Constitutional Law – Professor Lahav – Spring 2010

Issues: Separation of powers, equal protection (argue classification), due process (argue fundamental right), federalism, commerce clause

Exam:

- ALWAYS start with the text
- Highlight confusion on the exam (if you are not sure if it is economic legislation, e.g.)
- Argue in 3's
  - Ex: Justice Jackson's Model in the Steel Seizure case
  - Ex: Rehnquist in *Lopez*
- Cover the entire field we've studied
- Go methodically though all steps
- **Distinguish**: cases/precedent, facts, means vs. ends, explicit vs. implicit, dicta vs. holding, concepts vs. conception, federal statute vs. state statute, enumerate federal power vs. state police power, standards (O'Connor/Kennedy) vs. rules (Scalia), original/actual purpose vs. manufactured purpose
- Expects order – need a beginning/middle-analysis/end
- Discretion: address the most important/pertinent issues
  - Can say, "I see there is an X issue, I will address it superficially because I believe Y issue is more important"
- Remember to court the number of justices re: majority, plurality, joint

Normative Conflict = **tension** between a norm and the Constitution

Justice Black: textualist – always carried around a Constitution in his pocket

Remember legislation's statutory interpretation tools/arguments

"assuming *arguendo*"

Ultra vires – outside of your powers – so statute/order is null and void

Counter argument to slippery slope (pg. 194): abuse of power is not an argument against the power itself – the power exists and Congress can use it

Don't talk to us about abuse, because we are focusing on the power [not the abuse] – so don't give us a parade of horrible

We are focusing on the power now – is this OK for Congress to do; if in the future you show us Congress is abusing the power, we will deal with it then

More important for the Court to deal with the power at issue, rather than with legal uncertainties, since there is a lot of legal uncertainty in the future

Counter argument to "federalism will be destroyed": if federalism is going to fade away, so be it …; also, federalism will not be destroyed because the states are protected by the political process (ex: Congress is made up of the states)

Minimalism: the business of the Court should always be to employ minimalism – rule on the narrowest ground possible … don't need rhetoric, don't need broad points – better theory is to decide incrementally (case by case); minimalism chooses the legal intrusive legal problem and decides the case on that ground

- Narrow Holding:
  - Stare decisis: we obey precedents
    - Ratio decidendi (holding): the legal reason, without which, the case would not have been decided
      - Only thing you are bound by under stare decisis is the ratio decidendi

- Obiter dictum (dicta): larger theoretical explanation re: where we are and why we are doing this
    - Persuasive, but not binding

Challenging a statute:

(i) on its face/facial challenge

More aggressive – you are asking to kill a statute; it is a direct insult to the legislative branch to tell them they do not have the power to do this

(ii) as applied

More cautious, more conservative, more respectful and deferential tool

Precedent: when the Court makes a decision about what the Constitution says, that is the end of the story; unless we get a constitutional amendment (not an easy task) – or – if the Court decides to reverse itself (which the Court does not like to do because want to present itself as loyal to precedent, rather than legislating from the bench – gives the Court stability and predictability – taking away the idea that the Court is making decision for you: we love/obey precedent …)

- Rhetoric: "We decided" → Court uses "we" even if "we" means Justice Marshall 100 years ago to project **institutional continuity**
- Court deals with precedent (to either avoid or use it) by distinguishing (i) on the basis of the facts, or (ii) distinguishing on the basis of law

Typical **police powers**: education, health, transportation, safety, family law …

SCOTUS gets it jurisdiction from Article III: can decide **"cases and controversies"** – so they need a case and a controversy between the parties in the suit

Most of the time, the Court only does what they need to do and no more (focus on the facts of the case and controversy immediately before them), but sometimes they do more than they need to (ex: *Dred Scot*: they thought they were resolving the controversy, but critics say the decision could have been limited to its facts and did not need to involve the whole nation)

Ex: *Brown* – focuses only on the case in front of them re: education & segregation; does not outlaw all segregation

Issue of the Court's jurisdiction (Article III: "cases and controversies") can be interpreted to mean that we should only look to the ratio decidendi – not dictum, not policy – limits it vision to the parties

Means-Ends: very important distinction

- Means: use means in order to achieve the ends
- Ends: why are you doing it?
- START WITH THE END FIRST, THEN DO THE MEANS

Which **level of review** do I think the Court will give?

And then correct yourself – if you think rational basis review, think maybe they will do intermediate scrutiny, maybe actual purpose …

Process vs. Substance

The Court generally prefers issues of process (how) to issues of substance (what)

Focus on issues of process and you raise your chances a little bit of winning

Actual purpose: Lahav does not care how we resolve actual purpose issues, but wants to see us challenge it – give arguments – the result does not matter though

The Court, nor individual justices, have been consistent on the issue of review based on actual purpose

Consider: might be hard to determine the legislature's actual purpose; different legislators might be motivated by different purposes

Exceptions in statutes are important to evaluate the means-end relationship

Think: if this exception is here, why can't I have the exception I want to argue for? (*Griswold*)

Exam: what is the constitutional question you choose to ask?

Level of abstraction: low level = very specific (descriptivity); high level = very basic ideas (fundamentality)

Ex: low level = right to die (Rehnquist); high level = right to bodily integrity (Souter)

If you want something new, use a high level of abstraction

Substantive Due Process: argue either (1) deeply rooted in the Nation's tradition (an argument from history), or (2) implicit on the concept of ordered liberty (an argument from philosophers of constitutionalism)

If you find a fundamental right, ask for strict scrutiny; but be ready to argue for rational basis review in case Court decides right is non-fundamental

SDP vs. EP argument in the context of *Skinner* (which used EP)

Substantive due process argument: statute violates a right which is basic to the perpetuation of the species – an independently protected fundamental right to have offspring that the State may not deny to anyone

Equal protection argument: leave aside the question whether there is an independently protected fundamental right to have offspring; procreation is a fundamental right or interest for purposes of EP analysis; the State, if it allows some to procreate, must allow all to procreate

Note: Court decides on the basis of one person – a majority of one can make a decision for us; whereas the Senate needs a supermajority – 60 votes; 5-4 decisions & importance of Justice Kennedy

First Principles: federalism; limited government; separation of powers; popular sovereignty (consent/will of the people)

If you want to kill a federal statute: say it is not within the government's enumerated powers

If you want to kill a state statute: say it is not within the state's police powers

Who likes **balancing**: O'Connor, Kennedy, Harlan, Souter, Breyer

The decision whether a right is fundamental tends to be dispositive of whether the statute is sustained or invalidated

Fundamental right: strict scrutiny; Non-fundamental right: rational basis review

Federalism: deference to Congress (*Rostker* & *Nguyen*) vs. no deference to the States (*Craig v. Boren*, *Hogan* & *VMI*)

Two competing understandings of the Equal Protection Clause [supplement]: (1) anti-caste principle (inferiority); (2) racial neutrality (colorblind)

Two competing conceptions of tradition [supplement]

(1) **tradition as historical practices**: "only those practices, defined at the most specific level, that were protected against government interference by other rules of law (i.e. statutes and common law) when the 14th Amendment was ratified" (Scalia in *Casey* & *Michael H.*)

(2) **tradition as aspirational principles**: the principles to which we as a people aspire and stand for, whether or not we have fully realized them in our historical practices (ex: "all persons created equal" is part of our tradition, despite our historical practices of racism) (*Bolling*, Ginsburg in *VMI*)

Possible (3) Justice Harlan: tradition is a **"living thing"** or evolving consensus

Think: legislative veto is unconstitutional because it violates presentment (pres. must sign or veto laws) and bicameralism (concurrence of both Houses)

Think: Scalia is more receptive to abstractions and extra-textual sources in interpreting powers are compared with rights

Ex: rights in *Casey* and *Michael H.*; Ex: powers in *Printz* and *Morrison*

Constitution

I. Ratified in 1787
II. Bill of Rights in 1791
    a. 10 amendments done right away
    b. Gives rights and tells the federal government what they cannot do
        i. Strengthens the idea of liberty
III. We've had for 233 years
IV. Preamble: "We the People of the United States … in order to form a more perfect Union …"
V. 7 articles
    a. Article I: Legislative Branch
        i. Process: who & how can they do it?
        ii. Substance: what can they do?
        iii. §8: enumerated powers of Congress
        iv. §9: limits on Congress' power ("no, no clause")
            1. §9(2): The writ of habeas corpus shall not be suspended
        v. §10: limits the States (federalism)
    b. Article II: Executive Branch
        i. §1(1): Vesting Clause: "The executive power shall be vested in a President"
        ii. §2(1): "The President shall be Commander in Chief of the Army and Navy"
        iii. §2(2): "He shall have power … to make treaties"
        iv. §2(3): Take Care Clause: "He shall take care that the laws are faithfully executed"
    c. Article III: Judicial Branch
        i. §1: "shall hold their office during good behavior"
        ii. §2: "The judicial power shall extend to all cases arising under this Constitution"
    d. Article IV: States – federalism
    e. Article V: Ways to amend the Constitution – will be very difficult
    f. Article VI: "Constitution … shall be the supreme law of the land"
    g. Article VII: Constitution is ratified
VI. 27 amendments

Judicial Review

I. Judicial Review can be a **destructive** power (invalidating) and a **legitimating** power (validating)
II. ***Marbury v. Madison*** (C.J. Marshall) (1803) (unanimous): canonical case establishing judicial review
    a. Marshall's rhetoric is framed to persuade you that he is not doing anything special – it is all coming from the Constitution
    b. Normative conflict: Constitution, Article III vs. Judiciary Act of 1789
        i. Marbury claims the writ of mandamus can be issues by the Court because of the Judiciary Act
            1. But, the Constitution, Article III, does not grant the Court original jurisdiction, only appellate jurisdiction – thus Court cannot issue the writ because Marbury filed directly with the Supreme Court
    c. Article III is silent as to what the Court should do if a statute is in conflict with the Constitution
    d. Arguments
        i. (1) First Principles: the principles that inspired and came before the text (what gave life/rise to the text)
            1. All of the power comes from the people (popular sovereignty)
                a. The people are supreme; power is vested in the people
        ii. (2) Government is limited (unlike England where the Parliament has unlimited power)
            1. If we have a limited government, then it follows that the legislature is limited
                a. "The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed and if acts prohibited and acts allowed are of equal obligation"

iii. (3) Comparative law: "Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution is void"
iv. (4) Why does the Court have the power to review?
1. Competence argument – Court can do it because the Court has always interpreted the law
a. "It is emphatically **the province and duty of the judicial department to say what the law is**"
i. "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each"
1. To hold otherwise would be to say that the legislature is omnipotent
v. (5) Textual argument
1. "Arising under" clause: "The judicial power of the United States is extended to all cases arising under the Constitution"
a. Marshall argues that the grant of jurisdiction would be meaningless if the courts did not have authority to examine the constitutionality of acts of Congress
2. "In declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank"
a. Supremacy Clause: Constitution is the supreme law of the land, and it is meaningless without the enforcement mechanism of judicial review (Article IV)
3. Marshall also relies on the fact that judges take an oath to uphold the Constitution

