagonism
- "We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were unjustified"
- Justice Murphy Dissent
    - "A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations"
    - Was not persuaded that the exclusion was reasonably related to an imminent public danger so as to deny the intervention of ordinary constitutional processes to alleviate the danger
        - i.e. why didn't we hold loyalty hearing like Britain did?
    - Harps on overinclusiveness
- Note all the stuff that the Court knew 11 months before they decided the case
    - Drafting japs into military while interning them at the same time
    - But again – court wasn't concerned with narrow tailoring at this point
- Two Questions to Think About Today?
    - (1) Did the Justice Department employ a racial classification by ordering "voluntary" interviews for a list of 5,000 Arab men in the days after 9/11?
        - Ashcroft insisted that the list was ethnically neutral
        - Individuals selected because they fit criteria for having knowledge of foreign-based terror operation

        - Based list on country of origin for their passport and argued that they could do it because they based the list on nationality and not ethnicity
    - (2) Does the government violate Equal Protection when it subjects Arab men to more frequent searches at the airport?

Brown v. Board of Education (1954)

- Issue: Does the segregation of school kids, based solely on race, deprive black kids of equal protection?
    - Decision did NOT turn on whether tangible factors were equal → question is whether the segregation itself is unequal irrespective of the equality of tangible factors
- Is the Court worried about the EFFECT and IMPACT of the segregation instead of the purposefulness of the decision to segregate
    - Is this decision intended to reach de facto segregation as well?
    - i.e. real estate agents only showing blacks certain communities creating "all black" schools
- The Court DOES NOT rely on the original intent of the framers of the 14th Amendment
    - Historical record says little about the intended effect on segregated schools, but the record does explicitly indicate that the 14th Amendment was never intended to strike down anti-interracial marriage laws
    - Also – modern public education is completely different than it was in 1868 – then it was still illegal to educate blacks
- Since the Court's basis isn't original intent, what is it?
    - "detrimental effect on black students"
    - "impact is greater when it has the sanction of law"
    - The segregation of schools legitimatizes the inferiority of black students
    - Does the Court focus on the importance of education or the evils of segregation?
        - This case doesn't apply to segregation in general – only to the segregation of public schools
        - Brown itself is a narrow decision (see last paragraph of opinion)
    - Social Science data cited in original FN11 → Is this appropriate?
        - Cahn → "I would not have the constitutional rights of Negros – or of other Americans – rest on any such flimsy foundation as some of the scientific demonstrations in these records" (NYU Law Review)
    - Segregation is about the oppression of blacks and the white man keeping his boot on the black man's neck – this simply has to end → court doesn't just come out and say this b/c
        - Politics of the issue
        - Can't piss off the north too much
        - Want a 9-0 decision
        - Need a narrow holding
- How far was Brown MEANT to go?
    - Get rid of all de facto segregation too?
    - But, the Court did use Brown as the basis for striking down all laws requiring segregation of public facilities

- What about 1980s NYC idea to have black/Hispanic magnet schools to try to better educate them?
  - Asserted compelling interest was to drive down drop-out, crime, and drug stats for blacks and Hispanics by better educating them
  - Narrowly tailored?

Loving v. Virginia (1967)

- Struck down VA statute banning interracial marriages
- Defense:
  - The law applies equally to whites and blacks;
  - It is a racial classification, but because of its equal application it is not invidious discrimination
- Response:
  - Court rejects this claim
  - "We deal with statutes containing racial classifications, and the fact of equal application does not immunize the statute from the very heavy burden of justification which the 14th Amendment has traditionally required of state statutes drawn according to race"
  - State has no legitimate interest in preserving the racial integrity of both races
  - "There is patently no legitimate overriding purpose independent of invidious racial discrimination which justifies this classification"
- Stewart concurrence: advocates a per se ban on all racial classifications, no matter what
- Are hate-crime laws Constitutional when they punish you more greatly for acting with a racial animus?
  - What about compelling state interest in punishing greater because of massive racial unrest these crimes can produce?
  - But...what about "thought" crimes? → punishing greater because you had racism IN MIND when acting criminally – they are already punishing you for the crime – now their tacking on more because you were thinking about race?

Palmore v. Sidoti (1984)

- S.Ct. reverses lower court's decision to remove a child from the custody of her mother and give her father custody because the reason for the change in custody was that Mom was marrying a black guy
- Substantial State Interest: the Best Interests of the Child
  - Trial court reasons from an assumption of the stigmatization the child will be faced with having interracial parents
  - S.Ct. concedes the stigmatization issue
  - But...Court says that the crucial questions is "whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother...they are not."
  - "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."
- "Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concern"

- Should this reasoning apply to the initial DECISION of who gets custody, as opposed removing a child?
    - So...when state adoption agencies want to match races with kids and parents when there are white parents out there who want the kids → is this unconstitutional?
    - Should the state be cooperating with a race-based request from the potential adoptive parents?
    - What would state interest be? → is interest in being raised with your "culture" compelling in the SS test?

Racially Discriminatory Purpose and Effect (Disparate Impact)

- These classifications are RACE-NEUTRAL; but the Plaintiff claims them to have a disparate impact on a particular race, or claims them to be applied in a racially discriminatory fashion
- Plaintiffs MUST prove a "racially discriminatory purpose" in order to win these cases

Yick Wo v. Hopkins (1886)

- Quintessential example of a race-neutral law that is administered in a racially discriminatory fashion
- City granted zero permits for Chinese people to run laundries out of 200 applicants, and all but one non-Chinese person was granted a permit
- **Racial discrimination in the administration of the law is enough to prove "racially discriminatory purpose**"

Washington v. Davis (1976)

- A disproportionate number of blacks failed a written test required to gain admission to the D.C. Police Academy – same test in general use throughout the federal civil service
- Central Purpose of the Equal Protection Clause → "the prevention of official conduct discriminating on the basis of race"
    - If so, why isn't a testing device with an adverse effect on racial minorities official discriminatory conduct?
- *Rule: Need to show proof of discriminatory racial PURPOSE to make out an equal protection violation*
    - Court conceded adverse impact, but then they said to **look to the intent of the government rather than impact on the victim**
    - The text doesn't mandate this purposefulness requirement – so where does it come from?
        - "We have difficulty understanding how a law establishing a racially neutral qualification for employment is nevertheless racially discriminatory and denies 'any person equal protection' simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups"
    - Is the purpose of the Equal Protection Clause to stamp out the bad thoughts of legislators or to alleviate the IMPACT of unequal protection under the law?
        - Point is to assure equal treatment – look at text – purposefulness requirement isn't anywhere in the text

        - Doesn't this imply focusing less on intent of legislators and more on the impact of the law?
- What must be shown to establish a discriminatory purpose?
    - Need not appear on face of law
    - Disparate impact may be relevant
    - May be inferred from totality of relevant facts
    - Disparate impact may be determinative where its hard to explain on non-racial grounds
    - **Standing alone, disparate impact doesn't trigger SS**
    - ***Once disparate impact shown – burden shifts to state to show nonracial reasons for the statute***
- No Discriminatory Purpose here because there was a RATIONAL governmental purpose
    - Verbally competent cops
    - Affirmative efforts to recruit black cops
    - Changing composition of cop force and training classes
- Court also fears the consequences of applying SS to disparate impact claims
    - Would reach a host of tax, welfare, etc. laws
    - But is this just a fear of too much justice?
- Can minorities be harmed when official government actions perpetuate past discriminations?
    - Arguments goes: Blacks got unequal education in the 50s and this contributes to their substandard performance today
    - Test was not validated as predictive of performance as a police officer
    - So why should we allow government to perpetuate this past discrimination with a test with a predictably disparate impact

Arlington Heights v. Metro. Housing Corp. (1977)

- Factors to establish Discriminatory Intent
    - Impact of the Official Action (put only in exceptional cases like Yick Wo)
    - Historical Background of the decision
    - Specific sequence of events leading up to the challenged decision
    - Departures from the normal procedural sequence
    - Substantive departures MAY be relevant
    - Legislative or Administrative History
- BUT...proving Discriminatory Intent DOES NOT win the case!
    - "**Such proof would, however, have shifted to the government the burden of establishing that the same decision would have resulted even had the impermissible purpose not been considered**."
    - "If this were established, the complaining party in a case of this kind no longer fairly could attribute the injury complained of to improper consideration of a discriminatory purpose."
    - Court seems to be recognizing that legislature can just re-pass the legislation with a different "intent" and get around the whole issue
- How is this OK?
    - Seems like we're moving the goalpost back 10 yards with every 1st down
        - It's pretty damn hard to prove discriminatory intent (see 6 factors)

- But then govern't can come back with neutral reasons

Rogers v. Lodge (1982)

- Court upheld lower court findings of racially discriminatory vote dilution from circumstantial evidence surrounding an at-large election system in Burke County, Ga.
- "The State policy behind the at-large election system in Burke County was neutral in origin, but has been subverted to invidious purposes"
  - Discriminatory purpose need not be shown by direct evidence – it can be inferred from the totality of the circumstances
  - No smoking-gun proof needed – don't need to identify particular individuals who have discriminated
  - NOT an "impacts" test – still inquiring into INTENT – we can just do it with circumstantial evidence
- Factors Relevant for Proving Discriminatory Purpose
  - (1) No black had ever been elected
  - (2) Majority of the population was Black, but Blacks were a minority of registered voters
  - (3) Bloc voting along racial lines
  - These factors are ONLY RELEVANT – STANDING ALONE, WITHOUT MORE, THEY DO NOT PROVE DISCRIMINATORY PURPOSE (they "bear heavily" on the determination)
- HISTORY serves as the "more"
  - "Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination, particularly in cases such as this one where the evidence shows that discriminatory practices were commonly utilized, that they were abandoned when enjoined by courts or made illegal by civil rights litigation, and that they were replaced by laws and practices which, though neutral on their face, serve to maintain the status quo."
  - No smoking gun needed
- So what's the remedy?
  - Powell gets on this in his dissent → how else could you do it besides a quota member on the Commission?
  - Then what if blacks were populated all over county? Dividing into single-member districts wouldn't help either – would need a "black" district
  - But...legitimate nonracial reason for an at-large system → ensure commissioners have support all though out county to guard against corruption and political wars
- How wise is it to go to circumstantial evidence?

McClesky v. Kemp (1986)

- Issue: whether a complex statistical study that indicates a risk that racial considerations enter into capital sentencing determinations proves that the D's capital sentence is unconstitutional?
- Baldus Study
  - Your odds of getting the death penalty in Ga. go up if you kill a white person
  - If you're a black person killing a white person, it's even more

    - Biggest effect is in "mid-range" cases → room for discretion brings racial factors into play
        - McClesky's was a mid-range case, thus likely under this model to be influenced by racial considerations
    - Factored in 230 non-racial explanations for the disparities and there was STILL and effect
    - Also shows prosecutors more likely to seek death penalty in mid-range cases and juries are more likely to impose it
- McClesky's Case
    - He had NO EVIDENCE that racial considerations played a part in his sentence; NO EVIDENCE that the decision-makers in HIS case acted with a discriminatory purpose
    - He relied ONLY upon the Baldus Study, claiming that it compelled an inference that his sentence rests on purposeful discrimination
    - Court rejected McClesky's Equal Protection Claim because the Baldus Study was insufficient to support an inference that any of the decision makers in McClesky's case acted with discriminatory purpose
        - Stats can only show an increased RISK of discrimination, they can't prove discrimination in this actual case
        - The State had good reasons for imposing the Death Penalty
            - Felony Murder
            - Killed a Cop
        - Good Reasons + No Actual Poof of Discrimination = let the sentence stand
- Why not make prosecutors accountable for their decisions to seek the death penalty – especially when there were no guidelines for death penalty proceedings?
    - "policy considerations behind a prosecutor's wide discretion suggest an impropriety of requiring prosecutors to defend their decisions to seek the death penalty often years after they were made"
- Further – we can't hold the Ga. Legislature accountable for maintaining the death penalty in light of these findings
    - "For this claim to prevail, McClesky would have to prove that the Georgia Legislature enacted or maintained the death penalty statute BECAUSE OF an anticipated racially discriminatory effect, not merely IN SPITE OF it."
    - Legislature has legit reasons for keeping the death penalty
- What about the long historical evidence that Brennan cites in dissent?
    - Powell dismisses it in FN20 of majority opinion: "But unless historical evidence is reasonably **contemporaneous** with the challenged decision, it has little probative value."
    - But is Powell consistent? → acknowledgment of statistical evidence in Maxwell v. Bishop to distinguish it from Furman v. Georgia, in which he dissented
    - Marshall's concurrence in Furman talked of statistics; so did Burger's
    - Brennan also brings home Coker v. Georgia (no death for rape), where Court considered evidence of statistical disparities for blacks
- How do we reconcile this with Rogers v. Lodge (above)? How compelling is Powell's reasoning?

    - A smoking gun wasn't needed in Rogers, so why are we requiring on here?
    - Why not acknowledge the Baldus study – it did take into account 230 NON-RACIAL variables that could have influenced the result – and there was STILL an effect!
- McClesky contends that Georgia's capital punishment system is arbitrary and capricious in APPLICATION, and therefore his sentence is excessive
    - Powell's response: "Even Professor Baldus does not contend that his statistics PROVE that race enters into any capital sentencing decisions or that race was a factor in McClesky's particular case"
    - Also: treatise on the wisdom of the Jury
        - "It is the jury that is a criminal defendant's fundamental protection of life and liberty against race or color prejudice"
        - "A jury representative of a criminal defendant's community assures a diffused impartiality"
        - "Conscience of the community"
        - "The capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular defendant. It is not surprising that such judgments often are difficult to explain."
        - "The inherent lack of predictability of jury decisions does not justify their condemnation"
    - REJOINDER: It's not unexplainable or unpredictable – 230 NON-RACIAL VARIABLES – this is what the fuck they are doing!
- McClesky then contends that the Constitution condemns the discretion allowed to the jury under Georgia's capital sentencing scheme
    - Powell says HELL NO
        - The discretion is beneficial and can work to the D's advantage too – we need it – the jury is fundamental to our legal system
        - "Apparent discrepancies in sentencing are an inevitable part of our criminal justice system."
        - "there is no perfect procedure"
    - REJOINDER: The Baldus study explains the damn discrepancy – with RACE – why no recognize it as a "major systematic defect" like in Furman?
- Powell argues recognition of the Baldus study in this case would lead to slippery slope of invalidating all sorts of other penalties (like length of prison sentences)
    - But isn't this just a FEAR OF TOO MUCH JUSTICE?
    - The Baldus study shows what's going on with deal penalty application in Georgia: you kill a white person and you're cooked
- Powell also argues that McClesky's concerns are better address to a legislature, who are better equipped to evaluate statistical studies
    - But why would the legislature do anything when the S.Ct. has said there's nothing constitutionally wrong with the current system?
- Could the Baldus study justify striking the whole death penalty?
    - Isn't this too much judicial activism, since the states want the death penalty?

- Blackmun dissenting comment: "Of the 17 defendants, including McCleskey, who were arrested and charged with homicide of a police officer in Fulton County during the 1973-1979 period, McCleskey, alone, was sentenced to death."
    - Only one other had even gotten to the penalty phase – he got life for killing a black cop
- Scalia Memo (form Maclin)
    - Wouldn't vote to reverse sentence even with more stat evidence
    - The racism is real, but it is unconscious, nothing less than abolishing the death penalty would remedy the situation and I'm not going to do that
    - I accept that jury is imposing death penalty based on race, but I'm not going to do anything about it
    - Doesn't this make the argument for abolishing the Death Penalty?

Affirmative Action – "Benign Racial Classifications"

- **Distinguish from above**
    - **Those are neutral statutes that are alleged to have a discriminatory purpose or effect**
    - **THESE are statutes that make a racial classification on their face, but the classification is alleged to be benign and beneficial – i.e. NOT invidious**

Regents of Univ. of California v. Bakke (1978)

- Holding: Setting-aside 16 seats in the class (medical school here) for minorities is unconstitutional, but State can consider race in admissions if it is not determinative
    - That the State could consider race was part of the holding because the Court reversed California court's enjoinment from using race at all
- Court applies Strict Scrutiny and calls this a suspect racial classification
    - Poor whites can't complete for these spots
- Brennan Dissent
    - Only STIGMITIZING racial classification should get SS – this is not one
    - Doesn't want to apply SS because whites as a class do not have any of the "traditional indicia of suspectness."
    - Wants "remedial" racial classification to get intermediate scrutiny: Important/Substantial
- Powell (Majority) response to Brennan
    - "There is no principled basis for deciding which groups would merit SS and which would not"
        - It may not always be clear that a preference is in fact benign
        - Preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection
        - There is a measure of inequality in forcing innocent persons to bear the burdens of redressing grievances not of their making.
- Why do we care about "reinforcing common stereotypes?"
    - Isn't the better question how you do when you get in, not how you got there?
    - Is there any Constitutional Basis for this? Or is it just policy?
- California's asserted Justifications for the Quota

- **Reducing the historic deficit of traditionally disfavored minorities in medical schools and the medical profession**
  - Court: This is FACIALLY INVALID
  - Quotas = discrimination for its own sake
  - There is no compelling state interest to justify an outright quota in educational admissions (fails 1st Prong of SS)
  - Cites Loving, Brown, McLaughlin
    - Isn't there a constitutional difference between the cited cases and what Cal. is doing here? Do they support Powell's contention?
    - Or are they all racial line-drawing?
- **Countering the effects of societal discrimination**
  - "amorphous concept of injury that may be ageless in its reach into the past"
  - There must be ACTUAL Discrimination to justify preferring members of an injured group – rights of victims rationale
  - Broad "societal" discrimination invocation is not a compelling interest
- **Increasing the number of physicians who will practice in communities currently underserved**
  - Court says this is no good because the means-end relationship is too tenuous
- **Obtaining the educational benefits of a diverse student body**
  - THIS is a COMPELLING INTEREST
    - It implicates First Amendment values regarding a "robust exchange of ideas" in the sense of academic freedom
    - But how is this as compelling as the national emergency in Korematsu? Compelling is supposed to be something we can't do without
  - But the MEANS here are NOT NARROWLY TAILORED
    - A quota is not the least restrictive, nor the best way to achieve this compelling interest
    - "Assignment of a fixed number of places to a minority group is not a necessary means towards that end"
    - "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element"
    - The Harvard Plan
      - Race or ethnic background as a "plus"
      - "simply one element – to be weighed fairly against other elements – in the selection process"
      - FN5 – "individualized review" is key to constitutionality
    - Davis has a facial intent to discriminate, while under Harvard Plan, it considers race as one factor among many
    - But doesn't the Harvard Plan still make a racial classification?
      - Calls it "facially nondiscriminatory," but is it?

    - Powell concedes that all factors don't get weighed equally under the Harvard Plan and that race COULD end up being determinative
    - But the distinction is that Harvard gives everyone theoretical access to every seat, whereas UC-Davis gave whites ZERO access to 16 seats
    - However, could just say that UC-Davis is simply being more candid than Harvard and Harvard obviously cares about the numbers too
- "Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, but the standard of justification will remain constant."
    - If its political, shouldn't the court be deferring?
    - Why is academic diversity an OK political judgment, but the other factors Cal. gives not?
    - So why is using race as "one factor among many" entitled to deference and saying we want to reduce the historic discrimination not entitled to deference?
        - Both creating a racial classification
    - Should there be deference to political judgment that less-qualified people get ahead from Affirmative Action?

<u>Wygant v. Jackson Board of Education</u> (1986)

- Court held that a minority preference in teacher layoffs was unconstitutional → laid off white teachers even though they had more seniority in order to retain the same percentage of minority teachers after the layoffs as before
- Providing "role models" is NOT a compelling state interest able to satisfy SS
    - No logical stopping point
    - Allows discriminatory hiring and layoffs long past the point required by any legitimate remedial purpose
    - Premise of the theory that black students are better off with black teachers could lead to more segregation in schools
- Powell's prerequisite for ANY affirmative action program by the government can proceed:
    - There must be sufficient evidence the justify the conclusion that there had been some prior discrimination by the government unit involved before allowing limited use of racial classifications in order to remedy such discrimination
    - Need a firm basis for concluding that that Affirmative Action is necessary to remedy a past constitutional violation
        - Stat disparity in workforce between racial composition of teaching staff and the qualified public school teaching population might be sufficient for a prima facie case to shift the burden onto the government
    - But, this requirement is not to be equated for the need of a explicit admission of wrongdoing or a court finding of wrongdoing
    - Essentially: **REMEDYING PAST DISCRIMINATION, THAT THE GOVERNMENT CAN PROVE ACTUALLY OCCURRED, IS THE ONLY COMPELLING INTEREST THAT CAN GET PAST STRICT SCRUTINY**

- Court goes even further here and says that even if this compelling interest were present – the layoff provision was not a "necessary" means of achieving the purpose of remedying such discrimination
    - Imposing the loss of an existing job imposes too severe a burden on non-minority employees
    - Hiring goals impose a diffuse burden while layoffs impose the entire burden of achieving racial equality on particular individuals – that burden is too intrusive – thus means less intrusive than racial layoffs are available
    - BUT...this was part of a negotiated collective bargaining agreement!
    - How is denying job different from losing job?
        - Interest is the same for both – achieving an integrated faculty – whether that is compelling or not is up for argument
        - If interest is sufficient to justify hiring, how are they not sufficient to justify "retainment"
        - What about expectations created with a job?
- Stevens in Croson (contra to result here)
    - "The School Board in Wygant could have reasonably concluded that an integrated faculty has benefits to the entire student body than an all-white or nearly all-white faculty cannot give"

Richmond v. J.A. Croson Co. (1989)

- Richmond enacted a minority set-aside requirement for city contracts → court held it unconstitutional (O'Conner)
- Why does the City have less authority than Congress to enact a race-based remedy?
    - §1 of the 14th Amendment is an explicit constraint on State power
    - §5 of the 14th Amendment is a positive grant of power to Congress
    - Thus, this explains why Congress got more deference to their race-based remedy in a contracting set-aside in Fullilove case
- Thus, this race-based classification, like all others is governed by SS
    - The Richmond Plan denies certain citizens the opportunity to compete for a FIXED PERCENTAGE of public contracts based solely upon their race
    - Need SS to "smoke-out" illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool
    - Classifications of race carry a danger of stigmatic harm – unless uses of race are reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility
    - Here, its not a White majority disadvantaging themselves
        - 50% of Richmond population are blacks
        - 5 out of 9 seats on the City Council are Black
        - Thus, the racial set-aside could be viewed as racial politics and that's a recipe for disaster
        - CONTRA: Don't Whites really have all the power? Note statues of Confederate Generals
    - BUT...how the hell can we classify the White population in Richmond as a "discrete and insular minority?"
- Why was there not enough evidence to justify a race-based remedy?

    - A generalized assertion that there has been past discrimination in an entire industry is not enough
        - It provides no guidance for a legislative body to determine the precise scope of the injury it seeks to remedy
        - It has no logical stopping point
        - Generalized assertion of past discrimination in history can't justify a RIGID QUOTA
        - Nothing approaching a prima facie case of a constitutional or statutory violation by ANYONE in the Richmond construction industry
    - Why isn't Richmond's proffered evidence enough for O'Conner's majority?
        - Mere recitation of a "benign" purpose is not enought
        - Richmond: Blacks are 50% of the population and got .67% of Contracts
            - O'Conner: so what? Reliance on this statistic is misplaced because the city does not even know how many MBEs in the relevant market are qualified to undertake prime or subcontracting work in public construction projects (Base Rate Error)
        - States must identify alleged discrimination (past or present) with specificity – here couldn't identify one instance of discrimination
            - No smoking gun = no compelling interest for a STATE to enact remedial race-based measures
- Set-Aside is NOT Narrowly-Tailored
    - City never considered race-neutral means
    - Based on the completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population
- Evidential Requirements for Actual Discrimination (the Smoking Gun)
    - Systematic exclusion of MBE from subcontracting opportunities
    - Statistical disparity between number qualified and number actually engaged
- Scalia's $.02 in all of this
    - SS must be applied to all governmental classifications by race regardless of whether they are remedial or benign
    - In my view there is only one circumstance in which the States may act BY RACE to "undo the effects of past discrimination": where that is necessary to eliminate their own maintenance of a system of unlawful racial classification
    - The relevant proposition is that it was blacks, or Jews, or Irish who were discriminated against, but that it was individual men and women, "created equal," who were discriminated against
    - Since blacks have been disproportionately disadvantaged by racial discrimination, any race-neutral remedial program aimed at the disadvantaged AS SUCH will have a disproportionately beneficial impact on blacks – without using race
    - Affirmative Action divides the country into groups rather than makes us equal
- Does O'Conner agree with Scalia?
    - Not really – she seems to leave to door open for Affirmative Action
    - Croson argues for a complete limitation of race-based remedial efforts to remedying effects on OWN past discrimination (Wygant); Richmond argues for sweeping legislative power to remedy past discrimination

        - NEITHER OF THESE STARK ALTERNATIVES CAN WITHSTAND ANALYSIS
    - Note talk of evidential requirements
    - Note talk of identifying discrimination with specificity
    - All leaves to door open, just in case
    - O'Conner is a middle-of-the-roader

Metro Broadcasting, Inc. v. FCC (1990)

- Upheld two minority preference policies of the FCC
    - New licenses for minority-owned stations
    - Transferring to minority-owned stations
- Brennan's majority opinion applied INTERMEDIATE SCRUTINY
    - Important governmental interest in Broadcast Diversity
        - Diversity of views and information on airwaves serves important First Amendment Values
    - Preference was SUBSTANTIALLY RELATED to the achievement of the diversity goal
        - Claims there is a nexus between minority station ownership and broadcast diversity – giving deference to Congress and FCC's judgment on that
        - No impermissible burdens on non-minorities
- THUS, there is NO remedial goal for Congress here (Goal=broadcast diversity)
    - Before holding that IM applies – disclaims any "remedial" purpose
    - Thus, since this is not a remedial goal, Congress is not acting under its 14th Amendment §5 powers
        - So this debate is not implicated here
- So is there really a nexus between minority station ownership and broadcast diversity?
    - Talking about the OWNERS, not the DJs
    - Should we rely on race as a proxy for broadcast diversity?
    - O'Conner's point – going to end up denying licenses because they promote enough of a Black or Hispanic point of view if the black owner wants to play the Beatles all day long
    - Is there anything to the argument that minority owners will be more likely, in the aggregate, to put on minority programming?
        - Debate – Holds Water vs. Owners are all about making money and will program however they can make a buck
- O'Conner does NOT agree with Brennan – dissent
    - Insists on across-the-board SS for all racial classifications, whether promulgated by the State or the Feds, but explicitly says § 5 powers aren't before the Court
    - Broadcast Diversity it NOT a compelling interest: The ONLY COMPELLING INTEREST is that of remedying the effect of racial discrimination
    - Interest in broadcast diversity it too amorphous (not compelling)
        - No principled way for court or government to articulate it
        - Would support indefinite use of racial classifications

Adarand Constructors, Inc. v. Pena (1995)

- Under FEDERAL LAW: Prime Contractors get $ incentives for hiring socially and economically disadvantaged individuals – this is a clause in the government contracts and minorities are presumed to be in this class– Court strikes this as unconstitutional (O'Connor)
- Croson never declared the standard of review for the equal protection component of the 5th Amendment (i.e. for the Feds)
- Three General Propositions with respect to governmental racial classifications (through Croson)
    - (1) Skepticism → any preference based on racial or ethnic criteria must necessarily receive a most searching examination
    - (2) Consistency → the standard of review under the equal protection clause is not dependant on the race of those burdened or benefited by a particular classification
    - (3) Congruence → equal protection analysis in the 5th Amendment area is the same as that under the Fourteenth Amendment
    - Thus, any person, regardless of race, should be able to demand SS of a racial classification
- Metro Broadcasting departed from this principles in Two Significant Ways
    - (1) Turned its back on Croson's explanation of why SS of all governmental classifications is essential
    - (2) It squarely rejected the congruence principle between the standards applicable to federal and state racial classifications – and it doing so undermined the other two
- HELD: all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under SS
- O'Conner rejects Stevens dissent where he says that Courts ought to be able to distinguish between invidious and benign racial classifications
    - It's not good vs. bad classifications, it PERMISSIBLE VS. IMPERMISSIBLE classifications
    - Even benign classifications will raise feelings of racism and delay the day of true equality
- Is the majority's apparent view of congressional power at odds with the history and the role of the federal government with protecting racial minorities (power under §5 to enact race-based benefiting legislation)
    - Purports not to answer
    - But under congruence principle – 5th and 14th equal protection is the same
- What deference does the Court owe to Congress?
    - Purports not to decide this either
    - Requiring a "compelling interest" doesn't contravene any principle of appropriate respect for Congress
        - This implies Congressional race-based classifications, even those enacted under §5 of 14th, will get SS
    - What about history and text of 14th?
        - Federal government must be primary defender of rights of racial minorities viz the states – purpose of §5

        - Why examine congressional measures with the same lens as the States given the 14th Amendment history? Should we do away with this consistency principle like the dissent wants?
- Scalia's $.02
    - There can be no such thing as a creditor or debtor race
    - In the eyes of the government, we are just one race here: American
    - Government can never have a compelling interest in discriminating on the basis of race in order to "make up" for past racial discrimination in the opposite direction
    - Need to be compensating for an IDENTIFIABLE past discrimination (Croson)
    - Are these views consistent with his views in the peremptory challenges cases (let 'em discriminate) and his Memo in McCleskey v. Kemp (death penalty is racist, but so what?)?
        - (ME) Both of those contexts have to do with neutral laws alleged to have a racially discriminatory purpose or effect – here we're talking about a facially discriminatory law
            - Adhering to strict standard of proof in neutral states with an effect cases in order to guard against the slippery slope?
            - He's OK with discrimination so long as its isn't on the face of the statute?
- Thomas
    - Strongly disagrees with Dissent's suggestion that there is a "racial paternalism" exception to equal protection
    - Affirmative action engenders attitudes of superiority and provokes resentment among those who believe that they have been wronged by the government's use of race
    - AA is no better that Plessey's "separate but equal"
- What if anything is left of court's holding in Metro Broadcasting?
    - Overruled to extent that its inconsistent with the view that SS applies to benign race-based classification
- Is there any support for Ginsburg's claim that majority implicitly endorses two types of SS, depending upon the nature of the governmental racial classification?
    - YES
    - O'Conner: "We wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.'"
    - Way Ginsburg reads it
        - SS is "fatal in fact" invidious racial classifications like Korematsu
        - But majority disavows a "fatal" strict scrutiny for benign racial classifications
    - Any support in the opinion for this so-called flexible SS?
        - "Not Fatal in Fact" quote
        - Talk about utility of SS for telling the difference between "benign" and "invidious" racial classifications

Grutter v. Bollinger (2003)

- U.Mich. Law School may seek to enroll a "critical mass" of minority students
- Standard of Review for Race is NOT Altered

- O'Conner still says its SS
  - All racial classifications are subjected to SS, but SS is NOT "strict in theory, but fatal in fact" → Thus, not all racial classifications will be struck down on SS because not every racial classification is equally objectionable
  - **"Context matters"** and SS is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in a particular context
- Why does context matter here and not in Adarand or Croson?
- Why does O'Conner emphasize the importance and sincerity of use of race here, but not in Adarand? Is she shifting position?
- Are **context, importance, and sincerity** part of the Constitutional analysis?
  - If so, where did they come from?
  - The didn't come from Croson or Adarand
  - Sound Judicial Policy?
  - Different rules for the unique context of education?

- O'Conner endorses Powell's approach in Bakke: **Achieving student body diversity is a COMPELLING STATE INTERST**
  - Is O'Conner's approach here consistent with her approach in Metro Broadcasting?
    - There she said that the only compelling state interest was remedying past discrimination and the diversity WAS NOT a compelling state interest
  - Why is diversity a compelling state interest?
    - Obtaining the educational benefits that will flow from diversity
    - We will DEFER to the Law School's educational judgment that such diversity is essential to its educational mission
      - Why not defer to UC-Davis' judgment in Bakke?
      - COURT: "Critical mass" concept is NOT a quota → Quotas are out-right racial balancing and that is unconstitutional
    - The benefits of educational diversity are not theoretical – they are REAL – thus the "critical mass" concept is an appropriate menas to achieve diversity
      - Citations to the amicus briefs of
        - (1) major business that advocate the need for diversity in the global market place; and
        - (2) the military, advocating the need for legitimacy of authority from the officers' corps, which can only be attained with a diverse officers' corps
      - Law School is disproportionately the path to leadership and we must cultivate a set of leaders with legitimacy in the eyes of the populace
      - BEGS THE QUESTION: how are these benefits any different whether achieved by QUOTA or by CRITICAL MASS?
    - Isn't the whole point of SS NOT to defer to the government when they classify citizens based on race?
      - But that's what the Court is doing here

- The "critical mass" policy **MEETS the requirement of NARROW TAILORING**
    - Quotas and/or Separate Admissions tracts are unconstitutional; "critical mass" is not a quota
    - Government CAN use race as a PLUS FACTOR in the context of INDIVIDUALIZED CONSIDERATION
        - Adopts the essence of Powell in Bakke: the emphasis on individualized consideration
    - Narrow Tailoring doesn't require exhaustion of every conceivable race-neutral alternative – just need a serious, good faith consideration of workable race-neutral alternatives
        - Is O'Conner shifting again?
            - She criticized Richmond in Croson for not considering race-neutral alternatives
        - Can't require sacrifice of academic quality for sake of diversity or diversity for the sake of academic quality
        - "We are satisfied that the Law School adequately considered race-neutral alternatives currently capable of producing a critical mass without forcing the Law School to abandon the academic selectivity that is the cornerstone of its educational mission"
    - Can't be undue burden on white applicants → this is not
    - 25 year sunset provision (2028) → Thomas thinks its part of the holding
- Note Rehnquist's argument that it's a quota

Gratz v. Bollinger (2003)

- Court strikes down U.Mich.'s undergraduate admissions program that gave 20 points (out of a needed 100 to guarantee admission) solely for being a minority
    - Resulted in almost every minority applicant who was minimally qualified being offered admission
    - Struck it down because of LACK OF INDIVIDUALIZED REVIEW OF APPLICANTS
    - Compelling interest in educational diversity was present, but the plan was not narrowly tailored
- The means were not narrowly tailored
    - No individualized consideration, just an automatic award of 20 points
    - Automatic distribution of 20 points has effect of making race DECISIVE for every minimally qualified minority applicant – like a set-aside or a quota
        - How is it like a set-aside though?
            - Give 20 points for disadvantaged socioeconomic status, athletic ability, at provost's discretion...how is a set-aside?
        - So is it or is it not a set-aside like in Bakke?
            - In Bakke – white people couldn't compete for the seats – here, it's possible for white people to get 20 points on one of these other criteria
            - So can we call this a "separate track" for minority applicants like in Bakke?

        - What about white people not being able to compete for THESE 20 points?
- Is school just making race a more candid factor?
    - So are we just rewarding a vague policy that accomplishes the same objective in the law school?

Race-Conscious Redistricting
Shaw v. Reno (1993)

- 1990 census made NC entitled to another House seat, thus legislature re-drew district line and made one black-majority district; the AG objected pursuant to Voting Rights Act and made NC add a second black-majority district, which ended up having to be drawn in a dramatically irregular shape.
- Precise Issue: *whether the appellants had stated a claim upon which relief could be granted under equal protection by alleging a reapportionment scheme so irrational on its face that it could only be understood as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification?*
    - YES – this is enough to state a claim and survive a 12(b)(6)
    - Didn't decide any 15th Amendment Issues
    - This is NOT a case about the dilution of white votes
- There is no right to participate in a color-blind electoral process
    - When members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes when the district is drawn in accordance with traditional principles of districting:
        - Compactness
        - Contiguous Territory
        - Maintain the Integrity of Political Subdivisions
    - But – these principles are by no means constitutionally required and race can and will be a factor
    - CONSTITUTIONAL HARMS: **However, when a reapportionment plan includes people with nothing in common besides the color of their skin, the plan bears an uncomfortable resemblance to political apartheid**
        - Redistricting principles can be used to show other legitimate purposes
        - A plan like this reinforces the perception that members of the same racial group think alike and share the same political interests and prefer the same candidates at the polls: this is **impermissible racial stereotyping**
        - This will also lead the elected official from the district to believe his job is represent only the members of the racial group in his district rather than his constituency as a whole
- But, whites still a majority in 10/12 (83%) of districts when their population is 70-something% - so where's the problem?
- Voting Rights Act
    - Requires southern states to have redistricting approved by the AG

- State argued it has a compelling interest in comply with the VRA and AG's demands for a 2d black-majority district
- Court's Response: "But, in the context of a 14th Amendment challenge, courts must bear in mind the difference between what the law permits, and what it requires"
- Never really resolve the issue though
- Disagreement
  - O'Conner concurrence in Bush v. Vera: compliance with the VRA might be a compelling state interest, but that's not the issue here
  - White dissent in Shaw: compliance with the VRA is a compelling state interest
  - UJO case → Hasidic Jews split to make a black district; Maj. said it was OK as compliance with VRA; Burger dissent said you can't divide one ethnic group's district to create a voting block composed of some other ethic or racial group in a new district
    - Can make a case that O'Conner adopted Burger's rationale in her Shaw decision

Miller v. Johnson (1995)

- Gives current constitutional test for redistricting
- **"Bizarreness" of district shape is NOT a threshold showing for stating a claim under equal protection for racial redistricting**
  - It IS persuasive circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in the drawing the district lines
- Plaintiff's burden is to show, either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that RACE WAS THE **PREDOMINANT FACTOR** motivating the legislature's decision to place a significant number of voters within or without a district
  - Plaintiff must PROVE: that the legislature **SUBORDINATED TRADITIONAL RACE-NEUTRAL DISTRICTING PRINCIPLES**, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations

Gender – "Heightened (Intermediate) Scrutiny"

- Is the goal a gender-neutral constitution?
- Or is it that M and W must be treated the same where they are similarly situated?
- Does this mean its OK to recognize accurate differences between M and W?

Facial Gender Classifications

Reed v. Reed (1971)

- State statutory preference for men over women in the appointment of administrators of estates when all else is equal is INVALIDATED
- Court purports to use R/B, but its obvious they are doing more
  - Can we say, in 1971, that there really isn't a rational basis for preferring men over women in financial matters?

- State interest in ADMINISTRATIVE CONVENIENCE is not enough to justify the classification – no rational relation between administrative convenience and gender
    - But...really...isn't there?

Frontiero v. Richardson (1973)

- Federal law affording men an automatic dependency allowance for their wives but requiring servicewomen to prove that their husbands were dependant is INVALIDATED
- **Brennan +3 make an argument for elevating gender to a "suspect classification" that warrants SS**
    - *Uses arguments from Carolene Products' FN4: Way to Determine if Suspect Class (used in other contexts)*
        - *(1) Sex is an immutable characteristic → a legal burden should bear some relationship to individual responsibility*
        - *(2) High visibility of the sex characteristic*
        - *(3) Under representation in the political area*
        - *(4) Sex bears no relationship to ability to perform or contribute to society*
        - *(5) Gender has been used invidiously to classify people without regard to their actual abilities*
    - **But Brennan never gets the 5 votes necessary to make gender subject to SS**
- Ely → only use SS for laws enacted before women had access to the political process – i.e. before 19th Amendment; now women are no longer a discrete and insular minority
- Any justification for treating Gender as a suspect classification?
    - Remember – the obvious and express purpose of the 14th Amendment was to remedy RACIAL discrimination – the Proponents of the amendment explicitly reject the notion that equal protection would apply to women

Craig v. Boren (1976)

- Does the sale of 3.2 beer to 18 year old Women but only to 21 year old Men violate Equal Protection?
    - YES, strike statute
- Standard of Review: INTERMEDIATE SCRUTINY
    - Important governmental objective
    - Substantially related to achievement of objective
    - (Administrative convenience is not an important governmental objective)
- Important State Interest → traffic safety
    - This prong is satisfied
- Substantially Related Means – NOT SATISFIED
    - .18% of Women and 2% of Men in the 18-20 age group arrested for DWI
        - These stats are proffered to show the gender classification is substantially related to the objective of traffic safety
    - **A correlation of 2% must be considered an "unduly tenuous fit"**
        - **Thus the substantially related means argument for making the gender classification is weak**
        - Would the conclusion be IRRATIONAL on these stats? But we're at more than rationality review here

        - Powell – wants to still can it "rational basis" review, but wants to give it some bite in gender context
    - Stevens concurrence: unfair to punish the innocent 98% of men
    - Also → not illegal for under 21 men to consume the 3.2 beer – so female friends can buy it and the men can legally consume it
        - Seems not to make a whole lot of sense
    - But then again, those 2% start to add up

Mississippi University for Women v. Hogan (1982)

- All-women's public nursing school could not deny admission to a man simply on the basis of gender
- An "**Exceedingly Persuasive Justification**" must be shown for any gender classification
    - This Burden can only be met by satisfying the Intermediate Scrutiny Test
- Mississippi proffered a "compensatory purpose" to remedy past discrimination against women
    - COURT: **A state can establish a compensatory purpose justification only in members of the gender benefited by the classification actually suffer a disadvantage related to the classification**
    - Here: women have had PLENTY of opportunities in nursing (get 94% of nursing degrees in Miss.), thus the compensatory purpose fails the first prong of intermediate scrutiny – no important interest to assert
- The fact that the school allows men to audit the classes fatally undermines any claim that the women in the school are adversely affected by the presence of men
    - Thus, no way the means of excluding men could be substantially related to their goal
- Also – policy perpetuates stereotype of nursing as a woman's job

J.E.B. v. Alabama (1994)

- Extends the Batson v. Kentucky rule on peremptory challenges to Gender → thus NO peremptory changes based on gender alone are allowed
- This was a paternity/child support case
    - State stuck male jurors, JEB struck female jurors
    - Doesn't all just cancel out in the end?
    - Are men and women really similarly situated in this context?
- Gender will be relevant to juror's views in certain cases – rape, child custody, etc., spousal or child abuse, sexual harassment → so why don't we just acknowledge this?
    - Like race in college admissions, gender matters in this context

U.S. v. Virginia (1996)

- VMI excludes women
- Two Questions Posed to the Court (Ginsburg Decision)
    - Does the exclusion of women from VMI violate equal protection?
    - What remedy is appropriate?
- The Standard of Review: Intermediate Scrutiny
    - "Exceedingly persuasive justification"
        - Minimum, State must make IM Scrutiny showing

        - Justification must be genuine, not hypothesized or invented post-hoc in response to litigation
        - Justification must not rely upon overbroad generalizations about the different talents, capacities, or preferences of males and females
    - "*Without equating gender classifications, for all purposes, to classifications based on race or national origin*, the Court, in post-Reed decisions, has carefully inspected official action that closes a door or denies opportunity to women (or men)."
        - Is she attempting to leave the door open for SS for gender??? This is supposed to be settled law!
    - SCALIA
        - Court interprets "exceedingly persuasive justification" in a fashion that contradicts the reasoning of Hogan and other precedents
            - IM Scrutiny has never required a least restrictive means analysis, but only a "substantial relation" between the classification and the state interests that it serves
            - On this standard – just because there may be a few women who want to and are able to undertake VMI's regime – just not make the all-male policy fatal
            - There is no support in our cases for the notion that a sex-based classification is invalid unless it relates to characteristics that hold true for every instance
        - Some of the Court's statements are misleading, insofar as they suggest that we have not already categorically HELD strict scrutiny to be inapplicable to sex-based classifications. Those statements are irresponsible insofar as they are calculated to destabilize current law
        - Ginsburg is coming AWFUL close to SS and that's not what the law says to do
    - REHNQUIST (concurring)
        - Doesn't like the "exceedingly persuasive justification" language – to vague – at least we have some concept of what the IM test means
- Does the court give us any hint on the constitutional validity of state-supported single-sex schools?
    - "Inherent differences between men and women remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an INDIVIDUAL'S opportunity" (see FN1)
    - FN1 → **single-sex school can celebrate diversity by dissipating, rather than perpetuating, traditional gender classifications**
        - **BUT → the state must EVENHANDEDLY support diverse educational opportunities**
        - Is state being even handed if state tax funds and exemptions for donations are used to support single-sex private schools when there are no equal male schools to support?
            - Such as in Mass. with Mount Holyoke and Smith College – can Romney still give them the tax exemptions, etc.?