III. Countermajoritarian Difficulty ("against the majority"): judicial review gives the Court the power to kill statutes that the legislature wanted
a. To become a law: House, Senate and President all had to approve
b. To kill a statute: only need 5 votes
i. Essentially, 5 votes can decide what everyone before did was unconstitutional (i.e. undo the approval of the House, Senate and President)
1. Appointed justices are overruling what the elected legislature and president decided (elected = by the *majority* of the people)
c. Counterargument: judicial review enforces the fundamental law of We the People against encroachment by the ordinary law of the people; therefore, it is not undemocratic because it upholds the supremacy of We the People embodied in the Constitution (just one argument)

IV. Constitution, Democracy, and Judicial Review
a. Legal formalism (mechanical interpretation): judges just compare the texts (Constitution vs. statute)
i. Their values have nothing to do with the decision – we're not doing anything – just applying the law/text
1. Formalism rejects the idea of personal responsibility – judges decide from the text/intent of the Constitution, not their own discretion
ii. Originalism: when you do not understand something in the Constitution, go back to the original text
1. No subjective discretion – Constitution tells us what to do
2. If it is not explicitly in the text or the text is ambiguous, then consider what the Framers at the time of ratification thoughts (original intent)
a. If you don't like the answer, then go to the legislature for change

b. Ex: "equality" framers were concerned about equality for blacks only (not women, not homosexuals, etc.)
    i. Originalism would say look to what was meant in 1864
    ii. Others would say equality is an elastic principle
        1. Concept of equality – every generation changes it
            a. Constitution includes concepts (do not change), not conceptions (can change over time)
                i. Constitution is not a rigid text, but rather an elastic, breathing text – a living Constitution
        2. Conception – what framers thought at the time
    iii. Challenges to Originalism
        1. Original intent = applying what the framers (dead, white, rich males) meant – the long hand of the dead is coming out of the grave and is controlling
            a. "We the people … now" – not "we the people then"
        2. Judges cannot do their jobs 100% objectively – whoever you are, you bring with you ideas, experience, baggage – who you are makes a difference
        3. Constitution is open-ended; very rare that framers' intent will be crystal clear
        4. Things change; times change
        5. Justice Kennedy: history is indeterminate

V. Separation of Powers & Checks and Balances
    a. Montesquieu: separation of powers
        i. Captures the constitutional effort to allocate different sorts of power among the three governmental entities that are constituted in different ways
        ii. Separation of powers is about drawing inferences concerning the nature of governmental ***structures*** created by the constitutional text and inferences from the relationships among those structures
    b. Checks and balances: focuses on the constitutional effort to ensure that the system will be able to guard against usurpation of authority by any one branch
        i. Suggests overlapping functions in which each branch is able to intrude on and thereby to check the power of the others
    c. Purposes
        i. Efficiency: a division of labor among the various branches makes government more efficient
        ii. Prevention of tyranny: the separation of powers diffuses governmental power, diminishing the likelihood that any one branch will be able to use governmental power against the citizenry

<u>Executive Branch</u>

I. Presidential Powers, Article II:
    a. §1, subsection 1
        i. Vesting Clause: "The executive power shall be vested in a President"
    b. §2, subsection 1
        i. Commander in Chief of the Army and Navy (note: he needs an Army to command though, which is a power of Congress – to raise and support an Army)
        ii. Grant reprieves and pardons
    c. §2, subsection 2
        i. Make treaties (note: he needs advice and consent of 2/3rds (supermajority) of the Senate first)
        ii. Make appointments (collaboration of the branches)
    d. §2, subsection 3
        i. Give the State of the Union

ii. Recommend bills to Congress
iii. Convene both Houses
iv. Can receive/appoint/recognize ambassadors – great power of the President in foreign affairs
v. Take Care Clause: "He shall take care that the laws are faithfully executed"
1. Most recognized limitation on Executive power: President may not make the laws, he may only carry them out

e. "A state of war is not a blank check for the President when it comes to the rights of the Nation's citizens" [echoed in *Youngstown* & *Hamdi*]
f. President can issue executive orders because he has the power to "take care" that the laws are faithfully executed (so presumably, there must be a law)

II. ***Youngstown v. Sawyer*** (Black) (1952) (6-3): The Steel Seizure Case
a. Case of first impression = first time the powers of the President have come before the Court (what are the powers of the President?)
b. Facts: steel workers wanted to go on strike during the Korean War because of a labor dispute; Pres. Truman issued an Executive Order re: Secretary of Commerce take control of and seize the steel mills; Truman issued a statement to Congress re: if you don't like my Order, let me know & I will defer to you (respect for separation of powers)
c. Normative conflict: Executive Order and Article II
d. Result: not within the President's Article II powers
i. President did not have the power to issue the Executive Order
e. Justice Black (majority): <u>textualist</u> interpretation – if I do not see it in the text, the power does not exist [formalistic: President's power must come from an act of Congress or the Constitution itself]
i. <u>Doctrine</u>: President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution – can be implicit or explicit
1. First, see if President gets the power from a statute – does a statute resolve the tension, explicitly or implicitly? No.
a. Look to a statute first because statutory basis is narrower than Constitutional basis
i. Rule of Constitutional Avoidance: we avoid interpreting the Constitution if we can do a statutory analysis
2. Second, look to Article II in the Constitution
a. Black finds no power in Article II that allows the President to seize property through an Executive Order for national security reasons
i. President can only act according to the law – statute or Constitution
ii. "The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times"
1. <u>Positivism</u>: the law is independent of what is happening right now; law does not reflect social conditions
a. Constitution is the same text – in good times and in bad [separation of powers]
f. Justice Frankfurter (concurrence): <u>history</u> – must look at history to see what powers the President has had historically & how President has interacted with Congress; need to study history
i. "It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard **the gloss which life** has written upon them" (i.e. Black is too narrow in his textualist interpretation)
1. "**A systematic, unbroken, executive practice, long pursued to the knowledge of Congress and never before questioned**, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of

power part of the structure of our government, may be treated as a gloss on executive power vested in the President by Article II"

a. Here, rule of the gloss is not satisfied, so Executive Order cannot stand

g. Justice Jackson (concurrence): **context** – must read the text, but that is not enough, need to consider in context (both present and historical context); need to bring in the experience of politics [functionalist/holistic, versus formalistic]
   i. Intent of the Framers is indeterminate – we will never know, so not going to be helpful/conclusive
   ii. Jackson Model: 3 possibilities derived from practical wisdom and experience (President's powers fluctuate depending upon disjunction or conjunction with the legislature) [where does your case fall?]
      1. **First**: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate"
         a. If there is a statute that authorizes the President to act, "strongest presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it"
         b. Black's approach
      2. **Second**: "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain"
         a. "Any actual test of power is likely to depend on the imperatives of events and contemporary imponderables, rather than on abstract theories of law"
      3. **Third**: "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus an constitutional powers of Congress over the matter"
         a. "Presidential claim to a power at once so conclusive (final) and preclusive must be scrutinized with caution"
   iii. Justice Jackson wants to gently push Congress to do something because the President is taking away their power

h. Justice Vinson (dissent): ***ex necessitate*** – "exception by necessity" (laws of out necessity)
   i. U.S. security is in jeopardy, because of that we should interpret the power to exist
      1. Emergency situations create or validates inherent powers
         a. Gravity of the emergency and immediacy of the disaster are relevant to Vinson, as a matter of law
   ii. "All the laws but one" position: the law that allows the President to seize the mills during this emergency is the "but one" law that is missing
      1. Admits he is legislating, but says at the same time, if he does not, all the other laws will be compromised, so let the President abide by his duty to take care
   iii. Have to be pragmatic (not dogmatic and rigid): we all agree this is a terrible problem, so let's not deny the President the tools to deal with the problem
      1. No danger of unlimited powers by the President because he notified Congress & Congress is passive
      2. By virtue of being the Executive, he has inherent powers to do certain things that must be done

i. Government's argument
   i. "*The* executive power shall be vested …"
      1. Unitary: in one person, in order to expedite the needs of the country
      2. "The executive power" implies more than we see enumerated in Article II

            a. Jackson's counter: if that is true, the Founders would not have listed the powers are they did; why would there be a list if the first line means the Executive has more powers than the list includes
        3. Executive power "shall be vested" – in comparison to "All legislative powers *herein granted*" … so vesting clause is much more general, i.e. text means to give President more powers than listed
    ii. "The President shall be Commander in Chief" (needs war powers)
        1. Jackson's counter: President is Commander in Chief of the Army & Navy, not the country (no monopoly of war powers)
    iii. *Ex necessitate*
        1. Jackson's counter: rejects *ex necessitate* as an argument – Constitution does not contemplate situations of emergency