- Clinton administration: Single sex colleges for men are unconstitutional, but single sex colleges for women are OK because of history of tradition
  - Is this the correct way to read FN1?
- Under FN1, could Mass. step in and start running Smith College if it ran into financial trouble?
  - NO – VI.B. (ME) – can't just create a college for men and call it evenhanded – can't be Smith College equal by analysis in this section
- Is this view consistent with Court's view on racial preferences?
  - Note Grambling and Morgan State – can't keep it all black
  - But Gender is IM scrutiny...

- State Interest #1: Court rejects the claim that VMI promotes educational diversity – WHY?
  - Neither recent nor distant history bears our VA's alleged pursuit of diversity though single-sex educational options
    - "protection" of women against higher education – considered dangerous for them
    - Widely held historical notions about women's "proper place"
    - Rehnquist doesn't think its fair to consider VMI's origins in deciding the constitutionality of the current admission policy
      - VMI reconsidered its policy after Hogan decision – so we should only consider history after 1982
      - Does Rehnquist's approach make sense?
      - Does this mean it was OK to deny woman a law license in 1948? (Ill. and Meyer Bradwell)
- State Interest #2: Court rejects claim that VMI's adversarial method would be destroyed by admitting women: District Court findings regarding the "adversarial method":
  - Found: *That men respond to adversarial environment and women to a cooperative environment*
  - Court Responds by saying these findings are besides the point
    - Can't exclude women based on fixed notions about the roles of men and women
    - Proper question: Whether VMI can exclude an **INDIVIDUAL woman** who is willing and able?
    - **These fixed notions just become self-fulfilling prophecies once they are routinely trotted-out**
  - Court is concerned with the principle rather than what the District Court found as a factual matter
    - A higher court is supposed to find findings of fact clearly erroneous before dismissing them – Ginsburg says nothing of the sort in this opinion
    - **Ginsburg focuses more on the individual will and capacity to attend VMI rather than the limits of applying the adversarial method to women in general**
    - **VA's assertions are just generalizations about women, and that has never been enough to withstand IM scrutiny**
  - Found: *Changes that VMI would have to make:*

        - *Physical Training*
        - *No Privacy would have to be eliminated*
        - *Change Adversative Method*
    - These findings aren't contested either
    - Is the principle or the facts more important?
    - Thus, Court has rejected both state interests as "unimportant"
- Healthworks Gym's legislative exemption from public accommodations law
    - Is this unconstitutional under equal protection law?
    - No other public accommodation can discriminate on basis of gender, etc. – so why can Healthworks? Can Harvard Club exclude black? Women?
- Any tension between Grutter and VMI case?
    - Deference to educational mission in Grutter is in the SS context
    - Here: IM and there's less flexibility when there should be more!
    - Clear tension – so how good is VMI after Grutter?
- **Constitutional violation according to Ginsburg is the categorical exclusion of women from an extraordinary educational opportunity only given to men – thus remedy must directly answer that**
- Court rejects VWIL as a sufficient remedy – WHY?
    - Simple: VWIL is a "pale shadow" of VMI in terms of statute, support, alumni connections, etc.
    - VWIL is something different – it's not just a VMI for women – it was a separate institution designed for women's leadership development – thus it didn't have the same goals as VMI
- REHNQUIST concurrence
    - **Constitutional violation is the maintenance of an all male school without providing a comparable school for women**
    - VA could have resolved question after Hogan by admitting women or devoting comparable resources to a VWIL-type school – "facility for woman"
        - BUT...says that VWIL is distinctly inferior to men's institution
        - However, the remedy doesn't need to be admission of women to VMI or a VMI clone for women → VA just needs to show that their interest in educating men in a single sex environment is as strong as their interest in educating women in a single sex environment

Classifications Based-On "Real" Differences between the Genders
Geduldig v. Aiello (1974)

- Held: exclusion of disability that accompanies normal pregnancy and childbirth from California's disability insurance system did not constitute invidious discrimination under the equal protection clause
- Court essentially applied rationality review in a very deferential manner
- This is NOT a gender classification
    - It is true that only women can get pregnant, but not all women do
    - Thus, there is no risk from which men are protected that women aren't and vice versa
    - The law divides citizens into two groups: (1) Pregnant Persons and (2) Non-Pregnant Persons; the latter group contains BOTH men and women

    - Non-pregnant persons are the ones who get the fiscal and actuarial benefits of this program, thus no gender classification because the non-pregnant group would be the ones paying for the pregnancies otherwise – thus both men and women receive the benefits of this law – no one gender alone is burdened
- Rational Basis: Covering pregnancies would cost us too much money – and if we had to cover everything the premiums would be through the roof – so fiscal benefits are to the gender-diverse group (non-pregnant persons), thus no equal protection violation
- Normal pregnancy is an objectively identifiable physical condition; absent a showing that pregnancy is being used as a pretext for invidious gender discrimination, lawmakers can enact rational legislation

Michael M. v. Superior Court (1981)

- Upheld a statutory rape law that punished the male, but not the female participant in sexual intercourse when the female was under 18 and not the man's wife – law made no distinction about age difference; thus here it was a 17 year old male and a 16 year old female – only the male was (or could be) charged with rape under the statute
- Standard of Review
    - The traditional minimum rationality test takes on a "sharper focus" when gender-based classifications are challenged
    - Legislature may NOT make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability of social status of the affected class
    - Court has and will uphold statutes where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain circumstances
    - Not quite IM – but more than RB
        - This is after Craig; but this is a Rehnquist opinion – thus its probably a Brennan v. Rehnquist issue when it comes to articulating standard of review
- Purpose of law → To prevent teen pregnancies and protect young women
    - Even under IM standard, this would be important state interest
- Means
    - Thus, it is hardly unreasonable for a legislature acting to protect minor females to exclude them from punishment
    - The criminal sanction imposed solely on males thus serves to roughly "equalize" the DETERRENTS on the sexes to have teen sex
- If we equalized the law, then it would become unenforceable because no girl would report the sex for fear of criminal sanctions
- What about applying the criminal law equally? → it's a basic constitutional principle (Stevens)
    - It undermines the criminal law to have a law on the books that is unenforceable if its not equally applied

Rostker v. Goldberg (1981)

- Upheld selective service registration for males only and not females

- Why does the Court give great weight to Congress' decision?
    - The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference
    - Congress cannot ignore the Constitution when it acts in the area of military affairs, but the tests and limitations to be applied may differ because of the military context → the Constitution requires such deference to Congressional choice
    - Would a similar analysis apply to congress' differential power from states under § 5 of 14th Amendment?
- Under IM Scrutiny, can the decision not to register women be upheld?
    - Interest in "raising and supporting armies" is IMPORTANT
    - The Classification is SUBSTANTIALLY related to this interest
        - This was not a blind and unthinking decision by congress – they debated it and concluded that forcing women to register would be unwise and unacceptable to a large majority of the populace
        - Women, in 1981, were not allowed to fight in combat and the purpose of the selective service registration was to have a draft pool from which to build a COMBAT ARMY – thus not registering women is substantially related to the goal of building a combat army
    - The classification realistically reflects the fact that the sexes are not similarly situated in this case
- Rehnquist chides the District Court for evaluating the military's need for women
    - District Court should have been more deferential
    - Congress appropriately concluded that women for non-combat roles could be supplied by volunteers
- Should constitutionality of no women in combat have been before the court?
    - This is the premise behind the constitutionality of male-only registration
    - Isn't this about two wrongs making a right?
    - Where is the legitimate basis for excluding women from combat?
- Marshall's dissent argues that the case is about REGISTERING for the draft and that when and if it came time to draft, the DRAFT for combat could be for men only
    - Remember: Administrative convenience is no justification for gender discrimination [Reed]

Discriminatory Purpose and Effect – Gender (Disparate Impact)

- Remember how to Distinguish: These are NEUTRAL statutes that the P claims have a disproportionate impact on a particular gender – the statue is NOT facially discriminatory

Personnel Administrator of Mass. v. Feeney (1979)

- Upheld a law that gave an absolute lifetime preference to Veterans for state civil service positions, even though the preference operates overwhelmingly in favor of males
- Two Part Test
    - (1) Is the classification in fact neutral?
        - Well – not totally – it overtly prefers veterans – this has no plausible relation to any job-related criteria like in Washington v. Davis

    - (2) Does the adverse effect reflect invidious gender discrimination?
        - Must prove PURPOSEFUL discrimination against gender to offend the Constitution
        - Discriminatory purpose implies MORE than intent as volition or intent as awareness of consequences – It implies that the decision maker (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 (Note McCleskey, decided 7 years later)
- Thus, this case does NOT apply the rule that people intend the consequences of their acts
- FN2
    - BUT → inevitability or foreseeability do have SOME bearing upon the existence of discriminatory intent
    - In fact – even in this case – we can draw a STRONG INFERENCE that adverse effects against women were desired
    - But here: it is simply the inevitable consequence of a legislative policy (preferring veterans) that has always been deemed to be legitimate → this PLUS legislative history affirmatively demonstrating no intent to discriminate against women does not allow this "strong inference" to ripen into proof
- Also: This law DISADVANTAGES ALL NON-VETERANS
    - Significant numbers of non-veterans are men, thus they are placed at the same disadvantage as women
    - Kind of like the pregnancy case (Geduldig)
- Going to apply R/B unless we can show legislature INTENDED to discriminate with the "because of vs. in spite of" test → that's how we do neutral laws
    - Essentially, this is the same standard as for racially disproportionate impact
    - And it makes sense – since race usually gets strict scrutiny and gender usually gets IM – that the disparate impact test for gender wouldn't be any more than it is for race (essentially a strict intent test that is virtually never met)
- But note Marshall's dissent
    - The Veterans Preference has an exemption for clerical and secretarial position, which has created a gender-based civil service hierarchy, with men at the top and women at the bottom
    - "Such a statutory scheme both reflects and perpetuates precisely the kind of archaic assumptions about women's roles which have previously held invalid"
    - Who you 'wit?

Alienage – "Strict Scrutiny with the Dougal Exception"

- Should these classifications be subject to SS based on FN4?
    - History?
        - Long one of discrimination
    - Immutable?
        - Nope
    - Political powerlessness?
        - You bet – can't vote
    - Any nexus to one's ability to participate in society?
- Graham v. Richardson (1971) launched SS for alienage classifications

- Called them a prime example of a "discrete and insular minority" [see FN4 of Carolene Products]

Sugarman v. Dougall (1973)

- Can't exclude aliens from the Bar
- **Dougall Exception to SS for Alienage**
  - The Court has not held that a State may not, in an appropriately defined class of positions, require citizenship as a qualification for office
  - Power stems from State's basic obligation to preserve the basic conception of the political community
  - **Accordingly, State can discriminate based on alienage in:**
    - **(1) Voter Qualifications**
    - **(2) Persons holding state elective or important non-elective executive, legislative, and judicial positions**
    - **(3) For officers who participate directly in the formulation, execution, or review of broad public policy**
    - **(4) Those who perform functions that go to the heart of representative government**
  - This is no more than a recognition of the State's historical power to exclude aliens from participation in its democratic political institutions
  - Essentially – classifications within this exception get **RB review rather than SS**

Foley v. Connelie (1978)

- Uses the Dougall Exception to review a law excluding aliens from being State Troopers under Rational Basis – law upheld
- What is a State afraid of when it says that State Troopers must be citizens?
  - Government thinks aliens are untrustworthy and disloyal
- **In the enforcement and execution of the laws the police function is one where citizenship bears a rational relationship to the special demands of the particular position**
- What's so bad about alien cops?

Ambach v. Norwick (1979)

- Court applied the Dougall Exception to uphold State refusal to hire, as elementary and secondary school teachers, aliens who are eligible for citizenship but who refuse to seek naturalization
- Less demanding scrutiny is required when aliens are excluded from state functions that are bound up with the operation of the State as a governmental entity
- Rationale here
  - Importance of public schools in preparing individuals for participation as citizens and in the preservation of the values on which our society rests
  - Teachers' opportunities to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities
  - Thus, school teachers come within the governmental function exception

Bernal v. Fainter (1984) → governmental function exception doesn't extend to Notary Publics

Disability, Age, Poverty – Essentially is "Rational Basis w/ Bite"

Cleburne v. Cleburne Living Center, Inc. (1985)

- City denied a special use permit for the operation of a group home for the mentally retarded, acting pursuant to a municipal zoning ordinance requiring permits for such homes
    - APLLIED equal protection challenge and Court stuck the law with RB
- No such permits were required for apartment houses, multiple dwellings, boarding and lodging houses, frats or sorority houses, dorms, apartment hotels, hospitals, sanitariums, nursing homes, private clubs, or fraternal orders
- **Mental retardation is NOT a "quasi-suspect" classification**
    - Where individuals in the group affected by a law have distinguishing characteristics relevant to interests the state has the authority to implement, the courts have been very reluctant to closely scrutinize legislative choices as to whether, how, and to what extent those interests should pursued
    - Have declined to extend quasi-suspect classification to age (Mass. Board of Retirement v. Murgia (1976))
    - **Have to look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us → another reason not to make a blanket rule calling mental retardation quasi-suspect**
    - Much recent legislation intended to benefit the retarded also assumes the need for measures that might be perceived to disadvantage them
    - **Given the wide variation in the abilities and needs of the retarded themselves, governmental bodies must have a certain amount of flexibility and freedom from judicial oversight in shaping and limiting their remedial efforts**
- Other reasons for not applying Intermediate Scrutiny
    - Those who are mentally retarded have a reduced ability to cope with and function in the everyday world
        - Not all "mentally retarded" people have the same level of incapacity → how this large and diversified group is to be treated under the law is a difficult and often technical matter, very much a task for legislators guided by qualified professionals and not by the ill-informed opinions of the judiciary
    - Both national and state lawmakers have been addressing the difficulties of the mentally retarded in a manner that belies a continuing antipathy or prejudice and a corresponding need for mote intrusive oversight by the judiciary
        - Some legislatures may not act for fear of not meeting judicial standards
    - The legislative response to the needs of the mentally retarded negates any claim that the mentally retarded are politically powerless
    - Slippery Slope → if the large an amorphous class of the mentally retarded were deemed quasi-suspect, it would be difficult to find a principled way to distinguish a variety of other groups who can claim some degree of prejudice from at least part of the public at large: aging, disabled, mentally ill, infirm

- What about history of discrimination? But race is a much bigger issue
- Reasons the City gave for denying the permit – None of these are any good: **they don't withstand R/B analysis because the decision by the city appears to rest on an irrational prejudice against the mentally retarded**
    - (1) *Negative attitudes of neighbors*
        - **Mere negative attitudes, or fear**, unsubstantiated by factors which are properly cognizable in a zoning proceeding, **are not permissible bases** for treating a homes for the mentally retarded differently from apartment houses, etc.
        - Does this withstand analysis in 1985?
            - Bowers was decided in 1986 and "moral disapproval," which is really just code for "mere negative attitudes" was enough to sustain the law against gays
            - What about ANY plausible basis is OK to withstand R/B under equal protection? (FCC v. Beach) → that was economic context
            - What about Belle Terre case? Could exclude frat boys b/c they didn't what that as part of their neighborhood → sounds like a negative attitude...
            - What about Lee Optical? Can regulate one step at a time and just haven't gotten around to the other types of group housing...
        - BUT: Moreno → bare desire to harm a politically unpopular group is not a R/B for legislation
        - Point: This is a different brand of R/B scrutiny
    - (2) *Harassment from Jr. High kids located across the street*
        - Plenty of retarded actually ATTEND the school
    - (3) *Site located on a 500-year flood plain*
        - Why isn't this a concern with the other building you don't need a permit for
    - (4) *Doubts about the proposed residents' legal-responsibilities for their actions*
        - Why isn't this an issue with frat houses?
    - (5) *Concern for the size of the home and the number of people who would occupy it*
        - There would be lots of people inhabiting any of the other dwelling allowed on the property
- Is White just not being candid with us about the level of review?
    - Are we really doing something more than R/B?
    - But not bringing it to IM → isn't this just a fear of too much justice?

Sexual Orientation – More "Rational Basis with Bite"

Romar v. Evans (1996)

- Colorado Constitutional Amendment: repealed existing statutes, regulations, and ordinances, and policies of state and local entities that barred discrimination based on sexual orientation; ultimate effect is to prohibit adoption or re-enactment of any such measures unless the State constitution is first amended to allow such regulations
- FACIAL Challenge to the statue → and Court strikes it down with R/B Review
- State's Argument

    - The Statute puts gays in the same position as all other persons – so all the statute does is deny gays special rights
    - Kennedy's Response:
        - The amendment **withdraws from homosexuals, but no others, specific legal protections** form the injuries caused b discrimination, and it forbids reinstatement of these laws and policies, thus it puts them in a **solitary class** with respect to transactions and relations in both the private and governmental spheres
    - Scalia Dissent
        - More to Colorado S.Ct. Ruling: Amendment 2 is not intended to have any effect on general anti-discrimination legislation, but seeks only to prevent the adaptation of antidiscrimination laws intended to protect gays
        - Clear import is that general laws and policies that prohibit arbitrary discrimination would continue to prohibit discrimination on the basis of homosexual conduct as well
        - The Amendment prohibits SPECIAL treatment of homosexuals and nothing more → all that law prohibits is PREFENTIAL treatment
- **Can we call this law unconstitutional if we see it as a political fight?** SCALIA:
    - Political victories are subject to defeat and all this law did was resolve a political dispute within the state
    - Gays are geographically concentrated and have wielded their political power in these local areas to get special-treatment laws passed → all this Amendment did was counter that local influence by making it a state-wide issue
        - This amendment was passed by REFERENDUM!
        - This was a single-issue, single-shot referendum and the homosexuals just plain lost and now they are trying to seek constitutional protection from the court for losing a political battle
        - This is no good because the Court should stay out of politics
- There is nothing constitutionally requiring the State to enact specific anti-discrimination laws in favor of homosexuals, so why is it an issue to repeal those laws if they didn't have to be enacted in the first place?
    - The Feds could even repeal Title VII if they wanted to – and it would survive a disproportionate impacts test given how strict those tests are
    - What's the difference here?
- State Justifications
    - Respect for other citizens' freedom of association, and in particular the liberties of landlords or other employers who have personal or religious objects to homosexuality
    - Conserving resources to fight discrimination against other groups
    - Kennedy: The breadth of the Amendment is so far removed from these particular justifications that we find it impossible to credit them
    - Amendment 2 classifies homosexuals not to further a proper legislative end but to make them unequal to everyone else
- Kennedy explicitly strikes the law on Rational Basis
    - It lacks a rational relationship to legitimate state interests

    - (1) The amendment has the peculiar property of imposing a broad and undifferentiated disability on a single named group – a LITERAL violation of equal protection
        - "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most LITERAL sense"
        - Once state decides to protect certain groups – can't explicitly exempt one group from protection
        - But how is this any different from singling-out smokers or dog-owners, etc.?
        - Or saying no more welfare for unwed mothers? → there is no constitutional requirement to provide welfare either
    - (2) The amendment seems inexplicable by anything but animus toward the class that it effects
        - Moreno "bare desire to harm a politically unpopular group" as providing a basis for striking with Rational Basis
        - Classification of persons undertaken for its own sake – something equal protection does not permit
        - Only purpose is to make gays unequal to everyone else
- Scalia's take
    - What about Bowers? We upheld that law on Rational Basis with "moral disapproval" as the rational basis!
        - **Surely the only sort of "animus" here is moral disapproval of homosexual conduct, the same sort of moral disapproval that produced the centuries-old criminal laws that we held constitutional in Bowers!**
    - The society that eliminates criminal punishment for homosexual acts does not necessarily abandon the view that homosexuality is morally wrong and socially harmful; often abolition simply reflects the view that enforcement of such criminal laws involves unseemly intrusion into the intimate lives of citizens
    - We're not even putting them in jail – not a criminal statute – so doesn't even go as far as statute in Bowers
- So – perhaps we see this as the Court backing-off its stand in Bowers that moral disapproval is a legitimate and rational basis for legislation (which is the only time moral disapproval alone has been held to be a RB for a law)
- Is the majority overruling Bowers sub-silentio?
    - Nothing explicit
    - But they are aware of Bowers – however they could being thinking that's a due process case vs. this is an equal protection case
        - Would be saying moral disapproval is
            - (1) not a RB in equal protection; but
            - (2) is a RB is due process
- If Congress refused to put sexual orientation in a federal hate crimes statute, would that be unconstitutional?
    - No constitutional duty to pass Hate Crime statue
    - So why should they have a constitutional duty to include sexual orientation in it?

- Can Congress use its power under § 5 of 14th to protect gays from discrimination?
    - Yes – (ME) → following substantive content of 14th

Wrapping up the Gay-Marriage Debate

Are Bans on Same-Sex Marriage Constitutional, given Romar and Lawrence?

- What's interest is there in preventing gays from marrying besides animus?
    - No pro-creation
    - No stability of family unit
    - But – if marriage is fundamental right – history and tradition
        - But same shit as interracial marriage
    - So what interest, besides tradition, can justify a ban on gay marriage
    - Are we going to go on a natural law tangent from Griswold?
    - Legitimate state interest in morality?
        - ME: but morality changes
- Moreno as supportive – saying that bare desire isn't legit
- Bowers was only case to say morality, alone, was sufficient RB to uphold a law
    - Lawrence does away with this – (essentially)
    - Note White dissent in Beazer v. NYC Transit → dislike and negative attitudes not enough to sustain economic legislation under RB in that case – White wrote Bowers too
- Taken together, Lawrence and Romar can stand for the proposition that Court can't see any other justification for discriminating against gays besides animus – and that is not a rational basis for legislation
- **Now note: animus = negative attitude = "moral disapproval"**
- Now add on Cleburne – more justification for this view – animus (and its equivalents are not a rational basis for legislation)
- Now look at Moreno → hippie commune rule
- Lawrence + Romar + Cleburne + Moreno = animus/negative attitude/moral disapproval is not a rational basis for legislation
    - Note Moore v. East Cleveland too
- In cases upholding legislation where some animus was implicated – there is usually a "MORE" to it
    - Belle Terre → traffic/congestion/noise, etc. as interests
    - Polygamy? There's a more to that too – coercion/well-being of women (answer to Scalia's rant in Romar)
- Gay Marriage Context
    - Really can't see any other interest besides animus
    - Tradition? NO → Tradition = moral disapproval = animus
    - Think of broadness too: Military, CIA clearance, ADOPTION (Note that Florida allows gays to be foster parents but not adopt – where's the principled distinction?) What other interest besides animus?

Fundamental Interests and Equal Protection

Voting Rights

- There is no explicit right to vote in the Constitution

- But, a government based on a representative democracy assumes a right to vote
    - A right to vote in implied in the whole structure of our constitutional system
    - Several amendments also put limitations of discrimination in voting
- Why look to equal protection clause as constitutional basis for right to vote?
    - Why equal protection and why SS?
- What is the scope of the right to vote ?

Harper v. Va. State Bd. of Elections (1966)

- Court struck down a $1.50 annual poll tax
- There is a FUNDAMENTAL RIGHT TO VOTE – Why?
    - It is preservative of other basic civil and political rights, thus any infringement must be CAREFULLY AND METICULOUSLY SCRUTINIZED [i.e. SS for infringements on the right to vote]
    - We've never been confined to historic notions of equality
        - Notions of what constitutes equal treatment for purposes of equal protection DO change
        - Thus it doesn't matter whether the Framers of the 14th Amendment contemplated whether the equal protection clause would protect the right to vote
- Classifications based on wealth are subject to heightened scrutiny – they are "traditionally disfavored" (**have subsequently been said not to be a suspect class**)
- BUT...**wealth or fee paying has no relation to voting qualification: the right to vote is <u>too precious, too fundamental</u> to be so burdened or conditioned**
- Dissents: What the hell's going on here? This should be a RATIONAL BASIS – and there is clearly a rational basis
    - Collect Revenue
    - Traditional Part of Political Process throughout history
    - Weed-Out those who don't car about public affairs
    - Consistent with promoting civic responsibility
    - Better managed if restricted to these paying citizens
- Isn't this just more Lochnerizing?
    - Dissent: I thought we abandoned the "natural-law-due-process" formula? (Black, J.)
    - There is no explicit right to vote in the Constitution – so aren't we just making this up out of thin air?
- Would a FAIRLY-applied literacy test be constitutional? [class argument]

Kramer v. Union Free School Dist. No. 15 (1969)

- Court struck law providing that in certain NY School Districts residents may vote in the school district election only if they (1) own (or lease) taxable real property within the district, or (2) are parents (or have custody of) children enrolled in local public schools; Challenger was a single 31-year-old stockbroker who lived with his mother.
- Court applies SS for this voting restriction
- *<u>Why SS for infringements on our voting rights?</u>*
    - The franchise constitutes the foundation of our representative society – any unjustified discrimination in determining who may participate in political affairs

or in the selection of public officials undermines the legitimacy of representative government
    - The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to fairly represent all the people → **when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality**
    - THUS → need SS of any infringement of the franchise
- Court assumes, without deciding, that the State may have a Compelling interest in limiting the franchise to those "primarily interested in such elections"
- BUT...even with the assumption – **the statute does not meet the Narrow Tailoring requirement**
    - Law is OVER and UNDERINCLUSIVE
    - The classifications permit inclusion of many person who have, at best, a remote and indirect interest in school affairs and, on the other hand, exclude others who have a distinct and direct interest in the school meeting decisions
    - E.g. → Kramer is interested and feels directly affected, even though he is without kids or taxable real property, but does pay other state and federal taxes; however, an unemployed young man who pays no federal or state taxes, but rents an apartment in the district can vote (FN1)
- But, the law came from the NY legislature, and he voted for the legislators, so how is his right to vote violated?
    - He had a chance to vote for the people responsible for passing (and potentially repealing) the law
    - If didn't like the law he could vote the idiot legislator out
    - The legislators are accountable to the whole people
- The Governor could have appointed the school board so how does denying him the right to vote for them infringe anything?

Richardson v. Ramirez (1974)

- Exception to SS for disenfranchisement recognized in the case of ex-felons → State can constitutionally deny ex-felons the right to vote
- How do we justify no SS for ex-felons' right to vote?
    - "the exclusion of felons from the vote has an affirmative sanction which was not present in the case of other restrictions of the franchise."
    - Rehnquist finds "affirmative" support in Amend. XIV, § 2.
- Amend. XIV, § 2
    - Whole point of § 2 was to encourage SOUTHERN states to enfranchise black voters by threatening to reduce their representation in the House if they did not
    - As a historical note – Congress turned a blind eye to the Jim Crow laws and no southern state ever had their representation reduced in the House – thus this section was never enforced
    - But, the plain terms of § 2 excepts denials of the right to vote for "participation in the rebellion, or other crime"

    - Thus, the effect of § 2 is that a state will not be penalized in House representation if they deny the right to vote to those who have participated in the civil war or those who have committed other crimes (i.e. felons)
- Rehnquist reads this as a POSITIVE authorization to deny the right to vote to ex-felons – is it?
    - Just talking about reducing representation → not positive authorization, not talking about taking away right to vote
    - Isn't right to vote a separate concept from what's going on here? – aren't we conflating the concepts of House representation and the right to vote
    - Whole purpose of § 2 was an attempt to coerce the states to enfranchise blacks
- I read it as an implied understanding that states have always had the right to deny the franchise to ex-felons and the Framers of the 14th Amendment just didn't want any of the southern state to be penalized for legitimate denials of the right to vote
- Rehnquist: "those who framed and adopted the 14th Amendment could not have intended to prohibit outright in § 1 of that Amendment that which was expressly exempted from the lesser sanction of reduced representation imposed by § 2 of the Amendment"
- Should race matter here?
    - History of felon disenfranchisement laws in south were designed to suppress political power of blacks
    - Today: 13% of blacks can't vote because of felon disenfranchisement laws (1/6)
        - Doesn't this give a big argument for disparate impact of disenfranchisement of felon laws?

Access to the Courts – Criminal Appeals
Griffin v. Illinois (1956)

- Held: a state must provide a trial transcript or its equivalent to an indigent criminal defendant appealing a conviction on non-Federal grounds (State imposed a fee for transcripts, and that was invalidated)
- Court is concerned about the discriminatory effects of the fee requirement against the poor
    - "To deny adequate review to the poor means that many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set-aside"
- Black reaffirms McKane v. Durston (States not constitutionally required to provide appellate review) – how do we square McKane and Griffin?
    - Would also "deny relief" if no appellate courts and there would be no constitutional violation
    - Doesn't make sense since states can shut down the appeal process all together
    - (1) Right to appeal is historically civil, not criminal
    - (2) At adoption of constitution, no right to criminal appeal
    - (3) Criminal appeal not granted til late 1800s – so hard to ground in historical due process
- But would it be constitutional to abolish all federal criminal appeals? How do we argue against this?
    - We would allow one judge to determine life, liberty, and property? (In a Death case?)

- Where else in our legal system do we have such a process?
- There is a 40% reversal rate for Death Sentences! Would we allow a clearly erroneous decision of law to stand?
- ME: concept of due process has changed in the last 200 years – appeal is part of history and tradition of modern due process
- J. Frankfurter concur (from Chemerinsky): The right to an appeal from a conviction for crimes today is so established that this leads to the easy assumption that it is fundamental to the protection of life and liberty and therefore a necessary ingredient of due process.

Douglas v. California (1963)

- A state must appoint counsel for an indigent defendant for the FIRST appeal, granted as a matter of statutory right, from a criminal conviction
- Didn't rely on the 6th Amendment because the appellate process is not traditionally considered part of the criminal process
- Constitutional evil was DISCRIMINATION AGAINST THE INDIGNENT
  - Equal judgment can't depend on the wealth of the defendant
  - Specific law at issue was that a judge would review the record and if an appeal was deemed "meritorious," the state would appoint counsel
  - Is this about rich v. poor or meritorious v. frivolous appeals?
    - Rich man can pay attorney to argue a frivolous appeal – he will still lose
    - Why should state pay for an attorney to argue frivolous appeal?
    - Is it unreasonable to make poor person jump through a hoop rich person doesn't? States do it all the time....
    - If case is non-frivolous, then poor man will get an attorney
  - **But maybe judge will not see the merit in the case without help of counsel's arguments**
- Harlan Dissent
  - General applicability with disparate impact is OK
  - Equal protection isn't affirmative duty to lift handicaps flowing from differences in economic circumstances
  - If you want to talk due process: surely it cannot be contended that the requirements of fair procedure are exhausted once an indigent has been given an appellate review

Ross v. Moffitt (1974)

- Refused to extend Douglas right of appellate counsel to indigents seeking discretionary review
- Why doesn't discretionary review require the appointment of counsel?
  - Due Process protections certainly apply to discretionary appeals
  - Rehnquist CONCEDES that an indigent defendant seeking discretionary review is handicapped without counsel when compared with a rich defendant – why doesn't this matter?
    - Significant difference between the trial and appellate stages – Douglas gave you a free attorney to prepare a brief from nothing but the trial

record; when seeking discretionary review, there are more tools, such as an already written brief and opinions from the lower appeals
- Trial: converting from presumed innocent to convicted criminal – need lawyer (see Gideon)
- Appeals: D initiates proceeding to overturn a finding of guilt → D needs an attorney on appeal not as a shied to protect him, but rather as a sword to upset the prior determination of guilt
  - But the State is not required to provide criminal appeals (McKane)

- Unfairness occur only in poor are singled out by the state and denied meaningful access
  - "The fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required"
  - Duty of State is only to give Defendant an opportunity to present his claims fairly in the State appellate process

- Equal Protection not violated
  - 14th doesn't require absolute equality or to make economic differences among Ds equal
  - Just adequate opportunity to present claims and make sure poor D isn't entirely cut off from any appeal that is statutorily provided as a matter of right
  - Not providing Counsel for discretionary review doesn't deny poor meaningful access to a court of last resort
- Point of S.Cts. is not to correct errors of law – it is to advance an agenda about where the law should be going – S.Cts. don't take every case
  - This is a very different part of the appeals process
  - What we care about here are splits in circuits or new issues of law that need to be decided – how is this a determination of right? It's not.
- So bottom line is that there needs to be a stopping point – and its discretionary review – Douglas is the line in the sand

Access to the Courts – Civil Litigation and Economic Barriers

Boddie v. Connecticut (1971)
- Can't deny access to the courts for a divorce because of inability to pay court costs
- Grounded in notion that marriage is a fundamental right, thus can't deny only legal means to get out if it
- Test (from Little v. Streater (1981))
  - Can't bar access to court because of inability to pay if
  - (1) No choice of alternative forum; and
  - (2) Constitutionally Significant Interest

M.L.B. v. S.L.J. (1996)
- State can't require payment of transcript fee for an appeal of the termination of parental rights
- How does court distinguish this case from earlier cases applying Rational Basis to transcript-fee requirements in CIVIL litigation?

    - "The accusatory state action she is trying to fend off is **barely distinguishable from criminal condemnation** in view of the magnitude and permanence of the loss she faces"
    - This case falls into an exemption involving state controls or intrusions on family relationships → thus a more "close" examination of governmental interest in the intrusion
- The SOURCE of the right
    - Griffin rested on Due Process and Equal Protection
    - Equal Protection implicates fencing-out certain parties because they can't pay a fee
    - Due Process concerns the essential fairness of state-ordered proceedings anterior to adverse state action
    - MOST of the time → Cases like this rest on EQUAL PROTECTION
- Relevance of Mayer v. Chicago (1971)
    - Held: a petty offender who was fined $500 was entitled to a free transcript for appeal because of "stakes" for the defendant (he was a medical student and was afraid of being denied a license)
    - Similarly here, the stakes for M.L.B. are large and more substantial than mere loss of money
    - Some have called Mayer an unjustified extension of Griffin because if the offender wasn't even entitled to an free attorney at trial (for a petty offense), who should he be entitled to a free transcript for appeal?
        - Isn't Mayer a relic of the Warren Court that should be overturned?
        - Shouldn't Griffin only apply to CRIMINAL cases?
    - What about Lassiter v. Dept. of Social Services (1981)?
        - You're not entitled to a free attorney in a parental rights proceeding
        - Shouldn't this start our analysis and not Mayer?
        - If you're not entitled to an attorney at trial, why should you be entitled to a free transcript to appeal?
- How does Ginsburg deal with cases like Harris v. McRae that explicitly state that the government doesn't have to subsidize your exercise of your constitutional rights?
    - McRae: Don't have to fund abortions for poor women
    - She again equates this action to a "quasi-criminal" proceeding and frames it as the parent trying to defend against the State's destruction of her familial bonds and resist the branding of parental unfitness – like a criminal defendant she seeks to be spared from the State's devastatingly adverse action
    - **BUT...if the State doesn't have to fund your fundamental right to an abortion – why should they have to fund your exercise of your fundamental family right?**
    - How do we distinguish Harris?
        - Here: STATE is taking action against woman that has devastating consequences
        - Difference: State is not the one taking the abortion action?
- Ginsburg concedes that they wouldn't even have to give her an appeal (2d¶ of opinion) – but once the state affords that right, they can't bolt the door (see Griffin)
- What about the slippery slope?

    - Are we now going to give free transcripts to appeals of
        - Paternity suits?
        - Custody decisions? (see Troxel)
        - Evictions?
        - Foreclosures?
        - Where does the fundamental family interest end?
    - Last paragraph tries to limit the case to appeal of termination of parental rights – but still – the reasoning can take us far
- Thomas Dissent
    - No effective way to restrict this opinion to this case
    - She got plenty of Due Process at trial
    - What about Washington v. Davis?
        - No principled distinction between facially neutral statute (in race context) and a facially neutral law that prevents P from taking an appeal without paying for a transcript
        - **Why does a non-suspect class get more judicial protection than a suspect class from a neutral law?**
            - Surely Davis would govern this if there was a claim of discriminatory impact on obtaining a transcript based on RACE
            - And we know that Davis is a rather strict test: Discriminatory Purpose – b/c of versus in spite of
        - This is a NEUTRAL rule → everyone who wants to appeal has to pay – yeah there's a disparate impact – but Davis controls because it is a neutral rule
        - Griffin doesn't survive Davis
- ME: we're messing with intersection of DP and Equal Protection
    - DP Issue: State can't infringe on fundamental liberty interests – i.e. abortion or family privacy rights
        - Argument here: how is there a line between not funding abortion, but funding the transcript to allow exercise of familial privacy rights?
    - Equal Protection Issue: Classifying Poor vs. Rich
        - But Poor aren't a suspect class
        - And this is a neutral law to be subject to Davis and its progeny → overruling disparate impact is hard

Education

San Antonio Indep. School Dist. v. Rodriguez (1973)

- Upheld Texas' system of funding local school districts with local property taxes; complainants alleged that discriminated against the poor because of interdistrict disparities in per-pupil expenditures
- Wealth is NOT a suspect classification
    - Note Powell's test derived from FN4 of Carolene Products he uses in Frontiero (above – Gender) – do you agree that wealth is not a suspect classification?