III. ***Dames & Moore v. Regan*** (Rehnquist) (1981)
- a. Background: during Iranian Hostage Crisis & American Embassy was under seize by Iranian students
- b. Normative conflict: Executive Agreement vs. Article II
- c. Result: Executive Agreement (to terminate litigation pending before a federal district court) is valid
- d. Rehnquist looks to **Justice Jackson's & Frankfurter's opinions from the Steel Seizure Case**
    - i. Factors: international emergency (*ex necessitate*) and Congress acquiesced in the President's action (not by statute, but by being passive)
        1. "We are not prepared to say that the President lacks the power …"
    - ii. "We are not confronted with a situation in which Congress has in some way resisted the exercise of Presidential authority"
        1. Here, no contrary indication of legislative intent & a history of congressional acquiescence
        2. Cf. Steel Seizure case where the background of the Taft-Hartley Act's legislative history loomed, which proved negative intent of Congress since they denied the President emergency powers to seize property
- e. "We re-emphasize the narrowness of our decision. **We do not decide that the President possesses plenary (constitutional) power** …"
    - i. Limited holding, specific to the facts, very limited precedential value
        1. Emergency powers granted on the basis of the specific emergency [not a grant of emergency powers in general]

IV. ***Medellin v. Texas*** (Roberts) (2008)
- a. Facts: Medellin is a Mexican citizen tried in Texas court for murder; Vienna Convention (a treaty) provides that he should be able to consult with consul and that did not happen in this case
    - i. Court distinguishes between self-executing and non-self-executing treaties (even though Article VI does not mention both)
        1. If it is self-executing, it is part of the law of the land
        2. If it is not, it is not part of the law of the land until Congress legislates it
            a. Vienna Convention is a non-self-executing treaty, so not the law of the land, and therefore the state courts do not have to obey it and Medellin can be executed in violation of the Vienna Convention
    - ii. So, President issues a Memorandum asking the state courts to obey the treaty, in spite of SCOTUS' holding, and let Medellin consult his consul
    - iii. Note: no emergency situation here (like in *Dames & Moore*)
- b. Normative conflict: Presidential Memorandum vs. Article II
    - i. Does the President have the power to issue the Memorandum
- c. Result: Memorandum invalid
- d. First Principle: "The President's authority to act must stem either from an act of Congress or from the Constitution itself" [**Black's language from Steel Seizure case**]

i. President has important interests at stake, but, "such considerations do not allow us to set aside first principles"
    1. Remember: Justice Marshall referred to first principles as well in *Marbury*
ii. Memorandum does not stem from an act of Congress and Article II does not give the President the power to legislate
    1. Roberts also suggests that congressional acquiescence would not be relevant here
        a. Court is pushing Congress to take back its power – wants Congress to take more power and reign in the President to restore the balance of powers

Allocation of War Powers

I. Article I, §8(11): power to declare war is for Congress (House and Senate)
II. Article I, §8(12): Congress has the power to raise and support armies
III. Article II, §2(1): President is the Commander in Chief of the Army and Navy
    a. Expectation of the Constitution is that Congress and the President will work together in war efforts
IV. ***Hamdi v. Rumsfeld*** (O'Connor) (2004)
    a. Facts: Hamdi, a U.S. citizen born here, is shipped to detention in North Carolina after allegations he was fighting with the Taliban; Hamdi's father brings a habeas corpus action re: cannot hold a U.S. citizen in perpetual detention
    b. Normative conflict: Executive Order (detention) vs. UCMJ (passed by Congress)
    c. Result: Executive Order is null and void because the UCMJ does not allow it
        i. Hamdi needs to be given due process (not a lot, but a little)
            1. "… although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the U.S. as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker"
                a. Limited holding: only about American citizens on American soil
        ii. "Whatever powers the Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake"
            1. "Unless Congress acts to suspend it, the great writ of habeas corpus allows the judicial branch to play a necessary role in maintaining this delicate balance of governance, serving as an important judicial check on the Executive's discretion in the realm of detentions"
            2. In times of crisis, the branches should work together and the President should not have unilateral power to take private property or detain citizens on American soil
    d. Justice O'Connor (majority): exercises the doctrine of constitutional avoidance
        i. "We have long since made clear that a state of war is not a blank check for the President when it comes to the nation's citizens"
    e. Justice Souter and Justice Ginsburg (concurrence): do statutory analysis, rather than constitutional
        i. Non-Detention Act: after U.S. put Japanese-Americans in detention camps, Congress passed this Act, which holds that the U.S. will never detain American citizens on American soil, and it we have to do it, we must do so explicitly
            1. If one text is explicit (Non-Detention Act) and the other is implicit (AUMF), we prefer the explicit one
                a. If Congress wants to take away liberty, it must do so clearly
    f. Justice Scalia (dissent): Article I, §9 explicitly prohibits the suspension of habeas corpus without cases of rebellion or invasion or when the public safety might require it – which did not happen here

g. Justice Thomas (dissent): President is acting pursuant to the powers vested in the President (more than just the powers listed in the Constitution)
    i. President need to implement residual powers in order to run the country
    ii. Compare Article I ("herein granted shall be vested") with Article II ("shall be vested")
        1. Theory: powers in Article I are limited to those enumerated, but the President is not limited because did not use "herein granted"

h. Court is, again, telling Congress to re-take their power back from the President
    i. Congress responds to this with the Detainee Treatment Act & Military Commissions Act – congressional statutes doing just what the President wanted
        1. Court responds in *Boumediene*

V. ***Boumediene v. Bush*** (Kennedy) (2008) (5-4)
    a. Normative conflict: Detainee Treatment Act vs. Article I, Section 9, subsection 2: habeas corpus
    b. Result: the Detainee Treatment Act unconstitutionally restricted the writ of habeas corpus and that the limited review in the U.S. Court of Appeals provided for in the Act was not an adequate substitute for habeas
        i. Habeas corpus: every person shall have the right to come before the court; Congress cannot take this right away
            1. Court is not worried about substance (i.e. whether he committed the crime or not), rather Court is concerned with the process
                a. Justice Kennedy does not want to sacrifice too much liberty for security – <u>balancing</u> issue
        ii. Court is increasing its control/review of Presidential actions (*Hamdi* → *Hamdan* → *Boumediene*)

<u>Federalism</u>

I. Federalism (vertical): the power of the federal government (as an undivided entity) versus the power of the state governments ["federalism" never appears or is defined in the Constitution, but it is a pillar of our society]
    a. Federal government has enumerated powers
        i. Ex: Article I, Section 8: 18 enumerated powers of Congress
    b. State governments have police powers
        i. Ex: Article I, Section 10: what the States cannot do
        ii. Ex: Tenth Amendment: powers of the States
            1. Tenth Amendment reminds us that the federal government is limited
    c. Notions of Federalism [supplement]:
        i. Dual federalism/sovereignty → ex: Rehnquist re: truly local and truly national (*Hammer*, *NLC*, *Lopez*, *Morrison*, New *York*, *Printz*)
        ii. Cooperative federalism → ex: Souter re: boundaries are fluid
        iii. National supremacy → Court imposed limits on Congress' powers are unnecessary; State interests are adequately safeguarded by the national political process (*McCulloch*, *Gibbons*, *Darby*, *Garcia*)

II. ***McCulloch v. Maryland*** (Marshall) (1819)
    a. Facts: Congress establishes a Bank – can they do that? Or is that a police power of the States?
        i. Undivided federal government said the Bank is valid under the Constitution (Congress submitted, President signed, and Court validated/legitimated)
        ii. First time we see the word "nation" – Marshall is trying to establish something: we are creating a nation here
    b. Normative conflict: Statute that created the Bank vs. Article I, Section 8
        i. Incorporating a Bank is not explicitly enumerated in the Constitution, so can Congress still establish it?
    c. <u>Doctrine</u>: Congress may choose any means not prohibited by the Constitution to carry out its powers (N&P Clause)

d. Tradition/Practice: "The power now contested was exercised by the first Congress elected under the present Constitution"
    i. These are the minds who ratified the Constitution (they were there at the moment of creation), so they must have known what they meant; and if they established a Bank, they knew that it was legitimate under the Constitution (i.e. first Congress thought that they had this power)
        1. [similar argument that Justice Frankfurter used in *Youngstown* re: history/gloss]
    ii. But, "it will not be denied" that even though everyone accepted the Bank, it is OK to doubt it because it was, "a bold and daring usurpation"
        1. Maryland argues that the Constitution is the Constitution, so if Congress violates it, that act is unconstitutional – regardless of acceptance or that you were the first Congress
e. Supremacy of Congress: "**the government of the Union, though limited in its powers, is supreme within its sphere of action**"
    i. "The people have, in express terms, decided it, by saying, 'this Constitution, and the laws of the United States, which shall be made in pursuance thereof … shall be **the supreme law of the land'**" (uses Article VI language to support his argument)
        1. Dual Sovereignty: dividing the sovereignty to both governments
            a. When the people (not the States, like Maryland contends) ratified the Constitution, they created an undivided federal government and the State governments
                i. "The Framers split the atom of sovereignty" – Justice Kennedy in 1995
                    1. Two entities that are truly sovereign
f. Mischief Rule: if you want to understand what a particular arrangement in the Constitution is about, it is useful to find out what the situation was before and what the Framers were trying to correct
    i. "The men who drew and adopted [the Tenth Amendment] had experienced the embarrassment resulting from the insertion of ["expressly"] in the Article of Confederation, and probably omitted it to avoid those embarrassments" … Union did not function properly under the Articles of Confederation
        1. So Tenth Amendment does not use the word "expressly"
        2. Note: Articles of Confederation was a federation created by the States; Constitution was created by "the People"
g. Argument of Structure and Relationship: it is not enough to look at just the text – need to understand where the particular clause is located in the text (textual analysis of the whole instrument)
    i. Necessary & Proper Clause: "necessary" is married to the word "proper"; "necessary" is a broader term, not a limiting one (as Maryland contends)
        1. N & P Clause is in Article I, §8 with the enumerated powers (§9 is the limitations) and since N & P Clause is in §8 with the powers (not the limits), need to interpret it as a power and not as a limit
        2. N & P Clause allows Congress to use means to achieve their enumerated ends
h. Power not explicitly enumerated, "but **there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers**; and which requires everything granted shall be expressly and minutely described"
    i. "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code" [Constitution does not profess to enumerate the *means* by which the powers it confers may be executed]
        1. "Its nature requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves"

a. "We must never forget that it is a constitution we are expounding"
b. Constitution grants both enumerated and implied powers