    - The individuals or groups of individuals who constituted the class discriminated against in our prior cases (Griffin, Douglas) shared two distinguishing characteristics:
        - (1) Because of their impecunity they were completely unable to pay for some desired benefit, and
        - (2) As a consequence they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit
    - These distinguishing characteristics of wealth that we have considered relevant in the past aren't here
        - First, there is reason to believe that the poorest families are not necessarily clustered in the poorest property district
        - Second, lack of person resources has not occasioned an absolute deprivation of the desired benefit
            - Claim is QUALITY of education, NOT complete DEPREVATION of education
    - Where wealth is involved, equal protection does not require absolute equality or precisely equal advantages
    - Last, can't say that there is DISTRICT wealth discrimination
        - This has no traditional indicia of suspectness (Frontiero and FN4)
        - Class is too large, diverse, and amorphous, unified only by common residence in a district that happens to have less TAXABLE wealth
- Education is NOT a Fundamental Interest under Equal Protection
    - No Explicit or Implicit protection in the Constitution – that's how we determine a fundamental interest under Equal Protection
    - Voting – implicit in structure
    - Travel – implicit – Commerce Clause would make no sense without this right
    - Marshall Dissent: NEXUS THEORY between Education and Speech
        - Powell's response: *We have never presumed to possess either the ability or the authority to guarantee to the citizenry the most EFFECTIVE speech or the most INFORMED electoral choice*
- Thus, No Suspect Class and No Fundamental Interest means RATIONAL BASIS Test
    - State Interests
        - Policy choices in how to raise and distribute local tax revenues
        - Autonomy of educational policy
    - These satisfy Rational Basis because they are areas of traditional local concern that the court lacks to expertise and specialized knowledge to make the wisest decision for Texas
    - Thus, we defer to the legislative choice
    - Judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe continued research and experimentation
    - It is inevitable that some localities are going to be blessed with more taxable assets than others and wealth is not a static quantity
    - The ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them

Plyer v. Doe (1982)

- The exclusion of the children of illegal immigrants from Texas public schools is unconstitutional as violative of equal protection
- Standard of Review is RATIONAL BASIS
    - Illegal Aliens are NOT a suspect class (FN1)
    - Education is NOT a fundamental interest
    - How does Brennan get away with striking the law?
        - Blackmun suggests that something more than RB is going on here
- The Law has NO RATIONAL BASIS
    - **The law imposes a lifetime hardship on a discrete class of children not accountable for their disabling status**
    - Denying education here is an affront to an established goal of equal protection: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of **individual merit**
    - [cites illegitimacy cases]
    - Costs to innocent children who are the victims means State needs a substantial goal to further; **point is that children have no control over the situation**
    - Rejects the following proffered interests
        - Discouraging illegal immigration
        - Avoiding burdens on public schools
        - Reserving public education for those likely to reside later within the state
- Is the "lack of control" rationale consistent with prior cases?
    - Can delineate mentally retarded vs. mentally ill – patient has no control over this (Cleburne)
    - No control over living in an un-wealth property district (Rodriguez)
    - Here: no control over government deporting them
- These kids are indeed subject to the equal protection clause
    - "any person" → doesn't say "Citizen" and the framers sure as hell knew how to use that word
- Argument that they're here illegally (Dissent)
    - But all concede that they're not getting deported
    - So what rational basis is there for throwing the kids on the street to end up as criminals?
- But why is the "preservation of state resources" argument no good?
    - 1994 study - $3.1 Billion spent of education on illegal aliens' kids – that's no small chunk of change
    - Aren't we saying that TX has to go bankrupt before they have a RB?
    - Congress is excluding illegal aliens from social welfare programs – so what's wrong with what Texas is doing to their kids?
    - Couldn't state have rationally found $ outlays for educating them exceeds potential future cost of crime
    - Isn't education like a governmental benefit like social welfare programs?
- Kadrmas v. Dickinson Public Schools (1988)
    - O'Conner later calls this an application of IM scrutiny and attributed it to the unique circumstances of the case

Citizenship and Travel Rights
Zobel v. Williams (1982)

- Dividend program for Alaska citizens based on length of residence, which operated **retrospectively and prospectively**, declared unconstitutional as violative of equal protection
    - **Program was retroactive to year of statehood** and also operated prospectively for residents who moved to Alaska
- This case differs from the durational residency requirement cases
    - The asserted purpose in those cases was to establish only that only bona fide residents could get state benefits
    - No bona fide residency issues here – the law creates fixed, permanent distinction between concededly bona fide residents based on their length of residence
- Court does not rely on the right to travel here
    - FN3: In reality, right to travel analysis refers to little more than a particular application of equal protection analysis. Right to travel cases have examined, in equal protection terms, state distinctions between newcomers and longer-term residents. Here, we apply equal protection
    - The right to travel doesn't provide a justification for striking this law per se → need to actually do this in equal protection terms
- Rational Basis Review
    - Are Alaska's justifications rationally related to the classification (the means to the end, which is the justification)?
    - Legit Interest/Rationally Related Means
- Alaska proffers Three Justifications
    - (1) Creation of a financial incentive for individuals to establish and maintain residence in Alaska
        - Response: *Not rationally related to classification*. The State's interest is not in any way served by granting greater dividends to persons for their residency during the 21 years prior to the enactment
    - (2) Encouragement of prudent management of the Permanent Fund
        - Response: *Not rationally related to classification*. This doesn't support retrospective application either – this interest is not served by giving greater dividends to people who resided in Alaska 21 years before the enactment
    - (3) Apportionment of benefits in recognition of undefined "contributions of various kinds, both tangible and intangible, which residents have made during their years of residency" → **Past Contributions justification**
        - Response: *Not a legitimate state objective* (goal/end). "This reasoning would permit the State to apportion all benefits and services according to the past tax (or intangible) contributions of its citizens. ***The Equal Protection Clause prohibits such an apportionment of state services***."
        - See Shapiro (p.23 – welfare not until a year case)
        - The only apparent justification for the retrospective aspect of this program, "favoring established residents over new residents," is constitutionally unacceptable.

        - Allowing this would permit the states to divide citizens into expanding numbers of permanent classes.
        - This reasoning leads to a slippery slope → what would preclude varying university tuition, access to civil service jobs, etc.?
- Court does not decide if prospective application would be OK
    - OK on right to travel – in fact encourages it (here's a check for $1500)
    - Why would it be constitutionally suspect?
- Brennan's Reasoning for Unconstitutionality of Retrospective Application
    - (1) It violates the right to travel
    - (2) It violates the Citizenship Clause of the 14th Amendment (§ 1, cl.1)
        - This expressly equates citizenship only with simple residence
        - The Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence
        - Equity of citizenship is of the essence in our republic
- Brennan's exposition of the Citizenship Clause
    - The Constitution does not bar the States from making reasoned distinctions between citizens → If they meet the RB test, they are OK
    - But, length or duration of residence is never a valid justification for discrimination → it is irrational
    - The discrimination must be supported by a valid state interest independent of the discrimination itself
        - E.g. allegiance and attachment to the state may be rationally measured by length of residence, and that may bear some rational relationship to a LIMITED number of state purposes (like residency qualifications to be governor)
        - But these instances are RARE
    - But does this argument prove too much? How do the following classifications survive the citizenship clause under this reasoning?
        - Tax deductions for mortgage and none for rent
        - Preferences for Veterans
        - Don't these create classes of citizens?
            - ME: but these don't have to do with length of residence → perhaps these are rationally related to a legitimate interest? Are these the "reasoned distinctions" between citizens?
- O'Connor
    - Strikes the program on art. IV Privileges and Immunities
    - Two Part Test for a violation (fail it and there's a violation)
        - (1) There must be something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed
        - (2) the Court must find a substantial relationship between the evil and the discrimination practiced against the non-citizens
        - [test not me]
- What about Rehnquist dissent?
    - Isn't this just economic legislation that should get RB? Doesn't this solve the problem of the citizenship clause going too far?
    - Doesn't it encourage right to travel?

  - Doesn't P&I only deal with NONCITIZENS of states and not citizens, like is the case here?
  - What the hell's irrational about giving people money to come live in your state? Doesn't it encourage travel?
- Would Citizenship Clause have helped us Strike Amendment 2 in Romar?
  - Wasn't Col. dividing citizens into different categories?
  - Did Amendment 2 violate citizenship clause?
  - ME: No – it was preventing a class of citizens from getting any special treatment → it was keeping them on a level playing field; see Scalia dissent
    - But on Kennedy interpretation of the Amendment → its not a "reasoned" distinction between citizens

State Action under the Civil War Amendments

- General Question: Who is a "state actor" for Constitutional Purposes?
- Who is bound by the Constitution and who does not have to follow it?
- About WHO the Civil War Amendments can be enforced against
- To what extent can congress go beyond the Court's notions of state actors and apply the substance of the 14th Amendment and 15th Amendment against seeming private actors? (This is about applying the SUBSTANCE already declared by the Court to seemingly private actors)

Original Notions of State Action

The Civil Rights Cases (1883)

- Grew out of CRA1875 and continued exclusion of blacks from hotels, theatres, and RRs
- CRA1875 is BEYOND Congress' power under the 14th Amendment
  - "It is a State action of a particular character that is prohibited by § 1. Individual invasion of individual rights is the not subject matter of the amendment."
  - **Congress' only power under § 5 enforcement provision is to adopt appropriate legislation for correct the effects of discriminatory STATE laws and acts**
  - Regulating individuals is the domain of local jurisprudence
- Can a private individual violate another person's constitutional rights?
  - "Civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful act of individuals, unsupported by State authority."
  - "**The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual**"
  - STATE LAWS regulate private conduct and the 14th Amendment in turn polices those state laws to make sure they are in compliance with the Constitution
- What good is the right to vote or the right to travel if you can't enforce private discrimination?
- Dissent: Harlan's reading of the 14th Amendment – the CITIZENSHIP CLAUSE
  - The citizenship thus acquired may be protected, not alone by the judiciary, but by congressional legislation of a primary, direct character; this, because the power of

Congress is not restricted to the enforcement of prohibitions upon State laws or action
    - **Citizenship Clause grants an affirmative right that can be protected by the judiciary and congressional action that is direct from § 5**
    - What rights are secured by the citizenship clause?
        - Right of state citizenship
            - Exemption from race discrimination in respect to any civil right belonging to whites
        - American Citizenship
            - Fundamental to this that persons be treated the same by those exercising public functions
    - Why can't congress enforce the essence of state and national citizenship against individuals with § 5?
        - Isn't it the essence of citizenship to
            - Travel around the country
            - Go into an inn
            - Vote without being lynched
            - ...without discrimination on the account of your race?
    - But is this proving too much? Would you say that you have a citizenship right that outweighs have to PAY to ride the RR?
- Majority (Bradley) does not agree with Harlan on the scope of congressional power under 14th Amendment
    - Bradley: limited to regulation of official state action
    - Harlan: Can reach private individuals with the Citizenship Clause
- **But if Congress can regulate people at the local level, what happened to Federalism?**
- 13th Amendment Arguments
    - Bradley
        - **Legislation pursuant to § 2 of the 13th Amendment can be primary and direct upon the individual** (i.e., no State action is required by the Amendment)
        - But the discrimination at issue here just isn't closely enough tied to slavery to warrant a legitimate exercise of congressional power
        - "It would be running the slavery argument into the ground to make it apply to every act of discrimination which a person may see fit to make as the guests he will entertain, or as to the people he will take into his coach or cab or car, or admit to his concert or theatre, or deal with in other matters of intercourse or business"
        - Essentially: "mere discrimination is not slavery"
    - Harlan takes the opposite position
- This is the same court that decided Plessy v. Ferguson – so what weight should we give this ruling?

Modern Notions of State Action: Court Announced Limitations on the Constitutional Meaning of "State Action"

Public Functions

Marsh v. Alabama (1946)

- This case dealt with Chickasaw, Alabama → a "company town" – a town owned by a PRIVATE corporation and their ability to have someone arrested for trespass who was distributing religious literature (First Amendment rights implicated) on the town's premises
- Held: a Corporation that who owns titles to a town cannot justify impairing the public's interest in the functioning of the community in such a manner that the channels of communication remain free
- Rejected that a corporation had a right to control the inhabitants the way a homeowner can control the conduct of his guests
- Rationale: "**Since these facilities are built and operated primarily to benefit the public and *since their operation is essentially a public function*, it is subject to state regulation**"
    - **Operating a Town = a PUBLIC FUNCTION**
    - Test: *Balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion* → The First Amendment occupies the preferred position
- Does NOT look at the nexus between the private action and the state → operating a town is simply a public function that subjects the operator to Constitutional restraints
- What about colleges, like Cornell, that have their own "towns," except they are in the form of campuses that mesh in with the town in which they are located?
    - They have their own police, fire, housing, and eating facilities
    - Are these Colleges the equivalent of Chickasaw?
    - Note: **Marsh does NOT apply to shopping centers** – shopping center owners are NOT engaged in "state action" → Hudgens v. NLRB (1976)
    - So are the colleges more like a town or a shopping center?
        - If Cornell is functioning like a little city – they can't kick off protesters because bound by 1st amendment
        - No real demarcation between Ithaca and Cornell – what if you accidentally wander onto College property? – can they get you for trespassing?
        - Can Silber keep protesters off of Marsh Plaza?

Evans v. Newton (1966)

- Will of Sen. Bacon created a trust to be used for the operation of a WHITE ONLY park in Macon, Ga. in 1911
- City resigned as trustee and trust was transferred to private trustees
- Held: The service rendered even by a private park of this character is municipal in nature → a PARK is more like a fire department or police department that traditionally serves the community
- State Courts that aid private parties to perform such a public function on a segregated basis implicates the State in conduct proscribed by the 14th Amendment
- **Operation of a Park = Public Function**

White Primary Cases

- Smith v. Allwright (1944): Delegation of the State function of conducting an election makes the private party's actions the action of the State
- Terry v. Adams (1953)
    - The Whites-Only democrat club (Jaybird) held pre-primary elections to determine who would run in the Democratic primary – the winner of the Jaybird primary typically ran unopposed in real primary
    - "When a state structures its electoral apparatus in a form which devolves upon a political organization the uncontested choice of public officials, that organization itself, in whatever disguise, takes on those attributes of government which draw the Constitution's safeguards into play"
- Essentially: **Any kind of election – if related to a public office – is a PUBLIC FUNCTION**

Jackson v. Metro. Edison Co. (1974)

- Issue: whether a privately-owned utility company was bound to give procedural due process (notice, hearing, etc.) before terminating service
- Test: Whether the alleged action by the private entity includes *the exercise of powers **traditionally exclusively** reserved to the State*
    - This is the law today
    - Test not met in the case of a **PRIVATE UTILITY**
        - **Private Utility = Not traditional exclusive function of the State**
        - Usually have been private entities, although regulated big time by the state
        - What if they shut off her power because she was black?
            - This wouldn't be subject to the constitutional either, right?
        - Police, Fire, Garbage could be seen as dealing with the public more as state service, etc.
    - Operating a business "affected with a public interest" is not enough, without more, to convert their actions into the actions of the State → It is simply enough to justify BIG TIME regulation of the business BY the State
- Rehnquist Decision
- What about a private business running a jail?
    - Is this a public function?
    - Is private business running jail subject to the constitution?
- What about garbage collection? Is the business now subject to constitutional restraints?
    - Garbage is traditionally done by the state...
- Marshall plays the race card in dissent

Flagg Bros., Inc. v. Brooks (1978)

- Warehouseman wants to sell P's shit after Sheriff deposited it there subsequent to an eviction in order to satisfy the warehouseman's lien → UCC authorized such a sale and P sues for violation of procedural Due Process
- THIS IS NOT STATE ACTION
    - "While many function have been traditionally performed by governments, very few have been EXCLUSIVELY RESERVED to the State."
    - Utilizing the State's system of rights and remedies alone is not enough to implicate State Action

    - Creditors and Debtors have other remedies available to them
        - UCC
        - Replevy
    - Wholly unlike Chickasaw or White Primaries
- **State has to <u>delegate traditionally exclusive powers</u> for you to be considered a state actor on the public function rationale**
    - (1) running a town
    - (2) maintaining a public park
    - (3) running an election
- Rehnquist trying to put limits on what is state action because potentially any judicial enforcement of private agreement could be construed as state action

"Significant" State Involvement

<u>Shelley v. Kraemer</u> (1948)

- Holding: Invalidated judicial enforcement of race-restrictive housing covenants
- Re-Affirms the <u>Civil Rights Cases</u> – this is presumably still good law (how do we fit it into this framework though?)
- **Race-Restrictive Covenants, STANDING ALONE, cannot be regarded as violative of any rights guaranteed by the 14th Amendment**
    - The 14th Amendment erects no shield against merely private conduct, however discriminatory or wrongful (see Civil Rights Cases)
    - So long as the race-restrictive covenants are effectuated by VOLUNTARY adherence to their terms, there has been no State Action that qualifies as violative of the 14th Amendment
    - <u>But what about the CITIZENSHIP CLAUSE?</u>
        - What was the fucking point of the Civil War?
        - Isn't the ability to purchase Real Property a fundamental guarantee of citizenship? And doesn't the Citizenship Clause, BY ITS TERMS, apply to individual conduct?
        - But then again → the Citizenship Clause is a steep slippery slope
    - <u>What about the 13th Amendment?</u> → do these covenants violate the 13th Amendment, which ALSO applies to individual conduct?
        - Isn't this discrimination a badge or incident of slavery?
        - Couldn't congress outlaw these kinds of racially restrictive covenants with § 2 of the 13th Amendment?
        - (Maybe → deal with § 2 of 13th Later)
- WHERE is the State Action here?
    - ***The action of State Courts and judicial officers in their official capacity is action of the State within the 14th Amendment***
    - **<u>BUT FOR</u>** the active intervention of the state courts, supported by the full panoply of state power, blacks would be free to occupy the properties in question WITHOUT restraint (pretty strong causation statement)
    - It is the difference between judicial ACTION and judicial INACTION that is keeping the blacks out – this is State Action
    - The States have made available the full COERCIVE POWER of government to deny blacks the enjoyment of property rights based on race

- Problematic Issues
    - Doesn't this make EVERY private agreement a subject of State Action?
    - Why is state action involved when all the state is doing is giving legal effect to an agreement that an individual is free to make?
    - Is Shelly confined to willing buyers and sellers, or is it a broader rule? Is this is Shelly anywhere? Well...not really...but...re-affirms Civil Rights Cases – so ruling must be within purview of civil rights cases (and broad judicial enforcement would make everything state action)
- The ORIGIN of the discrimination DOES NOT MATTER
    - It is of no consequence that the pattern of discrimination was initially defined by the terms of a private agreement
    - State Action for the 14th Amendment refers to exertions of state power in all forms → this means judicial enforcement of private agreements too

Evans v. Abney (1970)

- Park in Evans v. Newton REVERTED back to Sen. Bacon's heirs since the trustees couldn't carry-out the terms of the trust due to the public function ruling
- Ruling allowing the park to revert and thus be closed didn't constitute state discrimination under the 14th Amendment
    - The effect of the Georgia decision *eliminated all discrimination against Negroes in the park by eliminating the park itself,* and the **termination of the park was a loss shared equally by the white and Negro citizens** of Macon.
    - Any harshness that may have resulted from the State court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Sen. Bacon's will.
- Why didn't the judicial enforcement of the reverter implicate State Action? It seems like it would have under Shelley → but then court tries to get around Shelley by saying there was no discrimination

Burton v. Wilmington Parking Authority (1961)

- Coffee Shop was a lessee in a parking garage owned by Wilmington Parking Authority, a state agency → The Coffee Shop discriminated on the basis of race
- Is this State Action?
- "To fashion and apply a precise formula for recognition of state responsibility under equal protection is an impossible task" → Thus, each case must be taken on a case-by-case basis and the Court must weigh the involvement of the State in the private conduct to ascertain its true significance
    - Will not find state action when only tangentially connected to the private conduct
    - **Will only find State Action when the state has been found to be involved in the private conduct TO SOME SIGNIFICANT EXTENT.**
    - Is Burton a retreat from Shelley?
        - Shelley = Any/Some State Involvement is enough
        - Burton = State needs to be involved to some SIGNFICANT extent
- What's the State Action here?
    - The Land and Building were publicly owned

    - The building, as an entity, was dedicated to public uses in performance of the Authority's essentially governmental functions
    - Property was not surplus → it was part of state's plan to operate its project as a self-sustaining unit
    - The PROFITS earned FROM DISCRIMINATION not only contributed to, but are indispensable elements in, the financial success of a governmental agency
    - It was an integral part of a building providing public service
- *No State may effectively **abdicate its responsibilities by either ignoring them** or by merely failing to discharge them whatever the motive may be...**by its <u>INACTION</u>, the State has not only made itself a party to the refusal of service**, but has elected to place its power, property and prestige behind the admitted discrimination*
    - ISSUE: State didn't include a non-discrimination clause in its lease!
    - Suggests an affirmative duty to do so and they have become a party to the discrimination by their INACTION
    - I.e. STATE TOLERANCE of the challenged action or inaction is enough to implicate state action for constitutional purposes
- Key to Relationship Between State and Private Actor: **The position of INTERDEPENDENCE makes it a JOINT PARTICIPANT in the challenged activity** → thus we can't call it "purely private"
- STEWART Concurrence
    - There is a State Law providing that a restaurant may "refuse service to persons whose reception or entertainment by him would be offensive to the major part of his customers"
    - The State Court has construed this law as authorizing a discriminatory classification based on race
    - Thus, the Law is unconstitutional on regular equal protection analysis

<u>Moose Lodge No. 107 v. Irvis</u> (1972)

- Court rejected a claim that a private club's racial discrimination was unconstitutional because it held a state liquor license
- Rehnquist Distinguishing <u>Burton</u>
    - State must have significantly involved itself with invidious discriminations
    - Here, there was *nothing approaching the symbiotic relationship between lessor and lessee*
    - Here, we don't have the state courts enforcing a private rule of discrimination
- What is the effect that the liquor license has for state action?
    - NOTHING
    - **A regulation must FOSTER and ENCOURAGE racial discrimination to be state action – a liquor license does neither**
    - Even though liquor licenses are limited in number, it falls far short of conferring upon club licensees a monopoly in the dispensing of liquor
- What about a State "abdicating" its responsibility to prevent itself being used as a party to invidious discrimination by its inaction?
    - Shouldn't non-discrimination have been a term of the license?
    - **<u>Moose Lodge</u> cuts back on the "abdication by inaction" part of <u>Burton</u>**

Reitman v. Mulkey (1967)

- Cal. voters enacted Prop. 14, amending the state constitution to prohibit the state from denying "the right of any person to decline to sell, lease, or rent real property to such persons as he, in his absolute discretion, chooses"
    - Bottom Line: repealed California's fair housing laws
    - S.Ct. affirms Cal. S.Ct.: The Cal. situation is "undeniably analogous" to the state "authorization" of racial discrimination, as found in Burton
- Court's holdings
    - Note, they principally adopted the Cal. S.Ct.'s interpretation of Prop. 14 and its holding regarding it: That it was an intended to allow discrimination in the housing market → Cal. prerogative to interpret their own laws
    - Prop. 14's INTENT was to authorize private racial discrimination in the housing market and to create a Constitutional right to discriminate on racial grounds
    - The IMPACT of Prop. 14 would be to encourage and significantly involve the State in private racial discrimination since a private discriminator can now point to an express constitutional right in his favor
- BUT...the mere repeal of an antidiscrimination law DOES NOT establish unconstitutional state action
    - Read together – seems like S.Ct. is harping on the INTENT finding
    - Also, Court has a big issue with the supposed AUTHORIZATION of private discrimination by the State
    - So...**look to state INTENT and AUTHORIZATION of private discrimination**
- Harlan Dissent
    - Cal. didn't HAVE to have an antidiscrimination law so how is it a constitutional violation to repeal one?
    - This is the straightforward application of a facially neutral statute
    - The whole theory of the majority is just a TRUISM
        - Every act of private discrimination is either forbidden by state law or permitted by it
        - Thus, there will always be some kind of state encouragement of private discrimination...where do we draw the line?
        - The denial of equal protection emerges only from the conclusion that the implementation of a new policy of governmental neutrality has the effect of lending encouragement to those who wish to discriminate → THIS IS A TRUSIM
- Does this holding survive Washington v. Davis?
    - Intent?
    - Because of vs. In Spite of?
- What does this say about the constitutionality repealing antidiscrimination laws?
    - Maine repealed all of its gay discrimination laws; this was different from Romar because in Romar Col. banned the adoption of any anti-gay discrimination laws too
    - What about Congress repealing Title VII?
        - No requirement that congress enact it...
        - Even with stipulation that private employers may start to discriminate more; Under logic of Reitman → could be an issue

        - Is this a reason for saying Reitman was wrongly decided? Isn't this a political issue?
    - Are these actions really state actions in the sense that they encourage private discrimination and thus violate the 14th Amendment?

Jackson v. Metro Edison Co. (1974)

- Issue is whether a private utility company, because of extensive state regulation as the holder of a certificate of public convenience from the Penn. Public Utilities Commission, is a state actor who must afford procedural due process (i.e. notice and a hearing) before the termination of service
- The mere fact that a business is subject to regulation does not turn that business into a state actor. Nor does the fact that the regulation is extensive and detailed (as in most public utilities) turn the business into a state actor
- TEST: *Whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself*
    - Monopoly status alone doesn't confer state action (Pollak, Moose Lodge), and Metro Edison isn't even a monopoly
    - **The State has not "specifically authorized and approved" the utility's termination practice because THEY DID NOT COMPEL IT**
        - The State approved Metro Edison's termination practice, but "approval by a state utility commission of such a request from a regulated utility, where the Commission has not put its own weight on the side of the proposed practice by ordering it, does NOT transmute a practice INITIATED BY THE UNTILITY and approved by the Commission into "state action"
        - *The challenged termination procedure **was initiated by Metro Edison** AND NOT the State, thus no state action*
    - No Symbiotic Relationship as in Burton
    - "At most, the Commission's *failure to overturn* this practice amounted to no more than a determination that the utility was authorized to employ such a practice if it so desired"
        - Chipping away at Burton again – Rehnquist is ignoring precedent
        - Also, the origin of the alleged constitutional violation didn't matter in Shelley – here is does
        - These aspects of Burton and Shelley appear no longer to be good law
- State putting clauses in Ks saying to follow the constitution: Burton = compelled to do so, Jackson = NO
- What about Marshall's point that they would have to find the same result if they terminated the service based on race?

Flagg Bros., Inc. v. Brooks (1978)

- Warehouseman wants to sell P's shit after Sheriff deposited it there subsequent to an eviction in order to satisfy the warehouseman's lien → UCC authorized such a sale and P sues for violation of procedural Due Process

- Jackson and Moose Lodge stand for the proposition that characterizing the State's inaction as "authorization" or "encouragement" of private discrimination is not enough to implicate state action under the 14th Amendment
- **State action is only present where a State, BY LAW, has COMPELLED the private act**
    - Inaction is NOT ENOUGH
    - Mere acquiescence in a private act is NOT ENOUGH
    - "If the mere denial of judicial relief is considered sufficient encouragement to make the State responsible for those private acts, all private deprivations of property would be converted into public acts whenever the State, for whatever reason, denies relief sought by the putative property owner"
- Not very much of Shelley and Burton is left
- Application Here
    - If the sale of the goods were conducted by state officials w/o providing a hearing, that would violate DP, but warehouseman's sale, even pursuant to UCC, was not state action
    - FN in opinion: No reason to believe she couldn't go to courts to prevent selling of her property
        - If she went to get injunctive relief and had been denied on grounds UCC barred relief sought → that ruling by NY court would have constituted challengeable state action
        - So, there's still a little bit left of Shelley

Blum v. Yaretsky (1982) and Rendell-Baker v. Kohn (1982)

- These cases even further extend the rationale of Jackson and Flagg Bros.
- Blum: Privately-owned nursing homes receiving reimbursements from the state for caring for Medicaid patients WERE NOT state actors for purposes of the 14th Amendment
    - The decisions ultimately turned on medical judgments made by private parties according to professional standards that ARE NOT ESTABLISHED BY THE STATE
    - State has to be **RESPONSIBLE** for the specific conduct that the Ps complain about
    - Normally, a State can only be held responsible for a private decision when it has exercised a **COERCIVE POWER or has provided such SIGNIFICANT ENCOURAGEMENT**, either overt or covert, that the choice must in law be deemed to be that of the State
    - The mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible
        - HERE: the decision emanated from a private actor
    - *Burton's "symbiotic relationship" standard NOT satisfied by the State subsidizing the operating and capital costs of the facilities, licensing them, and paying the medical expenses of more than 90% of the patients*
        - (What's left of Burton?)
- Rendall-Baker: A private school, whose income is derived primarily from public sources and which is regulated by public authorities is not engaging in State Action when it discharges employees

- *"Even though public funds accounted for almost all of the school's operating budget, it was not fundamentally different from many private corporations whose business depends primarily on contracts with the governments"*

- Both Courts are concerned about whether the State COERCED the challenged action; neither case challenged any state rules on personnel or Medicaid benefits
- Both are consistent with Moose Lodge

Lugar v. Edmondson Oil Co. (1982)

- A creditor had, pursuant to a state law, attached the debtor's property. The attachment writ was issued by a state clerk and executed by the Sheriff. The writ was later dismissed and debtor brought a § 1983 action for deprivation of constitutional rights under color of state law
- White's Two Prong Test for State Action component of 14th Amendment
  - (1) Is the challenged conduct "state action?"
    - Whether the claimed constitutional deprivation resulted from the exercise of a right or privilege having its source in state authority (Edmonson v. Leesville Concrete Co. (1991))
  - (2) Can the private parties appropriately be characterized as "state actors" on the facts of the case?
    - A private party's **JOINT PARTICIPATION with state officials** in the seizure of disputed property is sufficient to characterize that party as a "state actor" for 14th Amendment purposes
- FN3 – Distinguishing Lugar and Flagg Bros.
  - Flagg Bros.: Warehouser's remedy could be exercised without state officials participating
  - Lugar: state officials participated
- Difference from Blum: **Focus becomes on the CHARACTER of the Defendant** → state official or no state official

DeShaney v. Winnebago City Soc. Servs. Dept. (1989)

- Facts: Dad awarded custody in Divorce; social workers had gotten reports of abuse but did not remove the kid from Dad's custody; Dad beat him into a permanent brain injury and mom sued the State for deprivation of liberty without due process
- Issue: Does a State's FAILURE to Act trigger 14th Amendment protections (i.e., is the State under an affirmative duty to act)?
- Rehnquist REJECTS this notion – Why?
  - The TEXT of the 14th Amendment DP clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security; the language CANNOT be fairly extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means
  - HISTORY does not support such an interpretation: Purpose of 14th Amendment was to protect the people from the State, not to ensure that the State protect them from each other

        - But can make argument that framers were concerned about private actors too coming after people because of race and that they envisioned the State as being obligated to protect them → i.e. KKK
        - Is negligence a due process claim? Say private actors are attacking because of race, but cops aren't helping because they are just incompetent or lazy → are we going to allow a constitutional DP claim? (Font of Tort Law)
- An Affirmative duty of the State to protect arises ONLY when the State takes you into CUSTODY and hold you against your will
    - The duty here does NOT arise from their knowledge of your situation, but on the limitation the State as imposed on the individual's freedom to act on his own behalf
    - Thus, this exception is not applicable here because the State did not take the kid into custody
        - Then Rehnquist makes the argument that if the State had acted too quickly to take custody of the kid then you'd be in court bitching about familial privacy DP
- The fact that the State had previously intervened DIDN'T MATTER
    - When State returned Josh to Dad, State placed Josh in no worse position than if it hadn't acted at all → i.e. if state hadn't created social services department
    - State doesn't become guardian and guaranteer of safety just by ONCE providing shelter
- His life has been deprived – but not by the state – Dad goes to jail

Congressional Power to Reach Private Interferences with Constitutional Rights

- This is about CONGRESSIONAL lawmaking power in regard to applying constitutional limitations on private parties, rather than the Court's interpretation of the Constitutional meaning of State Action
- Congress could reach private actors
    - (1) By invoking the interpretations of the Court; or
    - (2) By invoking their authority under the enforcement provisions of the Civil War Amendments to reach private actors the Court itself couldn't reach
- Problems
    - (1) Identifying the sources of rights
        - May congress go beyond court's view of state action and reach private parties court won't reach?
    - (2) Lack of specificity in statutes, esp. criminal sanction: 18 U.S.C. §§ 241-242
    - (3) Statutory Construction: What constitutional rights can be read into such statutory right?
        - Should we read a state action requirement into statute purporting to incorporate 14th Amendment rights?

Criminal Statutes

U.S. v. Guest (1966)

- Prosecution for a criminal conspiracy by the defendants to deprive Blacks of the free exercise and enjoyment of several specified rights secured by the constitution and laws of the U.S.
- 18 U.S.C. § 241 (derived from § 6 of CRA1870): prohibits conspiracies to deprive a person of any right or privilege secured to him by the Constitution or laws of the U.S.
- Feds charge D with conspiracy to deprive a person of rights secured by the Equal Protection Clause of the 14th Amendment and D argues for dismissal because the Feds didn't allege the involvement of anyone acting under color of state law
    - Stewart: for the purposes of this charge, **§ 241 incorporates the Equal Protection clause as interpreted by the Court and nothing else** – Congress did not give substantive content to Equal Protection in enacting § 241
    - Stewart declines to answer to question of what kinds of other and broader legislation Congress might constitutionally enact under § 5 of the 14th Amendment
    - **The Indictment contains a sufficient allegation of state action to survive a motion to dismiss**
        - "By causing the arrest of Negroes by means of false reports that such Negroes had committed crimes"
        - This is broad enough to cover a charge of active connivance by agents of the State in making false reports or other conduct amounting to official discrimination, etc.
- <u>Brennan's Interpretation of § 241</u>
    - Concedes that the 14th Amendment doesn't extend to private actors
    - BUT, § 241, as an exercise of congressional power under § 5 of the 14th Amendment, prohibits ALL conspiracies to interfere with rights SECURED byt the Constitution
        - A right can be deemed "secured by the Constitution" within the meaning of § 241, even though only governmental interferences with the exercise of the right are prohibited by the Constitution itself
        - "Secured" means "created by, arising under or dependant upon," rather than "fully protected."
        - A right is "secured by the Constitution" if it finds its SOURCE in the Constitution.
        - **§ 241 must thus be viewed as an exercise of congressional power to amplify prohibitions of the Constitution addressed to government officers**; the Statute seeks to IMPLEMENT the Constitution, not deal solely with the BARE TERMS of the Constitution
            - The Bare Terms don't cover private actors
            - Where does Congress get the authority to punish private actors under the 14th Amendment?
                - Congress is implementing the bare terms of the Amendment
                - The Judicial Brach IS bound to the bare terms of the Amendment
                - This is the distinction between Congress and the Court's Authority

        - If the bare terms don't reach private actors, how can Congress use §5 to enforce § 1 against private actors?
    - HOWEVER, this case is about the use of state facilities
        - The 14th Amendment commands States to provide equal access to state-owned facilities
        - From this express right, we get an express corollary right to use state facilities free from discrimination based on race
        - **Then, Congress has a legitimate goal of ensuring that this corollary right is not invaded – thus § 241**
- Brennan's view of § 5 of the 14th Amendment
    - § 5 authorizes Congress to makes laws that it concludes are reasonably necessary to protect a right created by and arising under the 14th Amendment
    - Thus, Congress is fully empowered to determine that punishment of private conspiracies interfering with the exercise of 14th Amendment rights is necessary to its full protection
    - **The test for congressional power under § 5 is that announced by McCulloch**
    - **§ 5 is a positive grant of legislative power**
    - Claims that a majority of the Court has rejected the interpretation of congressional power under § 5 announced in the Civil Rights Cases
    - Thus, **§ 5 empowers congress to enact laws punishing ALL conspiracies to interfere with the exercise of 14th Amendment rights, whether or not state officials acting under color of law are implicated**
    - Congress has the power to determine that in order to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals – not state officials themselves or acting in concert with state officials – to engage in the same conduct
    - **Congress can use § 5 powers to reach private conduct that the court hasn't said is state action**
    - What happened to Marbury? Doesn't the Court get to say "what the law is"?
- D.Ct. also erred in Dismissing the **Right to Travel** count
    - Stewart, FN4
        - The Right to Travel is a fundamental right and it doesn't matter who interferes with it, whether public or private
        - The Right to Travel has constitutional protection independent of the 14th Amendment
    - Stewart limits the application of § 241 to the Right to Travel by announcing a strict scienter requirement that must be proved in order for a conviction → "a specific intent to interfere with the federal right must be proved"
        - Must avoid a void for vagueness issue
    - Harlan's dissenting point is that the Right to Travel is viz. the government and not other private individuals (Stewart rebuts by saying its independent of 14th)
    - Here, conspiracy charge is based on impeding the fundamental right – the racial context doesn't matter

Screws v. U.S. (1945)

- The big objection to apply criminal sanctions to violations of rights secured by the Constitution was notice to the D of the law and thus a void for vagueness arguments
- This is the first case where the Court began its practice of reading strict scienter requirements into 18 U.S.C. §§ 241-242

Civil Statutes

Griffin v. Breckenridge (1971)

- This is about 42 U.S.C. § 1985(3), which grants civil remedies for conspiracies to deny "the equal protection of the laws, or of equal privileges and immunities under the laws"
- Held: § 1985(3) applies to certain private conspiracies as well as those under color of law
- **Congress' Constitutional Authority for reaching private actors under § 1985(c) is based upon:**
    - **(1) 13th Amendment, § 2** (See Jones, below for further discussion)
    - **(2) The Right to Travel**
- Court doesn't touch the 14th Amendment Question
- Avoiding the problem of the "font of Tort law"
    - Stewart adds that an element of the cause of action is an "invidiously discriminatory motivation"
    - **There must be some RACIAL or OTHERWISE CLASS-BASED invidiously discriminatory animus behind the conspirators' action**
    - What is the basis for adding this element?
        - Nothing on its face, but the language about EQUAL protection and EQUAL privileges implies it
        - *But why the hell would a Reconstruction Congress pass a statutory law talking about "equal protection" with an intent that it be more narrowly construed than the Constitutional Equal Protection Clause?*
            - The Constitution's Equal Protection Clause has no strict specific intent requirement for race!
        - Was this a justifiable reading of the statute?
            - Why not construe this to the same extent that we construe the 14th equal protection clause? What's wrong with this?

Bray v. Alexandria Women's Health Clinic (1993)

- Held: Animus towards abortion did not constitute a class-based animus towards women, and thus the animus required by § 1985(3) was not present
- Left open the question of whether forms of class-based animus other than racial animus could fall within the domain of S 1985(3)
- § 1985(3) does NOT include within the notion of a "class" those whose connection lay only in a common desire to engage in conduct that the § 1985(3) defendant disfavors → such a definitional ploy would turn § 1985(3) into a font of tort law, which is what the animus requirement sought to avoid
- Even assuming, arguendo, that animus against women is covered by § 1985(3), *the animus required by the Statute is at least a purpose that focuses upon women BY REASON OF THEIR SEX*
    - Here, animus is aimed at a dislike of abortion, not a dislike of women
    - **Hating Abortion ≠ Hating Women** → Why?

        - Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred or condescension toward women as a class, as is evident from the fact that **men and women are on both sides of the issue**, just as men and women are on both sides of the petitioner's unlawful demonstrations
        - Have to select or undertake activity BECAUSE OF not just IN SPITE OF its adverse effects on the group
        - Saying that Hating Abortion and Hating Women are equivalent ignores the INTENT of the Defendants
        - They're targeting abortionists – docs are men and women
- Has Scalia added an **"irrational intent" element** to the statute?
    - "some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged exclusively or predominately by a particular class of people, an intent to disfavor that class can readily be presumed"
    - Gives tax on yarmulkes = tax on Jews example
    - Isn't Scalia re-writing the statute too?
    - But he could just be clarifying the intent requirement
- Why shouldn't disproportionate impact be enough?
    - **Scalia's unstated view is that this situation is equivalent to the Equal Protection analysis of a facially neutral statute that is alleged to have a disproportionate impact**
    - See Washington v. Davis; McCleskey v. Kemp; Feeney
    - On this doctrine, disproportionate impact IS NOT ENOUGH; rational reasons usually survive equal protection analysis
    - And we're looking to these cases because § 1985 talks about "equal protection of the laws," just like the 14th Amendment
        - E.g.: Operation Rescue, the D, is in effect neutral
- Much of this is moot law now that there are statutes governing access to and protesting around abortion clinics

42 U.S.C. § 1983

- Civil remedies against actions "under color" of state law
- Monroe v. Pape (1961) → the "specific intent" requirement is not present here
- Readings have been influenced by the desire not to make § 1983 a font of federal tort law

Jones v. Alfred H. Mayer Co. (1968)

- 42 U.S.C. § 1982 prohibits ALL racial discrimination, private as well as public, in the sale or rental of property
- Holding: § 1982 is a valid exercise of the power of Congress to enforce the 13th Amendment; valid use of 13th Amendment, § 2 powers
- Reason for being able to reach private discrimination with § 2, 13th Amendment
    - ***Text of 13th Amendment makes plain that congress' scope goes beyond state laws***
    - It is an absolute declaration that slavery shall not exist in any part of the country
    - § 2 includes power to enact laws direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not (Civil Rights Cases)

    - Congress' authority to enforce the 13th Amendment by "appropriate legislation" includes the power to eliminate all racial barriers to the acquisition of real land personal property
- Scope of Congressional Power under 13th Amendment, § 2
    - ***Congress has the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the United States*** (Civil Rights Cases)
    - Congress has the power to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation
    - The determination here is no irrational (i.e., **we will measure congressional enactment under § 2 of 13th Amendment by a rationality standard**)
    - Leaves open the question of whether § 1 of the 13th Amendment did more than abolish slavery, but Congress gets the Necessary and Proper Clause too
    - All this comes from McCulloch, the Constitution, and the Civil Rights Cases
- Congress gets to RATIONALLY decide what the badges and incidents of slavery are: *Does this undercut anything else in con law?*
    - Marbury → it is the province of the court to say what the law is
    - Does congress have greater authority than the court to determine that Badges and Incidents are? Does this make any sense in light of Marbury?
    - (what about purpose of separating powers to keep this definition from the whim of politics)
- Is this consistent with Civil Rights Cases? Running the slavery argument into the ground?
- Consistent with Shelley? Private discrimination covenants are OK if voluntarily adhered to?