2. Constitution is for everyone – for the people – and you want to develop it so that everyone in society understands the Constitution and can participate
    a. If it was a huge legal code, the public would not understand it; we want people to feel like it is theirs (<u>philosophy</u> behind our Constitution)
3. "This provision is made in a Constitution intended to **endure for ages to come, and, consequently, to be adapted to the various crises of human affairs**"
    a. "To have prescribed the means by which government should, in all future time, execute its powers, would have been to change entirely the character of the instrument and give it the properties of a legal code"
        i. Constitution should endure and have the capacity to adapt itself to the time as we go forward and we change … this is a living Constitution … we always have the power and the need to read new things into it because we've changed

i. <u>Doctrine</u>: "Let the end by 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 consist with the letter and spirit of the Constitution, are constitutional" [implied powers of Congress: **we can deduce the means from the enumerated powers ends**]
    i. Spirit of the Constitution matters
        1. Can find in the Preamble, Declaration of Independence, of the People …
        2. Note: Scalia would say there is no spirit of the law – it is not a legal argument
    ii. <u>Safety valve</u>: Marshall tells Maryland that this doctrine is not too broad – States can come to the Court if Congress usurps the power of the State because the Court has the power of judicial review
        1. <u>Pretext doctrine</u>: States can use the pretext doctrine and allege Congress' arguments that their actions are constitution are actually just pretext to cover Congress' usurpation

j. From ***Marbury*** to ***McCulloch***:
    i. In *Marbury* the Court recognized the power of judicial review by reconciling the statute with the Constitution – Court claims they were just reading and applying the text [legal formalist]
    ii. In *McCulloch*, the Court has a different philosophy – this is a Constitution we're expounding [more pragmatic]
        1. Perhaps the Court and/or Marshall have grown up and look at things differently

III. Forms of Federalism
- a. Neither state nor nation may have the power to act
    i. Sovereignty does not give you the power to do whatever you want
        1. Ex: neither government can pass a regulation that violates the First Amendment
- b. The national government may be given exclusive power to regulate in some area
    i. Ex: only federal government can declare war and coin money
- c. State governments may have exclusive power to regulate in some area
    i. This is a controversial form
        1. Ex: do the states have the exclusive power to regulate marriage?
- d. State and national governments may have concurrent power to regulate in some area
    i. Ex: labor and employment discrimination or drug regulations

IV. ***Gibbons v. Ogden*** (Marshall) (1824): end of the federalist era – approaching the age of Jackson, who likes the states, agrarian
- a. Marshall's opportunity to interpret the Commerce Clause (Article I, §8(3): To regulate commerce with foreign nations, and among the several states, and with the Indian tribes)

i. Canonical case – know the language

b. Normative conflict: NY state statute vs. Congressional statute

c. Argument: the power of Commerce to regulate commerce does not reach navigation
   i. Marshall: "All America understands the word 'commerce' to comprehend navigation"
      1. Giving the words of the Constitution a general/ordinary interpretation

d. Congress can regulate commerce generally
   i. "This power, like all others vested in Congress, is **complete in itself**, may be exercised to its **utmost extent**, and acknowledges **no limitations**, other than are prescribed in the Constitution"
      1. Broad statement about the powers of Congress – acknowledging a very powerful and potent government within their enumerated powers
         a. Even though enumerated, congressional power is plenary over the States'
         b. Effective restraints on Congress' plenary power must proceed from political rather than from judicial processes (repeated in *Wickard*)
   ii. Limitations (<u>safety valve</u>): Congress cannot regulate those concerns "which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government"
      1. *Gibbons* does retain the power of the states
         a. Things that are internal are left to the States

e. History: Federalist Era → Jackson Era (states' rights) → Civil War (rejection of the idea of states' right and a reassertion of the Union – powers of the federal government) … cyclical

V. ***Hammer v. Dagenhart*** (Day) (1918) (5-4): The Child Labor Case

a. Case stands for the rise of State power/rights
   i. Case wanted to let the States make purely local decisions
      1. Shows sensitivity re: issues of federalism

b. Background: Congress wanted to discourage child labor because the child laborers were not growing up to be good citizens, so Congress passed a statute that prohibited the interstate transport of goods that were made by children – does not directly say the states cannot employ children, because this is a police power = <u>Commerce prohibited technique</u>
   i. Father & the State contend that this Act is not within Congress' enumerated powers and Congress cannot use the means of commerce prohibited technique, so the Act is unconstitutional
   ii. Congress makes an economic argument: we have to take care of the nation's economy, so we must address the issue of unfair competition and make sure the states are competing fairly in the market
      1. Unfair competition because there are states in the Union that already prohibit child labor and then there are states that allow it, this causing unfair competition because of the cheap labor – so progressive states are being harmed

c. "The Commerce Clause was not intended to give to Congress a general authority to equalize such conditions"
   i. "There is no power vested in Congress to require the States to exercise their police power so as to prevent possible unfair competition"
      1. Let the market work and correct itself – the invisible hand – Congress does not have to interfere
         a. Court is limiting congressional power & telling Congress not to make economic arguments like this

d. Congress also makes a moral argument: this is just the right thing to do
   i. Congress does not have the power to regulate morality
      1. Exception: if the commodity/good itself that is being shipped is evil in themselves, then Congress has the power to regulate (drugs, prostitutes, e.g.)

a. Congress can use the commerce prohibited technique and prohibit the shipment of immoral/evil goods across state lines
2. In this case, the goods are not inherently evil (just the way in which they were made via child labor) – these goods are neutral and have nothing to do with morality, so Congress is prohibited from using the commerce prohibited technique
a. Judicial activism

e. Congress does not have the power to create this Act because **it is, "an invasion by the federal power of the control of a purely local matter"**
i. Slippery Slope Argument: federalism will fall apart if we keep allowing Congress to regulate purely local matters
1. If Congress can regulate purely local matters, "all freedom of commerce will be at an end, and the power of the States over local matters may be eliminated, and thus our system of government be practically destroyed"

f. Doctrine: if the commerce prohibited technique is used, the goods themselves must be evil
g. Doctrine: if the goods are intrastate, or concern manufacturing, Congress cannot regulate – can only regulate commerce [= formalistic]
h. Justice Holmes (canonical dissent): known for judicial deference – if it looks OK on its face, we should defer to Congress and not interfere
i. We must defer because, "Congress is given power to regulate such commerce in unqualified terms" – think *Gibbons*
1. "It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command" … no limitations
ii. If the American people do not like what Congress is doing, they can vote the legislators out of office
iii. Focus is not on the purpose – we should not scrutinize the statute to figure out why Congress enacted it
1. We are only looking at the statute itself and Congress does have the power to decide whether goods can be shipper interstate – not interested as to why or what the nature of the goods are

i. *Hammer* overruled in *United States v. Darby* (1941): "*Hammer* was a departure from the principles which have prevailed in the interpretation of the Commerce Clause both before and since the decision … It should be and now is overruled"
i. Very rare

VI. ***Wickard v. Filburn*** (Jackson) (1942)
a. Reassertion of federal government's power
b. Background: after finding that the total supply of wheat would substantially exceed a normal year's domestic consumption and export needs, Congress passed an Act which set a quota for wheat production
i. Filburn contends this is a purely local matter – he is harvesting wheat for personal consumption, not for selling or shipping – and any effects from his actions upon interstate commerce are at most "indirect"
1. However, even if his activity alone is trivial, the aggregate of all the trivialities together will make a substantial difference

c. Result: Act is valid
i. Marshall made emphatic the embracing and penetrating nature of the federal commerce power by warning that effective restraints on its exercise must proceed from political rather than judicial processes

d. Doctrine: Congress can regulate commerce if the subject of the regulation has **substantial economic effects** (can be purely local)
i. "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic

effect on interstate commerce, and this is irrespective of whether such effect is 'direct' or 'indirect'"

1. Congress can regulate the purely local/trivial
    a. If Congress decides there is a substantial economic effect, that is good enough for us
        i. Judicial restraint & deference to Congress – Court will not substitute their judgment for that of Congress

ii. Substantial economic effects is married to rational basis review

1. How do we know if there are substantial economic effects? If it appears rational on its face, if Congress was rational in concluding this area has substantial economic effects – Court will exercise judicial restraint

e. Policy Argument: Jackson looks at reality – understanding economics, we need to validate this Act to stimulate the economy
    i. This is one of the first times the Court makes a policy argument
        1. Jackson is encouraging people to bring policy/economic arguments so Court knows what is going on in the country

f. Shift to allowing Congress to regulate the purely local → New Deal is being accepted by the Courts
    i. Pre-1937, to figure out whether Congress could regulate: decide whether it is interstate (Congress) or intrastate (States) – decide whether it is commerce (Congress) or manufacturing (States) – decide whether it is directly related to commerce (Congress) or if it regulates something that is indirect to commerce (States)
        1. Justice Jackson rejects **legal formalism** – legal problems cannot be resolved through formulas – in favor of **functionalism** – OK to make policy arguments
            a. "The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause has made the mechanical application of legal formulas no longer feasible"

The Commerce Clause, the New Deal, and the Rehnquist Court

I. Narrative:
    a. Early 1900's: SCOTUS was against the welfare state (more or less) – against the idea that the federal government should regulate the economy
        i. 1930's (Great Depression): SCOTUS continues to hold that the government should not regulate the economy
        ii. 1900's-1933: SCOTUS says yes sometimes, no sometimes
    b. 1933: FDR comes to power & declares the country wants a New Deal
        i. President & Congress pass civil regulations to help the country get out of the Depression (i.e. help to regulate the economy)
        ii. 1933-1937: SCOTUS beings to invalidate this legislation one after the other
        iii. 1937: FDR introduces the Court Packing Plan (constitutional crisis) – idea is that we need a Court that is going to help the economy heal, so FDR wants to add 6 new justices (one for each of the current justices who is 70+ y/o) to ensure he has a majority on the Court to sustain his legislation
            1. Senate killed this plan, but old justices understand the message and start to retire
        iv. 1939: FDR get the "Roosevelt Court" (FDR appoints Jackson, Frankfurter, Black, e.g.) and this Court validates New Deal legislation
            1. Commerce Clause (i.e. Congress' power to regulate the economy via) is the lynchpin of the whole thing
                a. Commerce Clause is an important source of power for Congress
                b. Commerce Clause is also a limitation on State legislative power (as we saw in *Gibbons*)
    c. Judicial Review: what is the role of the Court in all of this?

i. Judicial activism: is the Court a guardian of Congress – to put the judgment of Congress under the microscope and tell Congress whether they are right or wrong?
ii. Judicial deference: is the Court suppose to step back and not interfere – to make sure the American people vote to decide whether they want Congress' legislation
    1. Representation reinforcement: our business as justices is to make sure the American people are well represented, they all go vote, no one restricts them from expressing their opinions …
        a. Judges argue for people to seek rights through the political process, BUT everyone does not always have equal access to the political process
    2. 1937-1995: Roosevelt Court – rule: substantial economic effects/rational basis review and judicial restraint [dominance of functionalism; defeat of formalism]
        a. Rule of Thumb: No invalidation of statutes based on the Commerce Clause (at this time) because Congress has plenary power to pass whatever statutes it wants – so long as they are rational and have substantial economic effects
        b. Trio of cases that signify the triumph of the Commerce Clause
            i. *Wickard v. Filburn* (1942): questions of the power of Congress are not to be decided re: formulas – rejecting formalism
            ii. *Jones & Laughlin* (1937): policy argument: "law is not science, like mathematics" – law cannot be decided in a vacuum, must see what is going on in society
                1. "It is equally true that interference with that commerce must be appraised by a judgment that does not ignore actual experience"
            iii. *United States v. Darby* (1941): overrules *Hammer*

d. Legal Theory: how do the particular justices think about the law – how do we generate arguments to say the Constitution is in favor or against capitalism? (legal formalism, legal realism, positivism, e.g.)
    i. <u>Legal formalism</u>: law is independent of society; law can be mathematical – like bright line distinctions – mechanical jurisprudence (one of the ways by which the Court achieves the invalidation of statutes before 1937)
        1. Ex: *United States v. Butler* (1936): Court is being attacked because people are accusing them of applying their political theories into the Constitution; Court says nothing could be farther from the truth – not imposing our values
            a. "It is sometimes said that the court assumes a power to overrule or control the action of the people's representatives. This is a misconception. When an act of congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch has only one duty – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former" [mechanical jurisprudence]
                i. Greatest announcement of legal formalism we see coming from a justice
        2. Justices Scalia and Thomas are self-declared formalists
        3. Originialism is (roughly) a sub-set of formalism: don't decide by experience – go back to the Framers and see what they thought the words meant
    ii. <u>Pragmatism & Functionalism</u>: law is rooted in and reflects society
        1. Justice Holmes leads the challenge against legal formalism
            a. "Law is not a mathematical formula; it is all a question of proximity and degree"
                i. You can't avoid thinking; can't avoid discretion

1. "The life of the law has not been logic, but experience"

e. Political Theory (hiding underneath the Commerce Clause cases): what is the best way to run society? In this county should we have unregulated capitalism, regulated capitalism, or a welfare state – does the Constitution take a view?
f. 1972: Rehnquist is appointed to the Court
g. 1980: Reagan is elected and begins de-regulating and dismantling the New Deal
h. 1995: *Lopez*: for the first time since the Roosevelt Court a federal statute is invalidated on the basis of the Commerce Clause – triumph of formalism

II. ***United States v. Lopez*** (Rehnquist) (1995) (5-4): rise of states' rights, again; doctrinal shift (implicit in the opinion, not explicit)
   a. Facts: Congress passes the Gun-Free School Zones Act of 1990 – not a lot of legislative history; President signs the statute, but at the same time mentions Congress might have gone too far; Lopez is charged with violating the statute, but alleges it is unconstitutional – Congress acted *ultra vires*
   b. Government makes a substantial economic effects argument & an institutional competence argument – it is not the business of the Court to substitutes its rational judgment for that of Congress; if it does not appear arbitrary or irrational, then the Court should not interfere (separation of powers)
   c. Court faces two choices:
      i. Rational basis review – look at it with a naked eye and ask if it is rational and not substitute the Court's judgment for the legislature's
      ii. Scrutiny (Jackson talks about in the Steel Seizure case) – look at it under the microscope, scrutinize, and make my own decision
         1. The more you scrutinize, the more you can kill
   d. Justice Rehnquist: says he is still applying the substantial economic effects doctrine
      i. Slippery slope argument: "It is difficult to perceive any limitation on federal power" – have to stand firm or else this will lead to a collapse in federalism
      ii. "The Government argues that Congress ***could*** rationally have concluded that the Act substantially affects interstate commerce" ["could" not "did"]
         1. Government is asking us to, "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States" (i.e. Congress' power to regulate interstate commerce is not a general federal police power, but instead is subject to outer limits)
            a. Federalism will be destroyed – Constitution prescribes two government and justices take an oath to defend the Constitution – to uphold and protect the fundamental text, so Court must take care of federalism
            b. Government has to pile inferences because there is not a lot of legislative history, so Government is not entirely sure why Congress passed the statute
               i. Court says this is infringing on the police powers of the state (education/schools = police power)
                  1. Rehnquist wants to preserve a, "**distinction between what it truly national and what is truly local**"
      iii. Rehnquist is going to ask if the statute makes sense (not whether it is rational or if Congress can do it) and he concludes it does not make sense because of the inference piling
         1. Breyer tells Rehnquist he is keeping the substantial economic effects doctrine, but taking out the rational basis theory
      iv. Rehnquist is not doing minimalism

1. Starts with <u>first principles</u> (i.e. division of authority between federal and state governments) (imitating Marshall in *Marbury* & *McCulloch*) → goes to Federalist Papers (i.e. teaching us about federalism) → mentions the trio of cases (i.e. they are good law, I am not doing a revolution here – not wrecking the jurisprudence, "the doctrinal change (i.e. 1937) also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce" … "But, even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits") → "gift": then he summarizes the entire substantial economic effects doctrine (i.e. not narrow/minimalist) [be careful with summarizations – is the justice clearly restating or deviating a little bit?]
    a. "We have identified three broad categories of activity that Congress may regulate under its commerce power …"
        i. (1) **channels** of interstate commerce (highways, rivers, e.g.)
        ii. (2) to regulate and protect the **instrumentalities** of interstate commerce, or persons or things in interstate commerce (the railroad car, airplane itself – the instrument that is used to do interstate commerce) (even though the threat may come only from intrastate activities)
            1. NOTE: If it is a channel or instrumentality, do not have to ask whether it has a substantial economic effect … Congress has the power!
        iii. (3) to regulate those activities having a **substantial relation** to interstate commerce
            1. Rehnquist cites *Jones* (not *Darby* or *Wickard*) because Jones is an earlier case where the Court was a little more careful about the doctrine
    b. <u>Doctrine</u>: "We conclude, consistent with the great weight of our case law (i.e. not overturning anything, no doing a revolution), that **the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce**"
        i. [Note: does not mention rational basis review, so not explicitly destroying it, but assume he doesn't want to apply it? He is focusing on defending federalism by re-drawing the line between truly local and truly national; not interested in rational basis review right now (more flexible thing)]
        ii. Barbri: If the regulated **intra**state activity is non-commercial and non-economic, it cannot be regulated under the Commerce Clause unless Congress can factually show a substantial economic effect on **inter**state commerce
            1. If the activity is **intra**state but commercial or economic, Congress can regulate if there is a rational basis and the activity in aggregate substantially affects **inter**state commerce
        iii. Rehnquist is not satisfied that there could be a rational basis – the relation is too tenuous between the truly local activity and the substantial economic effect on interstate commerce
            1. Telling Congress to do their homework – have legislative history to show that you actually believed there were substantial economic effects [narrow holding: Congress did not do enough homework to

persuade the people & SCOTUS that there were substantial economic effects]

2. Telling the legal profession to attack statutes on the basis of federalism & we will invalidate more statutes – we have a 5 justice majority and we are telling you we are changing the rules of the game and will protect the states' police powers much more than we did before [broad dicta: telling us what he wants to do and see in the future]

e. Justices Kennedy & O'Connor (concurrence): this is a limited opinion – no revolution – not invalidating the substantial economic effects doctrine, just think Congress went too far here
f. Justice Thomas (concurrence: wants to go back to distinctions and legal formalism; claims substantial economic effects doctrine was legislating from the bench
g. Justice Breyer (dissent): "Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce … both because the Constitution delegates the commerce power directly to Congress and because the determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy … the traditional words 'rational basis' capture this leeway"

III. ***United States v. Morrison*** (Rehnquist & same majority from *Lopez*) (2000) (5-4)

a. Facts: a majority of state Attorney Generals came to Congress and said please pass this Act because AG's can't deal with it and felt it was a matter for the federal government to do; Congress passes the Violence Against Women Act, finding that gender-motivated violence affects interstate commerce by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce – Congress learned from *Lopez* and there is lots of legislative history (suggest that these are local, isolated incidents, but the aggregate effect of all affects the national economy)
b. Normative Conflict: Act vs. Commerce Clause (is the Act within Congress' Commerce Clause power?)
c. Result: Act is unconstitutional
d. Rehnquist does not use the aggregation rule – in dicta said it is not necessary to use in this case
    i. *Lopez* serves as precedent for this case, but the mountains of evidence/legislative history is irrelevant because Court finds that violence against women is not an economic activity – <u>Congress can only regulate intrastate activity when it is an economic activity</u>
        1. Because Court finds the evidence/proof irrelevant, the substantial economic effects doctrine is also irrelevant here
            a. At least in areas that the Court regards as traditionally regulated by the States, Congress cannot regulate noneconomic activity based on a cumulative substantial effect on interstate commerce
        2. Where does Rehnquist get the idea of 'economic activity' from the Commerce Clause? He is reading something into the Constitution (not explicit in the text, so not originalism), but relying on precedent, "our cases have upheld Commerce Clause regulations of intrastate activity only where that activity is economic in nature"
            a. Economic activity is an ambiguous term – activities are an open-ended phenomenon – Rehnquist is limiting economic activities
            b. Counter/Dissent (so not binding): Court is usurping the text of the Constitution by deciding that the Commerce Clause is limited only to economic activities
    ii. Rehnquist is insisting on limiting congressional power to economic activities in order to preserve federalism – his idea of <u>federalism</u>: bright lines between truly local and truly national