Runyon v. McCrary (1976)

- Issue: Whether 42 U.S.C. § 1981 prohibits private schools from excluding qualified children solely because they are Negroes
- §1981 says that all persons within the jurisdiction of the U.S. shall have the same right to make an enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens...
- **Constitutional Basis for § 1981: § 2 of 13th Amendment**
    - Makes Parallel to Jones
- As applied, § 1981 is Constitutional → *the private schools cannot refuse to contract with the otherwise qualified kids just because they are black*
- Does the Court give Congress TOO BROAD a power under § 2 of the 13th Amendment?
- No countervailing considerations are applicable
    - Freedom of Association
        - It may be assumed that parents have a first amendment right to send their children to education institutions that promote the belief that racial segregation is desirable, and that the children have an equal right to attend such institutions
        - But it does NOT FOLLOW that the PRACTICE of excluding racial minorities from such institutions is also protected by the same principle
        - Even though private discrimination can be characterized as associational freedom, it has never been constitutionally protected

        - Admitting the kids wouldn't stop teaching the ideas or dogma
    - Parental Rights
        - Meyer, Pierce, etc.
        - These cases don't involve a challenge to the subject matter that is taught at any private school
    - Right of Privacy
        - No constitutional right to provide their children with private school education unfettered by reasonable government regulation
- White Dissent
    - Not even white people can compel someone to contract with them if unwilling, even if the refusal is if for no reason
    - If white has no right to make contract with an unwilling person, why does a black?
    - Normally, have to have two parties to agree to have a contract
    - Dealing with the advertisements? Well – not a fucking offer...see Contracts class
- Powell Concurrence
    - *In certain personal contractual relationships, there is reason to assume that, although the choice made by the offeror is selective, it reflect "a purpose of exclusiveness" other than the desire to bar members of the Negro race*
    - Such a purpose, certainly in most cases, would invoke **associational rights** long respected
    - Talking about private tutors, babysitters, housekeepers
    - Is there difference between "purpose of exclusiveness" and outright racial discrimination? Distinction without a difference...
    - Choices, including those involved in entering into a contract, that a "private" in the sense that they are not part of a commercial relationship offered generally or widely, and that reflect the selectivity exercised by an individual entering into a personal relationship, certainly were never intended to be restricted by § 1981
    - The open offer to the public generally involved in the cases before us is simply not a "private" in this sense. (ME: not an offer, see Contracts)
    - A bright line is not easy, but this situation is clearly on one side of the line

NB: When we talk about the applicability of equal protection to private actors and conduct – we always have to ask where there is a countervailing constitutional consideration that may make such a private application unconstitutional AS APPLIED → think 1st Amendment vs. 14th Amendment

Congressional Power to Enforce Civil War Amendments

- Principally talking about 14th, § 5 and 15th, § 2 → we've already seen that Congress has very broad power to deal with racial (and maybe other class-based) discrimination under 13th, § 2
- Each Amendment gives Congress the power to "enforce the provisions" of the Amendment "with appropriate legislation"

- **How broad is Congress' authority under the enforcement provisions?**
    - Does congress have substantive AS WELL AS remedial powers?
    - Or is congress limited by only enforcing remedial provision?
    - If congress only has remedial power, when is congress free to invoke its powers?
    - Must it wait for judiciary to declare a violation, or can they enact remedial legislation before a court has found the constitution to be violated?
- Can congress use its §5 powers to declare 24-hour wait periods for abortions unconstitutional if it has a factual record supporting a disproportionate impact in driving down the number of abortions, thus a disproportionate impact on a constitutional right?
    - ***Does congress have ability to declare SUBSTANTIVE rights under § 5?***
        - Does "enforce" only mean congress can act remedial?
        - What does "appropriate legislation" mean? Does that allow Congress to go beyond where the Court is going?
        - Key question: Does congress have the power to go beyond where the Court has gone?
    - Casey was only a facial challenge → what can Congress do with an applied set of facts?
- Can Congress say that States are not required to educate illegal immigrants or that States may not deny ex-felons the right to vote using §5 to say that it violates Equal protection? (essentially, can congress overturn a constitutional decision of the S.Ct.?)
    - I would think not: Dickerson; Cooper
- *Can congress declare gays to be a suspect class subject to equal protection and declare gay marriage laws unconstitutional?*
    - Doesn't this cut the other way than overruling a constitutional decision?
    - **This is about going somewhere that the Court hasn't gone yet → declaring substance of equal protection/due process regarding something the judiciary hasn't spoken on**
    - But isn't it the province and the Duty of the Court to declare what the law is? (Marbury)

Voting Rights Act of 1965: 14th and 15th Amendment Enforcement Bases in Racial Context
Lassiter v. Northampton County Election Bd. (1959)

- Held: Literacy Tests for voting were NOT invalid on their FACE
- Assuming neutral administration of the law → can we strike them down on their face?
    - Court says they could bear a rational relationship to the goal of an intelligent electorate
    - "Literacy and intelligence are obviously no synonymous, yet in our society where newspapers, periodicals, books, and other printed matter canvass and debate campaign issues, a State might conclude that only those who are literate should exercise the franchise"
    - "We do not sit in judgment on the wisdom of the State's policy"
    - States traditionally have the broad power to determine the qualifications for voting
    - Can limit based on age, prior criminal history, etc. etc., why not literacy?
- Post decision: Harper and voting as fundamental right
- Decided before the 1965 Voting Rights Act

South Carolina v. Katzenbach (1966)

- The Court UPHELD several controversial provision of the 1965 Voting Rights Act
  - **Upheld a "coverage" formula that suspended the use of Literacy Tests in the covered areas for a period of 5 years**
  - Formula
    - (1) maintenance of a "test or device"
    - (2) Less than 50% of voting-age residents were registered on 11/1/64 or less than 50% of voting-age residents voted in the November Presidential Election of 1964
    - The findings were NOT reviewable
- This was a proper exercise of Congressional Power under § 2 of the 15th Amendment
- Scope of 15th, § 2 Powers
  - **Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting**
  - *The basic test to be applied is the same as in McCulloch and under the Necessary and Proper Clause*
  - Congress has power under § 2 of 15th to prohibit state action that does not on its face violate § 1 of 15th → task of fashioning specific remedies does NOT have to be left entirely to the courts
- Applied to this case
  - **Coverage formula is RATIONAL**
  - Legislation can be underinclusive and deal with a problem piecemeal (Lee Optical)
- What about Lassiter?
  - Isn't Congress prohibiting something under 15th, § 1 that the Court said was constitutional under 15th, § 1?
  - *We are not saying that Literacy Tests in and of themselves are violations of 15th, § 1, we are saying that, on this factual record, which shows that **Literacy Tests as applied in certain jurisdictions have been instituted for the PURPOSE of discrimination and have been administered in a discriminatory manner, the 15th Amendment has clearly been violated***
  - **So – we're saying that Congress has the power to fashion remedies for APPLIED Constitutional violations (at least under 15th Amendment) that wouldn't be facially invalid as unconstitutional so long as there is a sufficient factual record; AND that power is plenary and an exercise of it will be measured by the traditional McCulloch standard**

Katzenbach v. Morgan (1966)

- § 4(e) of VRA1965 provides that no person who has successfully completed the 6th primary grade in an accredited school in Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of his inability to read or write English → clearly aimed to keep NYC from disenfranchising Puerto Rican immigrants by having an English literacy requirement for voting

- Issue: Without regard to whether the judiciary would find that equal protection itself nullifies New York's English literacy requirement as applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the 14th Amendment?
- NY's Argument → § 4(e) cannot be sustained as appropriate legislation to enforce equal protection unless the JUDICIARY decides that the application of the English literacy requirement prohibited by § 4(e) is forbidden by equal protection
    - Court: NO NO NO; Brennan REJECTS this
    - Neither the language nor history of § 5 of the 14th supports such a construction
    - A construction that would require a judicial determination that the enforcement of the state law precluded by congress violated the Amendment, as a condition of sustaining the congressional enactment, would ***confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional...***
- The Scope of Congressional Power under 14th, § 5 a la Brennan
    - **Same broad powers expressed in the Necessary and Proper Clause as interpreted in McCulloch**
    - § 5 of 14th is a **POSITIVE GRANT of legislative power** authorizing Congress to ***exercise its discretion*** in determining whether and what legislation is needed to secure the guarantees of the 14th Amendment
    - Applied Inquiry: whether § 4(e) is "appropriate legislation" to enfore equal protection – that is, under the McCulloch standard, whether § 4(e) may be regarded as an enactment to enforce equal protection, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the Constitution"
- Brennan relies on the intent of the Framers, but is Brennan's conception "enforcing by appropriate legislation"?
    - Historians tell us that Framers were explicitly rejecting an open-ended power to congress to dictate the meaning and scope of "equal protection" → wanted Court to have final say so that if southern democrats ever got control of congress again they couldn't make equal protection a dead letter
    - What gives congress the authority to tell NY that it's literacy requirement was unconstitutional when the court hasn't said that it is? Isn't it the job of the judiciary to "say what the law is"?
    - Is it ok for congress to go beyond the court as long as the court is there to review?
- Harlan Dissent: When RECOGNIZED state violations of federal constitutional standards have occurred, Congress is of course empowered by § 5 to take appropriate remedial measures to redress and prevent the wrongs; But ***it is a JUDICIAL question whether the condition with which Congress has thus sought to deal is in truth an infringement of the Constitution***, something that is the necessary prerequisite to bringing the § 5 power into play at all
    - Brennan Response: It is not for us to review the congressional resolution of these factors; *It is enough that we be able to perceive a basis upon which the Congress might resolve the conflict as it did* → not much review going on with that
- Harlan: ***In effect the Court reads § 5 of the 14th Amendment as giving Congress the power to define the SUBSTANTIVE scope of the Amendment. If that indeed be the true reach of § 5, then I do not see why Congress should not be able as well to exercise***

its § 5 "discretion" by enacting statutes so as in effect to dilute equal protection and due process decisions of this Court

- Congress can't qualify S.Ct. on constitutional decisions → wouldn't Brennan's logic take us to congress qualifying S.Ct. decisions about the Constitution?
- Brennan's disclaimer in FN1 deals with this issue, but it doesn't logically follow; it's the mere ipse dixit of the Court

- Is there a principled distinction between making substantive law under 14th with their discretion but they can't use that discretion to dilute?
  - ME: Marbury; Dickerson; Cooper v. Aaron
  - ME for keeping power from congress: Don't want constitutional decisions to be on a whim of politics and anyway judiciary is going to say what the law is at the end of the day; but on the other hand let congress say what they want, but its still subject to Marbury at the end of the day → where Brennan goes wrong by doing rationality review with this → Court should still say what the law is at the end of the day
  - Harlan's point is that the Court will always decide the issue at the end of the day: "I do not believe it lessens out responsibility to decide the fundamental issue of whether in fact that state enactment violated federal constitutional rights
  - Can Congress pass a STATUTE saying that life beings at conception?
- **Two justifications that support § 4(e) given by congress**
  - (1) *A measure to secure for the Puerto Rican community residing in NY nondiscriminatory treatment by government – both in the imposition of voting qualifications and the provision or administration of governmental services*
  - (2) *Elimination of an invidious discrimination in establishing voter qualifications*
- NY Justification for English Requirement: its an incentive to learn English
  - Brennan: Congress might have questioned the sincerity and wisdom of this incentive → but it was Congress' prerogative to weigh the competing considerations and that ends the inquiry → **Congress had a rational basis for its exercise of power**
  - Harlan: Where's the data to support this congressional determination?: The range of material available for a Spanish-only literate is much more limited and the business of government is conducted in English; want voters to be able to understand candidates; i.e. **NY had the RB, NOT Congress**
  - Are Harlan's arguments rational justifications for NY?
- Is it sufficient that congress believed that NY had discriminated against Puerto Ricans in the right to vote?
  - If Congress has plenary power under § 5 like the commerce clause, why should congress have to build a record for the court?
- Discrimination in Public Services
  - This is already prohibited by equal protection doctrine
  - Thus, Congress has a platform on which to build that already says no discrimination based on ethnicity, etc.
  - Thus, why should they need a factual record?
  - How can they be overstepping power when they are building on what the court has already done?

- Last: underinclusiveness doesn't matter; Congress is allowed to fix a problem piecemeal (answer to argument of only fixing Puerto Rican's problems); See Lee Optical
- **Note what Brennan has done →** he had simultaneously purported to give Congress BROAD power under § 5, yet in the end he rests his holding on clearly established judicial interpretations of Equal Protection substance (e.g. Yick Wo) and then says that Congress rationally exercised their § 5 power to use those platforms as a basis for legislation – and with that exercise of power – we give deferential rationality review

Oregon v. Mitchell (1970)

- VRA, amended 1970, § 302: prohibited denial of the right to vote based on age if citizen was 18+
- Duck Counting
  - *§ 302 is constitutional as applied to National Elections, but Unconstitutional as applied to State and Local Elections*
  - Black provides the decisive vote
  - Brennan + 3 says constitutional across the board
  - Stewart + 3 says unconstitutional across the board
- Why does Black come-out with the split?
  - Congress has the ultimate power to supervise National Elections because the Constitution gives Congress the express authority to alter State election rules for national congressional offices (Art. I, § 4) – Presidential election is an obvious parallel
  - However, States retain the power to supervise their own state and local elections – an intrusion by Congress into this area would strike at the heart of state sovereignty
- Why doesn't Black use the Civil War Amendments to uphold the regulation upon the State?
  - **No legislative findings that a 21 year old vote requirement is used to discriminate on the basis of race**
  - **Thus, the Civil War Amendments aren't implicated**
  - Since Congress has attempted to invade an area preserved to the States by the Constitution without a foundation for enforcing the Civil War Amendments' ban on racial discrimination, I would hold Congress has exceeded its powers in attempting to lower the voting age in state and local elections
  - On the other hand, when Congress legislates in a domain not exclusively reserved to the States, its enforcement power need not be ties so closely to the goal of eliminating discrimination on account of race
  - But → doesn't jurisprudence say we don't need a racial hook?
- Why does Brennan think § 302 is OK?
  - (1) He thinks the denial of franchise to 18-20 violates equal protection without a statute
    - We must examine with care the laudable state purpose to further intelligent and responsible voting
    - Give a litany of evidence for why denying the vote to 18-20 is not supportable

- States don't have a legitimate interest in denying 18 year olds the right to vote We are faced with a restriction upon the franchise supported only by bare assertions and long practice, in the face of strong indications that the States themselves do not credit the factual propositions upon which the restriction is asserted to rest

▪ **Laying foundation for a JUDICIAL determination that denial of vote to 18 year olds is violating equal protection**

▪ <u>But a majority of the Court would NOT support this</u>

- Stewart (FN1): not discrete and insular minority; TEXT OF § 2 OF 14TH AMENDMENT → § 2 is positive authorization to the states to deny right to vote to under 21s just like ex-felons

▪ So has Brennan finally gone too far?

- Yep → Court wouldn't do it because of their principles
- Judiciary could not and would not say that the denial of right to vote to 18 year olds violated the constitution
- Can't say that this is remedial action of congress
- It's another example of Brennan giving to congress substantive power to interpret the equal protection clause

o (2) <u>§ 302 is a valid exercise of Congressional Power under § 5 of the 14th Amendment</u>

▪ Should Congress, pursuant to § 5, undertake an investigation in order to determine whether the factual basis necessary to support a state legislative discrimination exists, it need not stop once it determines that some reasonable men could believe the factual basis exists

▪ **§ 5 empowers Congress to make its own determination on the matter** (cites <u>Morgan</u>)

▪ It should hardly be necessary to add that if the asserted factual basis to support a given state discrimination does not exist, § 5 vests Congress with power to remove the discrimination by appropriate means

▪ Where we find that the legislators, in light of the facts and testimony before them, have **a RATIONAL BASIS** for finding a chosen regulatory scheme necessary our investigation is at an end

▪ Now has he gone off the deep end?

- This is even further than <u>Morgan</u>, because at least in <u>Morgan</u> there was a judicial basis upon which the Congress built, and it was that building that was subjected to rational basis review
- Such support is not present here: see § 2, 14th

▪ Significance of latest "ratchet" footnote: FN1

- Brennan's standard footnote saying that congress can expand but not dilute under § 5
- New addition: "Unless Congress were to unearth new evidence in its investigation, its identical findings to the identical issue would be no more reasonable than those of the state legislature"
- Does appear to retreat from original <u>Morgan</u> FN → now more emphasis on congressional fact finding rather than congressional value judgments

- Still just appears to be ipse dixit
- Assuming Congress unearthed new evidence that life begins at conception → can they overturn Roe/Casey?
  - Significance of the HYPO is that Brennan's ratchet is GONE
  - This is why Brennan's approach is FUCKING DANGEROUS
  - Isn't this why we would need more than mere toothless rationality review if we're going to give congress these powers to define the substance of equal protection for themselves?

- (3) The State lacked a rational basis for the classification, thus Congress could rationally decide that denial of franchise to 18-20 violated equal protection
  - In all fairness, "D" of Brennan's opinion once again falls back on established Constitutional Principles
  - "If discrimination is unnecessary to promote any legitimate State interest, it is plainly unconstitutional under Equal Protection and Congress has ample power to forbid it under § 5"
  - So, in the end, isn't Brennan just going back to the idea that Congress may build on established 14th Amendment jurisprudence using their § 5 powers and that such an exercise of this "building power" is subject only to rationality review?
    - Say this because he seems to be resting on the assumption that Court would also find a violation of Equal Protection applying a Rational Basis Test
    - But that is a VERY weak assumption since §2 of 14th seemingly assumes that keeping voting age at 21+ is rational
      - But, if we take a "living constitution" type theory, we can argue that notions a "rationality" have changed since 1868 and given all the evidence that Brennan cites denial of the franchise to 18-20 is no longer rational, irregardless of § 2, 14th.
    - So maybe Brennan isn't really going as far as he seems to be

<u>Rome v. U.S.</u> (1980)

- Under the 1965 Voting Rights Act, as amended, "covered" jurisdictions had to be "precleared" by the Attorney General before making any changes in their electoral system
  - Under § 5 of the VRA, the AG may clear a change in voting practice in a covered jurisdiction is it does not have the PURPOSE and will not have the EFFECT of denying or abridging the right to vote on account of race or color
- Here, Rome, GA wanted to change to an "at large" electoral system
  - Rome has DISPROVED any discriminatory purpose, but AG relied on the "effect" provision of VRA § 5 to deny clearance
  - District Court also denied a "bail out" from being a covered jurisdiction because Rome was simply a sub-unit of Georgia, so GA would need to qualify for bailing out, not just Rome
- City's argument that preclearance requirement was unconstitutional as applied to the City

    - Statute required (1) No Purpose and (2) No Effect; §1 of the 15th only prohibits a discriminatory purpose
    - Thus, ***the dual Purpose and Effect requirement is unconstitutional because § 1 of 15th only prohibits purposeful discrimination and Congress' § 2 powers went no further than § 1***
    - Consequently, Congress can only prevent Discriminatory Effect if there is a Discriminatory Purpose
    - HERE: THERE WAS NO FINDING OF DISCRIMINATORY PURPOSE AND THE CITY HAD DISPROVED ANY EXISTENCE OF DISCRIMONATORY PURPOSE
    - Rehnquist took this position in Dissent
        - Prohibiting EFFECT only is adding substance to the 15th Amendment
        - Congress can't do that
    - ALSO: Violates Principles of federalism; unfair to deny it opportunity to bail out until state of GA satisfies preclearance requirements
- What happened in Mobile v. Bolden?
    - Court rejected 14th and 15th challenges to at large election scheme; no need to change b/c already had an at large system; so challenge was discrimination by maintaining, not by changing
    - So, at large voting schemes are discriminatory or they are not
    - Court in Mobile reads § 1 only to prohibit purposeful discrimination
    - Court in Mobile holds that Mobile may MAINTAIN an at large system consistent with the Civil War Amendments
    - Rehnquist Dissent in Rome: city proved no discriminatory purpose, so how are Rome and Mobile consistent?
- Court's holdings in response to Purpose vs. Effect argument
    - Even assuming § 1 of the 15th prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2, outlaw voting practices that are discriminatory in effect
    - Congress authority under § 2 is no less broad than its authority under the Necessary and Proper Clause [see McCulloch, South Carolina]
    - South Carolina's holding makes clear that Congress may, under the authority of § 2 of the 15th Amendment, prohibit state action that, though in itself not violative of § 1, perpetuates the EFFECTS of past discrimination [See also Morgan, Oregon]
    - It is clear that under § 2 of the 15th Congress may prohibit practices that in and of themselves do not violate § 1 of the 15th, so long as the prohibitions attacking racial discrimination in voting are "appropriate," as that term is defined in McCulloch
- How are South Carolina and Oregon supportive of the Court's logic? Rehnquist doesn't think they are:
    - The Court found the ban on literacy tests to be an appropriate means of effectively preventing purposeful discrimination in the application of literacy tests as well as an appropriate means of remedying prior constitutional violation by state and local governments in the administration of education to minors

    - Even if not adopted with a discriminatory purpose, the tests could readily be APPLIED in a discriminatory fashion
    - THUS, a demonstration by the State that it sought to reinstate the tests for legitimate purposes DID NOT ELIMINATE the substantial risk of discrimination in application
    - ONLY A BAN COULD EFFECTIVELY PREVENT THE OCCURRENCE OF PURPOSEFUL DISCRIMINATION
    - The ban was also necessary as a remedy for past constitutional violations in education
- Difference between South Carolina/Oregon and Rome according to Rehnquist
    - In establishing the nationwide ban of literacy tests in Oregon, the Court established that under some circumstances, **a congressional remedy may be constitutionally OVERINCLUSIVE by prohibiting some state action which might not be purposefully discriminatory** → *That possibility does NOT justify the overinclusiveness allowed by the Court in this Case*
    - **The prohibition on vote diluting procedures is QUITE UNLIKE A LITERACY BAN**, where the disparate effects were traceable to the discrimination of GOVERNMNETAL BODIES in education even if their present desire to use the tests was legitimate
        - (1) Any disparate impact associated with the nondiscriminatory electoral changes in issue here results from bloc voting – **PRIVATE rather than governmental discrimination**
        - (2) No invocation of Congressional remedial powers – generalization of using literacy tests to discriminate doesn't apply to governmental structure
        - (3) The prohibition of all practices with a disparate impact does not enhance congressional prevention of purposeful discrimination
            - *The changes in issue are not, like literacy tests, though fair on their face, subject to discriminatory application by local authorities*
            - They are either discriminatory from the outset or not (here, Rome disproved discriminatory purpose)
        - (4) The advantages of supporting the imposition of a nationwide ban are simply not implicated in this case
    - What is now at stake in Rome is the preference of the black community to be represented by a black; this Court has never elevated such a notion, by no means confined to blacks, to the status of a constitutional right
- **Court's argument that Purpose and Effect for preclearance is OK** (with McCulloch background)
    - The VRA's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the 15th Amendment, even if it is assumed that § 1 of the 15th prohibits only intentional discrimination in voting
    - *Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting **create the risk of purposeful discrimination**, it was proper to prohibit changes that have a discriminatory impact*
    - How is this making a substantive change?

        - **Because it completely ignores the fact that there was no purposeful discrimination and city has disproved purposeful discrimination**
        - Isn't this the flaw in Marshall's reasoning?
        - And isn't this an APPLIED CHALLENGE? Not worried about VRA being facially unconstitutional...
- How could Rome be prohibited from changing to a system that court has already said is only unconstitutional if maintained for a discriminatory purpose rather than effect?
- What wrong with congress telling a covered jurisdiction they have to show no discriminatory purpose AND effect in order to guard against going back to old ways?
    - Essentially, what's wrong with what congress is requiring under VRA?
    - ME: adding substance to 15th Amendment...
    - Does basing unconstitutionality only on Impact go too far?
        - ME: what about Davis and McCleskey?: need purpose to strike down disparate impact → isn't what congress doing an end-run around these decisions/principles → gender disparate impact case too

"Proportionate" and "Congruent" Remedies under 14th, § 5 in a Non-Racial Context

City of Boerne v. Flores (1997)

- Congress enacted the Religious Freedom Restoration Act in direct response to the Court's decision in Oregon v. Smith.
    - Smith held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest
    - RFRA was an explicit attempt by Congress to overrule this decision
    - RFRA said government can't burden a person's exercise of religion even if it's a neutral statute unless it meets a compelling interest/least restrictive means test (essentially going back to old interpretation before Smith)
    - This was applied to the States, so congress must have used its 14th amendment § 5 powers to do this, since the 1st Amendment alone doesn't apply to the state – it only applies via the 14th
- Court's Statement on Congress'14th Amendment, § 5 powers
    - § 5 is a Positive Grant of legislative Power
    - The design of the 14th Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the 14th Amendment's restrictions on the States
    - Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause; **Congress does not enforce a constitutional right by changing what the right is**
    - *Congress has been given the power "to enforce," not the power to determine what constitutes a constitutional violation*
    - Flatly rejects idea that DP or Equal Protection Clauses may have different substantive meanings for judicial and legislative enforcement
    - ***Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the law affected by the congressional enactment have a significant likelihood of be unconstitutional [as determined by this Court]***

- Held: Congress exceeded its 14th Amendment § 5 powers with this enactment by declaring new substantive content of the 14th Amendment, thereby violating principles of Federalism and Separation of Powers; **there must be a CONGRUENCE and PROPORTIONALITY between the injury to be prevented or remedies and the means adopted to that end**
- Any suggestion that Congress has a substantive, non-remedial power under the 14th Amendment is not supported by case law
    - Oregon → Congress exceeded its power
    - Morgan → Holding can be supported as remedial legislation
    - But...approvingly cites Rome; seems to frame it as remedial to jurisdictions with a history of intentional racial discrimination in voting (but is this the BEST interpretation?)
- Is RFRA a Constitutional Interpretation or a Statutory Standard?
    - Didn't RFRA just alter the U.S.C. and not change the Constitution?
        - Court says it altered the Constitution by changing the meaning of the Free Exercise Clause of the 1st Amendment
        - In applying this change to the States, it also changed the meaning of "liberty" in the Due Process Clause, since this is how the 1st Amendment is incorporated against the States
        - Court is saying the § 5 doesn't give congress the power to do that
    - If we say that RFRA changed the Constitution, we have to say the same for the VRA in Rome AND Title VII and the ADA, for that matter
    - Title VII and the ADA provide **causes of action against the STATE** for discrimination on a **Disparate Impact theory**
        - Title VII and the ADA reach private individuals with the Commerce Clause, but Congress needs § 5 of the 14th to abrogate State Sovereign Immunity and allow a suit [see Seminole Tribe; Fitzpartick]
        - Thus, by allowing a cause of action on a disparate impact theory against the States, Congress is changing the meaning of the equal protection clause as announced in Washington v. Davis and McCleskey, etc.
        - S.Ct. has even recently upheld this in relation to disparate impact and the ADA
        - ISN'T THERE SOME TENSION HERE? Doesn't RFRA do the same thing as Title VII and ADA? Why is the Court having such a fit with RFRA?
    - So why does the court gloss-over these congressional disagreements with the Court but not the RFRA?
        - Look at the "proportionate and congruent" language in Flores as well as the language about building a strong congressional record
        - "If you have a sufficient factual basis for disagreeing with us, we'll allow it" – note findings in Title VII and ADA
        - And the issue in Flores was that there was not a scintilla of factual support for their legislation (as well as the slap congress tried to give the court)
        - ***Wasn't enough factual support in the RFRA record to say that remedy congress drew in Flores was proportionate to the risk of an actual constitutional violation***

- Why does the history of the 14th confirm the view that Congress only has "remedial" powers and not substantive powers under § 5?
    - The original draft – the Bingham proposal – contained "necessary and proper, etc." language and the House rejected it
        - The House rejected it as too broad, violative of Federalism, and giving Congress too much power at the expense of the existing Constitutional system
        - The provision was Not self-executing, thus as written, it was not directly enforceable by individuals in Court; consequently the meaning of the Amendment would shift with changing political majorities
    - Why does this support the Court's interpretation
        - The revised Amendment did not raise the concerns expressed earlier regarding broad congressional power to prescribe uniform national laws with respect to life, liberty, and property
        - Under the revised Amendment, Congress' power was no longer plenary, but remedial
    - Why read "enforce" so literally?
        - Why can't we say congress has the same power to "enforce" that the court does – so long as it is appropriate?
        - Why can't congress enforce its view of the 14th amendment?
        - Does § 5 really limit congress to only remedial actions to enforce court enforced remedies?
        - Why not look at § 5 as giving the Congress co-enforcement power with the Court? Kennedy does say it's a plenary grant of positive legislative power...
            - ME: don't want it to be subject to the whim of politics
- What does Kennedy say about precedent?
    - **Any suggestion that Congress has a substantive, non-remedial power under the 14th Amendment is not supported by our case law**
    - Gives the narrow view of Morgan, but acknowledges that there is a broad view while calling such an interpretation "unnecessary"
    - Marbury → would make the constitution susceptible to change with ordinary legislation = NO GOOD; shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Art. V.
- **Why can't RFRA be supported by § 5 Powers?**
    - Argument for: RFRA is a remedial and preventative power because it prevents and remedies laws which are enacted with the unconstitutional object of targeting religious beliefs and practices
    - Court: While preventative rules are sometimes appropriate remedial measures, there must be a CONGRUENCE between the means used and the ends to be achieved
        - There is no basis in the text of the constitution for this
        - Is this just judicial policy making?
    - ***The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved***

- (1) It is OVERINCLUSIVE → "*Laws valid under Smith would fall under RFRA without regard to whether they had the object of stifling or punishing free exercise*" → THIS IS A SUBSTANTIVE ALTERATION OF THE MEANING OF THE 14TH AMENDMENT
- (2) There is NO SUPPORT in the Legislative Record of modern instances of generally applicable laws passed because of religious bigotry
- RFRA is so out of proportion to a supposed remedial or preventative object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior – instead it is a substantive change in constitutional protections
- Preventative measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional
- *The Court, in essence, is saying that RFRA would prohibit laws that would be Constitutional, AS DETERMINED BY THIS COURT, and Congress hasn't built enough of a record to convince us that the overinclusion is justified (congressional record doesn't justify overinclusiveness)*
- Thus, the remedy is not proportional or congruent to the end

Florida Prepaid v. College Savings Bank (1999)

- Case invalidated the Patent and Plant Variety Protection Remedy Clarification Act, which has expressly abrogated the states' sovereign immunity from claims of patent infringement
  - NB: abrogating State sovereign immunity automatically implicated 14th, § 5 powers
- Rehnquist
  - Bourne is a BROAD decision that applies across the board
  - Boerne Rule: ***for Congress to invoke § 5, it must identify conduct transgressing the 14th Amendment's substantive provision [as determined by THIS Court], and must tailor its legislative scheme to remedying or preventing such conduct***
- Distinguishing Voting Rights Act cases from this one
  - In VRA cases, there was an undisputed record of constitutional violations
  - Here, Congress identified no pattern of constitutional violations or pattern of patent infringement by the states
- **Congruence and Proportionality Test**
  - Lack of Support in the legislative history for a "widespread and persisting deprivation of constitutional rights" of the sort Congress has faced in enacting proper prophylactic legislation
    - The lack of support in the record is NOT determinative
    - Identifying the targeted constitutional wrong or evil is still a critical part of the § 5 calculus
    - Here, the RECORD at best offers scant support for Congress' conclusion that States were depriving patent owners of property without due process of law by pleading sovereign immunity in federal-court patent actions
    - Why does congress have to build a record?

        - Isn't this reminiscent of C.J. in Lopez?
        - Record not necessary – but it could HELP us
    - Congress did nothing to limit the coverage of the Act; Nor did it make any attempt to confine the reach of the act (overinclusive)
- *Thus, the law based on § 5 is overinclusive in identifying constitutional violations as announced by the S.Ct. and Congress has no record to support their overinclusiveness (and by extension – they did so in the VRA cases)*
    - "The Act's indiscriminate scope offends the principle of proportionality set forth in Bourne, and is particularly incongruous in light of the scant support for the predicate unconstitutional conduct that Congress intended to remedy"
    - "It cannot be said that many of the acts of infringement affected by the congressional enactment have a significant likelihood of being unconstitutional [as determined by the Court]"
        - What is the point of all this if it's a plenary power?
        - Is he saying that congress is too dumb to understand the situation?
            - ME: Maybe saying we don't want 14th amendment to be on the whim of politics
            - Maclin – Court is protecting its own turf

U.S. v. Morrison (2000)

- Violence Against Women Act challenge – girl raped by two FB players at Va. Tech. and school didn't really investigate and just slapped them on the wrist
- VAWA can't be sustained with Commerce Power (see way above)
- Now Petitioners argue that the civil remedy should be upheld as an exercise of Congress' remedial power under § 5 of the 14th
    - Petitioners try to distinguish this case from the Civil Rights Cases by saying that there has been gender-base disparate treatment by STATE-authorities, whereas in the Civil Rights Cases, there was no such state action
    - Could have also made the argument that Brennan + 4 in Guest (although not all in one opinion) overruled the aspect of the Civil Rights Cases saying that Congress can't apply the 14th Amendment to private actors with its § 5 powers
        - Rehnquist says that Brennan's opinion stood alone and was NOT precedent
        - Goes on to say that the other justices Brennan uses to claim a "majority" gave no reasons for agreeing with Brennan and that we don't overrule cases by fiat
- Held: **VAWA fails the "congruence and proportionality" test because it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender-bias**
    - *If the Act isn't directed at the State or state actors – it fails the C&P test*, period
    - **The FB players wouldn't be state actors under 14th** – so congress can't reach them with § 5 powers and we already did away with the Commerce argument
    - Act visits no consequence whatever on any VA public official involved in investigating or prosecuting the assault
    - Note – no line between criminal and civil sanctions when it comes to § 5 powers

- What do we do with the voluminous congressional record saying state officials not taking violence against women seriously?
    - Not relevant because it wasn't directed at state officials
    - Also, Congress' findings indicate that the problem of discrimination against victims of gender-motivated crimes does not exist in all States, or even most States and the Act applies nationwide
        - So, **the Act is overinclusive viz. Court's established 14th Amendment doctrine and Congress doesn't have the record to support such overinclusiveness**
- Rehnquist rests on Two Bases
    - (1) Not directed at State Actors = Not C&P
    - (2) Overinclusive + Not Justification in the Record = Not C&P

Kimel v. Florida Board of Regents (2000)

- Held: Congress had exceeded its 14th Amendment remedial authority in allowing state employees to sue the states for damages for violations of the Age Discrimination in Employment Act →§ 5 enactment not C&P
    - See abrogation of state sovereign immunity again
- The Antidiscrimination protections of the ADEA for state employees far exceed the requirements of equal protection
    - Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level
    - Congress has effectively raised "age" to heightened scrutiny, which isn't required by Court's cases
    - Congress is substantively changing the content of the 14th Amendment
- **The ADEA fails the C&P Test**: through its broad restriction on the use of age as a discriminating factor, it "prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection standard" + "Congress *never identified any pattern of age discrimination* by the States, much less any discrimination whatsoever that rose to the level of constitutional violation"
    - **(1) overinclusive viz. Court's "age" equal protection jurisprudence**
    - **(2) No Congressional record to support overinclusiveness**

Univ. Alabama v. Garrett (2001)

- ADA Title I
    - Prohibited employers for discriminating against a qualified individual on account of disability
    - Required covered employers to make reasonable accommodations to the physical or mental limitations of otherwise qualified disabled workers except in cases of undue hardship
    - Gave money damages remedy for violations
    - Applied to state employers
- Held: Congress' attempt to abrogate state sovereign immunity for state-employer violations of Title I of the Americans with Disabilities Act was beyond their 14th, § 5 powers
    - Again – note abrogation of immunity implicates 14th Amendment

- "It is the responsibility of this Court, not Congress, to define the substance of constitutional guarantees"
    - ***<u>Cleburne</u> identified the substantive equal protection guarantee regarding disability classifications and the States are not required by the 14th Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are RATIONAL***
- Raises the Question: Why must Congress' § 5 powers be confined to prohibiting discrimination that the Court would find irrational under the equal protection clause?
    - Doesn't ADA extend protection to a previously unprotected class?
    - Breyer dissent
        - We're giving more scrutiny to laws that help the disabled by giving close scrutiny to congress' attempt to extend protections to disabled
        - When states burden disabled, we apply rational basis
        - This makes no sense
- **<u>C&P Test</u>**
    - <u>OVERINCLUSIVE</u>: the ADA, through the reasonable accommodations provision required of state-employers far more than was necessary to vindicate the particular rights at issue
        - The Accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternative responses that would be reasonable but would fall far short of imposing an "undue burden" upon the employer
    - <u>NO SUPPORT IN CONGRESSIONAL RECORD FOR OVERINCLUSIVENESS</u>
        - Most incidences of discrimination in the record were attributed to local government, who are NOT protected by the 11th Amendment
        - The incidences attributed to the States may not have even be unconstitutional under current doctrine
        - "It is telling that Congress assembled only such minimal evidence of unconstitutional state discrimination, given the large numbers of both state employees and disabled Americans
    - Also: The Act makes it the employer's duty to prove that it would suffer an undue burden in making reasonable accommodations, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision
- Why do we allow Federalism to override Congress when its mentioned no where in the text? Didn't the Civil War Amendments fundamentally alter the Federal Balance?
- Title VII issue again and abrogating state sovereign immunity – perhaps there was a TRUE voluminous congressional record to justify their overinclusiveness (or maybe, see Scalia in next case)

<u>Tennessee v. Lane</u> (2004)

- ADA Title II
    - No qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination by any such entity

- Court says that Title II of the ADA is a permissible exercise of Congress' 14th Amendment § 5 powers as applied to cases involving access to the state courts
- Constitutional Basis for the Statute
    - **Right of Access to the Courts, which is protected by the DUE PROCESS clause of the 14th**
    - **Thus, Congress is just building upon this established doctrine**
- Congressional Findings
    - Congress learned that many individuals, in many States across the country, were being excluded from courthouses and court proceedings by reason of their disabilities
- Stevens and "Doing Justice to the Case"
    - Nothing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole
    - *This case is about whether Congress, under § 5, has the power to enforce the constitutional right of access to the courts*
- Title II meets the Congruent and Proportionate Test
    - Failure to accommodate persons with disabilities will often have the same practical effect as outright exclusion
    - Title II is limited – it does not require States to employ any and all means to make judicial services accessible to persons with disabilities and it does not require States to compromise their essential eligibility criteria for public programs
    - Title II only requires that which would not fundamentally alter the nature of the service provided, and only when the individual seeking modification is otherwise eligible for the service
    - The duty to accommodate is perfectly consistent with the well-established due process principle that, within the limits of practicability, a State must afford all individuals a meaningful opportunity to be heard
- Rehnquist: No C&P
    - By requiring special accommodation and the elimination of programs that have a disparate impact on the disabled, Title II prohibits far more state conduct than does the equal protection ban on irrational discrimination
    - **Congress has identified NO PATTERN of actual constitutional violations by the States of the right of access to the courts (overinclusion not justified)**
    - *The effect of the "as applied" approach is to "rig the C&P test by artificially constricting the scope of the statute to closely mirror a recognized constitutional right* – precedent doesn't support this
- Scalia
    - C&P test is bullshit and nothing but a vehicle for judicial policy making
    - Go back to a strict textualist interpretation of "enforce by appropriate legislation"
    - But on Stare Decisis grounds – race is an exception and Congress' enactments when it comes to race will only be judged under McCulloch standard; all else gets strict textual

Nevada Dept. of Human Res. v. Hibbs (2003)

- Upheld Congress' power to apply the Family Medical Leave Act to State employers with § 5 of the 14th.

- Rehnquist opinion
- Scope of Congressional Power under § 5
    - Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct
    - *Congress is not confined to the enactment of legislation that merely parrots the precise wording of the 14th Amendment, but it may prohibit a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text*
    - But, this is subject to the C&P Test
- **C&P Test**
    - Basis in substantive law: FMLA aims to protect the right to be free from gender-based discrimination in the workplace. We have held that statutory classifications that distinguish between males and females are subject to heightened scrutiny
        - Thus, it's harder to say this law is overinclusive
    - Congressional Record
        - Congress must identify, not just the existence of age or disability-based state decision, but a wide-spread pattern of irrational reliance on such criteria → Standard for previous cases
        - Here, Congress directed its attention to state gender discrimination, which triggers a heightened level of scrutiny, thus the standard for demonstrating the constitutionality of a gender-based classification is more difficult to meet than our rational-basis test and it is therefore easier to Congress to show a pattern of state constitutional violations
    - In essence, *the level of congressional findings doesn't have to be as high to justify some overinclusiveness when the classification that is the subject of the enactment is subject to heightened scrutiny* – i.e. **its harder to say that the Act actually is overinclusive when we're dealing with a classification subject to heightened scrutiny**

My View of what's Going on with § 5 C&P Test

- (1) **Is the Statute OVERINCLUSIVE?**
    - Does it prohibit conduct that is constitutional as determined by the Court's substantive law?
    - Affected by Level of Review given the Classification that is the subject matter of the Act
        - Heightened Review – harder to say statute is overinclusive
        - Rational Review – easier to say that statute is prohibiting rational classifications and thus going beyond what the Court has said the Constitution protects
    - State Actor Limitation
- (2) **Does the Congressional Record Justify the Overinclusiveness?**
    - When classification is subject to rationality review: Has Congress identified a wide-spread pattern of irrational reliance by the States on such criteria (and they MEAN "widespread")
    - When classification is subject to heightened review: Its easier to show these patterns and harder to say that the statute is overinclusive

- VRA cases
- Hibbs and Gender

Logical Progression

1. What is the standard of review for what congress is trying to regulate?
2. Would leglislation make illegal what would stand under Court-announced equal protection? (Overinclusive?)
3. Has congress demonstrated a wide-spread pattern of [insert standard of review] discrimination? (i.e., irrational discrimination, or 24-hour waiting period being an undue burden, etc.) This varies with standard of review.

Answering a "Repeal of Entitlement or Anti-Discrimination Law" Question

- No constitutional duty to provide the entitlement or to enact the anti-discrimination law
- Entitlements = Social or Economic Legislation that is subject to rational basis, usually, in Equal Protection Context
- Is the class it repeals from suspect?
- Romar Analogy
  - Romar: repealed + forbid enactment
  - This was (1) literal equal protection violation and (2) Moreno Rule
- Reitman Analogy
  - Finding of Express Intent when repealing
  - But subject this to Washington v. Davis today
- Maine allowed to repeal gay anti-discrimination laws
- Were there legitimate (rational) reasons for repealing?
  - In Romar – could find nothing other than animus – and THAT was determinative (Moreno) + Forbid enactment