1. "The concern we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority seems well-founded … the Constitution requires a distinction between what is truly national and what is truly local
    a. Slippery slope
    b. Suppression of violent crime is a police power of the State = truly local

e. Souter (dissent): Rehnquist is doing <u>categorical federalism</u> by trying to draw bright lines between truly local and truly national – and this formalistic approach was rejected in *Wickard*
    i. Prefers <u>cooperative federalism</u>: there should be cooperation between the two governments – things are fluid, change over time, not cast in stone – while still recognizing a distinction between the federal and state governments
        1. It is meaningful that AG's are coming to Congress for help because their criminal statutes are not working and the federal government is much more powerful and wealthy (= cooperation)

<u>The Civil Rights Act of 1964, the Commerce Clause, and the Fourteenth Amendment</u>

I. Court decides two cases on the same day – Court holds the Civil Rights Act valid both **on its face** and **as applied to us**
    a. Court is establishing the reach of the Civil Rights Act and justifying when it is constitutional under the Commerce Clause
        i. This is an exercise of judicial review, which signals to the nation that the Act is constitutional, so stop challenging it and let's move forward
        ii. Normative Conflict: Article I, §8(3) vs. Title II of the Civil Rights Act
    b. ***Heart of Atlanta Motel v. United States*** (Clark) (1964) [on its face]
        i. Facts: Motel was denying rooms to black travelers; 75% of the guests were from out of state; Motel is arguing that they are a local motel and Congress does not have the power to regulate them – should be left to state police powers
            1. Motel is challenging the Act on its face – Congress can't do it, period
        ii. Court applies the substantial economic effects test/rational basis review
            1. Congress did its homework here and proved that even if it is local, it has a substantial economic effect & a rational basis for determining that
                a. "How obstructions in commerce may be removed – what <u>means</u> are to be employed – is within the sound and exclusive discretion of the Congress …
                    i. It is subject to one caveat – that the means chosen by its must be reasonably adapted to the end permitted by the Constitution …
                        1. **We cannot say that its choice here was not so adapted. The Constitution requires no more**"
                            a. <u>Double negative</u> – we're not saying we would have done the same thing, but if it is reasonably adapted, the Constitution requires no more
                            b. Compare this to Rehnquist in *Morrison*, who says he has an obligation under the Constitution to do more – to protect what is truly local
                                i. Here, Court is saying, I have no such obligation – just need to see if what Congress did was rational and whether their substantial economic effects were reasonable

… the Constitution requires no more

c. ***Katzenbach v. McClung*** (Clark) (1964) [as applied]
    i. Facts: Ollie's BBQ was prohibiting blacks from eating in the restaurant – could only do take-out; Ollie's BBQ served food that had come from out of the State; Ollie's BBQ is arguing that they are a local restaurant and Congress does not have the power to regulate them
        1. Ollie's BBQ wants a case-by-case determination whether they affect the economy and whether they can be regulated – claiming the Act is invalid as to them
    ii. Court repeats the <u>substantial economic effects test/rational basis review</u>
        1. "Where we find that the legislators have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end"
            a. "Congress had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce"
    iii. Justice Black (concurrence for both): <u>Aggregate Theory</u>: there is such a thing as truly local, but "in deciding the constitutional power of Congress in cases like the two before us, we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this singly local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow"
d. "As a matter of law" is Congress required to do their homework?
    i. If Congress is sovereign within its plenary powers, it does not have to do homework (as a matter of law), and the American people will hold them accountable
        1. In general, the theory is that a legislative record is not requires as a matter of law, but we can see from the cases that the legislative record is an extra weight in favor of the legitimacy of the statute (as the Court relies on it in these two cases)

II. **Theories of Federalism** [Reznik article on BB]
a. (1) <u>Categorical federalism/bright line theory</u>: preserving the distinctions between the truly local and the truly national (e.g. Rehnquist)
    i. An obligation to the theory of federalism which is categorical – Court needs to protect the truly local
    ii. Underlying assumption: that there is such a thing as truly local and truly national, and that the two can be identified and separated
b. (2) <u>Cooperative federalism</u>: you cannot look and see whether it is always truly local or truly national – not about categorization – things are fluid and change over time depending on circumstances, the economy, and personalities in power (e.g. Souter)
    i. Nobody wants to destroy the states (response to the slippery slope argument); the states and the federal government have to cooperate
        1. There are some things that the federal government can do better (more money, power, resources, etc.), and it does not matter if it is considered local
c. (3) <u>Political Safeguard of Federalism</u> [Weschler]
    i. Yes there is federalism, and yes there are States that should be protected, but **it is Congress' responsibility** – a political responsibility – to maintain, nurture and protect … not a matter of constitutional law
        1. Because American politics has the tools to protect/safeguard federalism and the States in the political process (i.e. Congress is made up of the States), there are guarantees that the interests of the States are protected
            a. So, we do not need judicial intervention – better for the Court to exercise restraint and let the political process deal with it

b. Don't worry about the slippery slope argument because it won't happen since the States are protected by the political process

III. Fourteenth Amendment (1868, post Civil War)
   a. Reconstruction Amendments: 13th (slavery outlawed), 14th (no discrimination/equal protection for the States), 15th (right of blacks to vote)
   b. Fourteenth Amendment limits the States, and until now we have not seen much limitations on the States, esp. when it comes to the rights for the people
      i. Prior to the Fourteenth Amendment, it was held that the federal government was limited by the Bill of Rights, but the States were not – they retained their full police powers
         1. **Fourteenth Amendment = big revolution because State governments are now explicitly limited in the text**
      ii. §5: Congress (federal government) shall have the power to enforce the Fourteenth Amendment
         1. Congress used the Commerce Clause rather than the Fourteenth Amendment §5 to pass the Civil Rights Act because Congress was misinterpreting the section
            a. Congress knew if they used the Commerce Clause it would be sustained, but if they used §5 it might be invalidated – because there was a previous SCOTUS decision from 1883 that held the legislature cannot reach discrimination against individuals (i.e. §5 is about state action; Congress can reach the states, but cannot reach the little individual (think Ollie's BBQ))
            b. Congress was worried about §5 and it was easier to go with the proven substantial economic effects doctrine
            c. Commerce Clause seemed the safest direction, based on how the Court would interpret the Act
   c. Fourteenth Amendment §1 goodies:
      i. Citizenship for everyone born in this country
         1. *Dred Scot* (1857): SCOTUS held that blacks cannot be citizens of the U.S. (self-inflicted wound)
            a. 14th Amendment was passed to do away with *Dred Scot*
      ii. Privileges and immunities: "no State shall make or enforce any law which abridges the privileges and immunities of the citizens of the U.S."
         1. Limit on state police powers
      iii. Due Process: State cannot deprive you of life, liberty, or property, without due process
         1. So in the reverse, State can take away your life, liberty, or property, if they give you due process
      iv. Equal protection: States cannot deny people the equal protection of the laws
   d. Up until the Fourteenth Amendment, we were only concerned about liberty (let me do what I want to do), and now equality is introduced into the picture
      i. Liberty says you can do whatever you want to do (i.e. you can take other people's equality)
         1. Equality complicates the idea of liberty – liberty finds itself in legal competition with equality

<u>Equality and the Constitution</u>

I. ***Plessy v. Ferguson*** (Brown) (1896) (7-1): separate but equal is OK under the Equal Protection Clause of the 14th Amendment
   a. Background: post-Reconstruction case, the South is very upset about the 14th Amendment and they are looking for ways to preserve their way of life; since the 14th Amendment was ratified, if a State tried to discriminate legally in political terms against blacks (i.e. blacks can't serve on a

jury), SCOTUS interpreted this as "putting a badge of inferiority" on them and therefore unconstitutional

i. So understanding is that it is not OK to put a badge of inferiority on blacks, but can we do other things – separate but equal?

b. Facts: Louisiana statute from 1890 (Jim Crow regime) provides that railroad companies needed to provide equal but separate accommodations for whites and blacks (State is using their police power to regulate transportation); Plessy was 7/8ths Caucasian (so he looked white, in order to show how arbitrary this was)

c. Plessy's Arguments:
   i. Argument Ad Absurdum (cousin to the slippery slope): he reasons by example – gives a bunch of absurd examples (eye color, hair color, body type, e.g.) to suggest how arbitrary this statute is
   ii. Badge of Inferiority Argument: when I am forced to go to a separate car I feel inferior

d. Court's Response:
   i. Applies the reasonableness test: this statute is perfectly reasonable, and you are giving us absurd ideas
      1. Standard of review: rational basis review – looks reasonable to us
         a. "Every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith and promotion of the public good, and not for the annoyance or oppression of a particular class"
            i. "*We cannot* say that the law … is unreasonable"
   ii. Court rejects Plessy's inferiority argument but holding that whites do not feel inferior when they go to the white car
      1. The feelings of inferiority are all in your imagination: "it is not by reason of anything found in the Act, but solely because the colored race chooses to put that construction upon it"
      2. **Legislation cannot fix social prejudices**: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical difference" (a theory about the limitation of law; law cannot change society)
         a. So they will leave the social prejudices alone and not ask whether it is reasonable, but it is not within their jurisdiction – suggesting that the purpose of the Equal Protection Clause of the 14th Amendment is not to eradicate social prejudice, but rather civil and political
            i. "If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically … If one race be inferior to the other socially, the Constitution cannot put them upon the same plane"

e. Justice Harlan (canonical dissent): **"Our Constitution is colorblind"**
   i. Rejects rational basis review argument: "A statute may be unreasonable merely because a sound public policy forbade its enactment. But I do not understand that the courts have anything to do with the policy or expediency of legislation"
      1. Says Court cannot apply rational basis review here – there may be good public policy arguments to separate the races, BUT the Court is not here to make policy decisions are to whether it is good or bad
         a. Harlan is saying that when he thinks about the constitutionality of a statute, he does not bring in policy arguments
            i. Tells you to draw a distinction between policy & expediency on the one hand and something else on the other hand – if you rule based on the basis of something else, that is OK, but do not rule on the basis of policy

b. Remember: *Heart of Atlanta Motel*, sustaining the Civil Rights Act: "We cannot say that its choice here was not so adapted. The Constitution requires no more" … policy is for Congress, not the Court
    i. In the Civil Rights Act cases, the Court is exercising deference, the Court is applying the standard of rational basis review (Constitution does not require us to decide whether it is good or bad policy) and the Act was sustained
        1. If you went with the dissent analysis in *Plessy* (we are not doing policy), the Civil Rights Act would have been killed
    ii. So, since same deference was applied & theory that it is not our business to do policy – can kill and validate statutes (i.e. deference re: Civil Rights Act: sustained; deference re: Harlan's dissent: killed)

ii. Neutral Principle Argument: a principle in the Constitution that will always be applied in all cases (formalistic), regardless of circumstances, regardless of historical contingencies – for good or for bad (an argument from principle, in contradistinction to an argument from policy)
    1. "Our Constitution is colorblind" – it cannot allow the States to segregate because it does not see race, so judges must interpret the Constitution in a manner that is colorblind
    2. Weschler argument: because of the separation of powers, the Court should be deferential to arguments of policy and expediency (it is not for the Court to do)(judicial restraint); when there is a neutral principle, however, the Court is justified and legitimate when it exercises judicial activism
        a. Justices love neutral principles – applying the Constitution, not a personal view of policy or expediency
    3. Harlan kills the statute on the basis of principle (not policy or expediency), and in this way he is formalistic

II. Road to *Brown*
- a. NAACP was established in the 1940s in an effort to advance the rights of blacks
    i. They strategize about litigation and how to translate a social/political problem into a legal problem
        1. Decide to collect cases and start with the easiest cases and then move to the difficult ones, because by the time we get to the difficult ones the Court will be faced with a body of precedent from the easier cases (stare decisis)
            a. NAACP started with higher education and worked its way down
                i. One argument for starting with higher education is that people would be less scared of desegregating at that level because there are less people involved in higher education and it was scarier for people to think about their children interacting with minority races

III. ***Brown v. Board of Education of Topeka*** (*Brown* I) (Warren) (1954) (unanimous): judicial activism big time
- a. Background: Warren is a child of the New Deal era, which was all about judicial restraint; but he was also in favor of equality, which would require judicial activism, so there is a tension for him
- b. Legal problem: State has segregated public education, but Brown wants to go to an integrated school
- c. Normative conflict: State segregation law vs. 14th Amendment's Equal Protection Clause
- d. Argument: State is violating the EP Clause when it provides for "separate but equal"
- e. Result: NO result (*sui generis*: its own kind) [minimalism because only re: education]
    i. Court holds that segregation is unconstitutional, but they do not go forward and say what to do about it

ii. This is a major statement: no State can segregate its schools (all 50 states, even though this case just involves Kansas)
    1. **Education is within the States' police power, but education is subordinate to the Equal Protection Clause**

f. Court makes a <u>policy argument</u> about the importance of education
    i. We do not know what the Founders of the 14th Amendment thought about the scope of equality
        a. <u>History is indeterminate</u>: "What Congress and the state legislatures had in mind cannot be determined with any degree of certainty"
    ii. Furthermore, since there was no public education at the time it was ratified, they likely did not think about education
        1. "We cannot turn the clock back to 1868 … We must consider public education in the light of its full development and its present place in American life … Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws"

g. Segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities
    i. Inferiority argument (negative argument): because of those qualities that are incapable of objective measurement (intangible considerations), segregation generates a feeling of inferiority, "in a way unlikely ever to be undone"
        1. "In the field of public education, the doctrine of 'separate but equal' has no place"
            a. "Separate educational facilities are inherently unequal"

h. The Court was so convinced of the knee jerk reaction to racist, separate but equal segregation that it did not pause to think about whether there were good things about integration
    i. Could the Court have made any other (positive) arguments – "intangibles" that cannot be achieved by separate but equal?
        1. Integrated education allows for more diversity (hear more POVs, better able to deal with real life, e.g.) and this generates <u>pluralism</u>: negotiation of identity between people – different experiences bring about different solutions to various problems
            a. Creates good citizens
        2. <u>Role modeling</u>: when you see and interact with diverse people, they can be role models for you

i. <u>Sociological Argument</u> in footnote 11: relying on sociological/psychological studies/evidence
    i. Problem with sociological/empirical arguments is that it is (a) not a legal argument and (b) empirical evidence can be falsified
        1. If you want to write an canonical opinion (that will endure), this might not be the best way to go … might have been better to find a neutral principle embedded in the Constitution
            a. Why did Warren not use the neutral principle from the *Plessy* dissent re: Constitution is colorblind?
                i. *Plessy* was on the minds of the justices – if the Court resurrected Harlan's dissenting opinion, some people would see it as radical – might be implied to suggest that the dissent in *Plessy* was actually correct – had to be careful about not incorporating and/or relying on a principle from a dissenting opinion
    ii. Warren relied on these studies/evidence because he is a child of the New Deal – when the attack on legal formalism was sizzling and pragmatism was on the rise – law is rooted in society, law is about social engineering

1. Pragmatists think sociological evidence is important when making legal arguments, so this was natural for Warren to believe in and find useful – he thought he had a persuasive argument and science on his side
    a. However, some people were not persuaded and preferred a legal argument that would last forever

j. *Brown* & *Plessy*: "Any language in *Plessy* contrary to this finding is rejected"
    i. *Plessy* was about transportation; *Brown* is about education
        1. *Brown's* holding (*ratio decidendi*) is only about public education
            a. This is a **narrow** opinion – Court could have overturned all segregation, but they specifically said this is about public education (focused only on the case and controversy in front of them)

IV. ***Brown v. Board of Education of Topeka*** (*Brown II*) (Warren) (1955): how relief will be accorded
    a. Background: President was angry about *Brown I*; Congress was a do-nothing Congress
        i. This decision has a lot to do with politics – Court knew politics at the time would not support an immediate desegregation order
    b. "Cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially non-discriminatory basis **with all deliberate speed** the parties to these cases"
        i. This threw the District Court into problems that they were not equipped to deal with, i.e. ordering and enforcing desegregation
        ii. <u>Federalism</u>: federal district courts are given power to supervise desegregation – supervising states' rights (education = police power)

V. ***Bolling v. Sharpe*** (Warren) (1954) (unanimous): companion case to (and decided on the same day as) *Brown I*
    a. Background: federal government was still segregating schools in Washington D.C.
    b. Issue of Federalism: we find equal protection in the 14th Amendment: "no STATE shall …"
        i. What about the federal government? There is no equal protection component that binds the federal government in the Constitution
            1. Argument went that the Founding Fathers in their great wisdom decided to bind the States and therefore, implicitly, decided the federal government did not need to be bound – so the federal government is free to discrimination
    c. NAACP argue that they find **equal protection in the 5th Amendment Due Process Clause**, which suggests that due process means to be fair and give a minimal measure of equality
        i. Technical difficulty: if equal protection resides in the 5th Amendment Due Process Clause (which makes sense on its face), then that renders equal protection in the 14th Amendment redundant/surplusage
            1. *Marbury*: Marshall tells us nothing in the Constitution is redundant, you have to give it meaning
        ii. Court resolves the difficulty by being <u>practical</u> (practical jurisprudence Court, no formalists on the Court at this time): It is unthinkable to bind the state governments and not the federal government – we just cannot think that way
            1. "In view of our decision that the Constitution prohibits the States from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government"

<u>Equal Protection Methodology</u>

I. TO APPLY EQUAL PROTECTION, MUST HAVE A CLASSIFICATION/DISTINCTION BETWEEN CLASSES
    a. Equal protection claims involve a challenge to laws that allocate benefits or impose burdens on a defined class of people
        i. Plaintiff argues that the government has drawn the line between the favored and the disfavored groups in an impermissible place
            1. Q: Is the classification permissible

II. Equal protection is a neutral term

a. EP Clause does not mention race
    i. It is an open-ended clause; not explicit – not clear what the states can and cannot do

III. Does the concept of equal protection change over time, or is it fixed?
    a. Historically contingent: each generation we change our understanding

IV. Equal protection does not mean everyone is entitled to equal treatment always, and it does not mean the government cannot discriminate
    a. Ex: government can discriminate between adult and children
    b. Ex: government can discriminate on certain handicaps (i.e. a blind person cannot get a driver's license)

V. General slogan: "The law has to treat similarly situated people similarly"

VI. Low Scrutiny: rational basis review (naked eye, looks OK to me)
    a. Rule of thumb: If the test is low scrutiny, in all likelihood the Court will validate the statute
    b. Judicial deference
        i. Respect for the separation of powers – it is not for them to legislate or do policy
    c. Everyone at least gets rational basis review
    d. A law will be upheld if it is rationally related to a legitimate government purpose
    e. Test/Standard of Review:
        i. Ends must be "legitimate" or "permissible"
            1. Court does not usually insist on actual purpose, so long as there is a conceivable purpose
        ii. Means-End relationship/Nexus must be "rational"
            1. [Note: a majority of the time, the end will be legitimate, and the question will be whether the means are rationally related, esp. when doing 'with a bite']
        iii. Challenger bears the burden of proof
    f. Rational Basis Review with a Bite
        i. Applying Rational basis review aggressively, and invalidating the statute
            1. Is it when legislation shows animus?
            2. Is it when classification is an immutable characteristic?
        ii. Court claims that it is always applying the same standard (i.e. do not admit to rational basis review with a bite)
        iii. Ex: *City of Cleburne* & *Romer*
    g. Standard of review for: social and economic legislation (generally), age, disabilities, sexual orientation (*Romer*), wealth & everything else

VII. Intermediate Scrutiny
    a. A law will be upheld if it is substantially related to an important government purpose
    b. Test/Standard of Review:
        i. Ends must serve important governmental objectives
        ii. Means-End relationship/Nexus must be substantially related; "fair and substantial"
        iii. Government bears the burden of proof
    c. Standard of review for: gender-based classifications

VIII. Strict Scrutiny (under the microscope)
    a. Rule of thumb: If the test is strict scrutiny, in all likelihood the Court will kill the statute
    b. Everybody agrees that if you come to Court with a race-based classification, then you get strict scrutiny
        i. Everybody else comes to Court wanting strict scrutiny (ex: women)
            1. So we argue for strict or intermediate scrutiny, but have to assume *arguendo* that we will not get it
    c. A law will be upheld if it is necessary to achieve a compelling government purpose
    d. Test/Standard of Review:
        i. Ends must be "compelling"
            1. Not enough if they are "permissible" (like rational basis review)
        ii. Means-End relationship/Nexus must be "closely/narrowly tailored"
            1. Least restrictive means

a. Overinclusive?
b. Underinclusive
c. Neutral alternatives?

iii. Government bears the burden of proof

e. Standard of review for: race-based classifications and fundamental rights

IX. Requirement of Statement of Purpose: where do I find the purpose/objective/end?

a. Most statutes have a recital – a declaration in the statute re: here is why we are doing this
   i. If we don't find it in the recital, or we are not satisfied, then we go to the legislative history (but note: will the statement of isolated legislators rise to the level of a constitutional argument – doesn't automatically presume this was the intent of the entire legislature)
      1. If we don't find a recital and the legislative history is poor and/or isolate & ineffective, then we go to plausible reasons = conceivable, manufacturers, post hoc (after the fact), non-laughable reasons

X. <u>General Rule</u>:

a. If it is rational basis review, we do not ask over/underinclusive – it can be incremental (*Railway* & *Lee Optical*: step by step OK)
b. If it is strict scrutiny we ask whether the classification is over or underinclusive – we ask whether there are less restrictive means – we ask if there are race-neutral means … we do this to see if the means-ends relationship is actually narrowly tailored

XI. ***New York City Transit Authority v. Beazer*** (Stevens) (1979)

a. Classification: people who have used narcotics vs. everyone else
   i. Sub-classification: methadone users vs. everyone else
b. Considerations: alcoholics can still apply for jobs –argument could become: if you are an alcoholic you are also a threat to safety, yet you can still apply
   i. This is a **blanket prohibition**, so might argue it is too large, too undifferentiated – overinclusive
c. End: public safety and efficiency (classic police powers of the States)
d. Means: blank prohibition (everybody, does not make distinctions) of narcotics/methadone users
e. Means-Ends relationship: rational
f. Test: rational basis review, statute upheld
   i. NYC TA determined there was a good reason for this classification/blank prohibition and it looks rational on its face, so we are not interfering – we do not have enough knowledge to know whether this classification is appropriate
   ii. "The exclusionary line challenged by respondents is … a policy choice made by that branch of Government vested with the power to make such choices"
      1. "Under these circumstances, **it is of no constitutional significance that the degree of rationality is not as great with respect to certain ill-defined subparts of the classification as it is with respect to the classification as a whole**"
         a. "No matter how unwise it may be for TA to refuse employment to individual car clearers or bus drivers simply because they are receiving methadone treatment, the Constitution does not authorize a federal court to interfere in that policy decision"
            i. While the sub-classification is not perfect (i.e. Court may not agree with it), it is sufficiently rational enough on its face for the Court to not intervene
               1. Footnote 9: **"Legislative classifications are valid unless they bear no rational relationship to the State's objectives … State legislation does not violate the Equal Protection Clause merely because the classifications it makes are imperfect"**

2. Could be overinclusive because some people could still be qualified … but Court defers
3. Could be underinclusive because it does not include alcoholics … but Court says you can do one step at a time

XII. ***U.S. Department of Agriculture v. Moreno*** (Brennan) (1973):
- a. This involves a federal statute, but we know from *Bolling* that the federal government is also bound by equal protection in the 5th Amendment
- b. Background: Congress passed the Food Stamp Act of 1964 under their Commerce Clause power to decide that certain households can get food stamps, but only if the household members are related to each other
- c. Classification: related households vs. unrelated households (ex: roommates)
- d. End (per the Act): to raise levels of nutrition among low-income households and increase utilization of food so as to strengthen our agriculture economy (Congress is in charge of the economy)
    - i. Objective looks good on its face, is legitimate
        1. But, look to the legislative history to test the purpose, to find evidence that Congress may have been using a <u>pretext</u> to discriminate against hippies
- e. Means-End relationship: not rational – they don't see a rational relationship
- f. Test: rational basis review with a bite, Act is invalidated (Court is willing to go beyond the face of the statute because they thought something fishy was going on)
    - i. "The challenged statutory classification is clearly irrelevant to these purposes"
        1. "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that **a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest**"

XIII. ***City of Cleburne v. Cleburne Living Center*** (White) (1985)
- a. Classification (on the face of the ordinance): groups that can get a permit vs. groups that cannot get a permit (insane, feeble-minded, alcoholics, drug addicts)
- b. Ends: (i) negative attitudes of the property owners that their property values may go down; (ii) high school students would harass the mentally retarded, so they have an interest in protecting the people they are excluding; (iii) the flood plain – there may be a flood
- c. Means-End relationship/Nexus: not rational
- d. Test: rational basis review; city ordinance is killed, so rule of thumb did not work here
    - i. Court asks counsel questions they were not prepared for – questions they said in *Lee Optical* they could not ask – but now they are
        1. Court pushes on the ends presented and pushes on the nexus, which the Court finds is not evident and does not make much sense
            - a. If you are simply afraid of the mentally retarded, then that is discrimination, because fear is not a rational justification
                - i. "Mere negative attitudes, or fear, are not permissible bases [for the classification]"
                    1. "[The classification] appears to us to rest on an <u>irrational prejudice</u>"
    - ii. Is Justice White doing rational basis review here?
        1. He does not tell us there is a change from rational basis review; he wants us to believe the mentally retarded are getting rational basis review, just like everyone else
            - a. But when we look at the opinion, we see him pushing and pushing the government lawyers – putting the ordinance under the microscope
- e. *City of Cleburne* stands for the Court saying they are doing rational basis review, but it is not the rational basis review we are familiar with
    - i. The Court aggressively enforces the idea of equality

XIV. ***Romer v. Evans*** (Kennedy) (1996) (6-3)

a. Background: Colorado enacted a constitutional amendment prohibiting local governments from enacting antidiscrimination measures protecting homosexual orientation, conduct, practices or relationships
    i. Gays want to be treated like *City of Cleburne* (and not like *Beazer*), so they focus on the same things: only ask for rational basis review (do not want the Court to think it is granting a new right), and by looking at *City of Cleburne* we see that fear or sheer animosity is not a constitutional argument – statute is overly broad and the nexus is not rational, so must come to the conclusion that the actual purpose is animosity

b. Test: "conventional rational basis inquiry"; Colorado amendment is killed
    i. Justice Kennedy does not see a means-end relationship that makes any sense, so he is forced to conclude that it is fueled by animosity, which is not permitted under the EP Clause [Court eliminates the reasons by process of elimination, and they are left with only a prejudicial reason]
        1. "[Amendment's] sheer breadth is so discontinuous with the reasons offered for it that the amendment seems inexplicable by anything but animus toward the class that is affects; it lacks a rational relationship to legitimate state interests"
            a. Cites *Moreno*: "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that **a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest**"
                i. Cannot classify on the basis of prejudice
            b. Kennedy uses language over overinclusiveness, which is typically not used in rational basis review; but this mass overbreadth lends itself to irrationality – cannot ignore it

c. In *Romer*, we see social and economic legislation getting different treatment than before (different than *Lee Optical*)
    i. Justice Kennedy is saying he did "conventional rational basis review," suggesting that there is only one standard (i.e. not two: rational basis review with(out) a bite)
        1. Rational basis review could be more aggressive (with a bite) when the classification show animus against a particular group, or is it when the classification discriminates against a group with immutable characteristics (i.e. they cannot change themselves)?

d. *City of Cleburne* & *Romer*: Court insists that they are using rational basis review – they examined the reasons and were only left with prejudice
    i. Shows that you can win even if the Court applies rational basis review – have to be clever about the arguments you are making

XV. ***Railway Express Agency v. New York*** (Douglas) (1949); beginning of the trend of deference and rational basis review without a bite

a. Facts: New York passes an ordinance because they are concerned with noise and traffic, so they prohibit advertisements on vehicles (transportation is within the police powers of the State); argument is that if the city wants to lower the noise, what difference does it make to the city where the noise comes from?

b. Classification (economic): those who own the vehicles vs. those who do not own/for hire

c. Test: rational basis review
    i. " … the fact that New York City sees fit to eliminate from traffic this kind of distraction but does not touch what may be even greater ones in a different category, such as the vivid displays on Times Square, is immaterial … **It is no requirement of equal protection that all evils of the same genus be eradicated or none at all**"
        1. Big thing in *Railway Express*: the city can choose to correct the problem one step at a time; the city does not have to have a comprehensive solution [similar to *Beazer*: statute addressed only narcotics uses; was not comprehensive to include ex-offenders, former alcoholics, mental patients, e.g.]

a. Court bends over backwards to validate this statute – judicial deference

XVI. ***Williamson v. Lee Optical*** (Douglas) (1955) (unanimous): canonical case

a. "I am doing *Lee Optical*": give us any reason that is half reasonable and we will take it – not going to put it under the microscope
    i. Rehnquist loves this case
        1. Lahav thinks this case will be used to try to overrule *Roe v. Wade*
b. Justice Douglas is leading a trend: if it is social or economic legislation, don't come and challenge it
    i. Legislatures always classify, so we will only ask the lawyers to manufacture plausible reasons
        1. Court is saying: we don't interfere if the decision has to do with social and economic legislation
            a. We are only going to ask if the legislature has any plausible, post hoc or manufactured reasons
                i. **Social and economic legislation gets rational basis review that is extremely deferential** (legacy of the New Deal)
                    1. EP Clause was designed to give equal protection on the basis of face (justification for being aggressive/strict scrutiny for race-based classifications (this case is only 1 yr after *Brown*; originalism)
                        a. However, Court is not sure if social and economic legislation is covered, so Court is deferential to the legislature
                            i. <u>Underinforcement thesis</u>: we are not going to enforce the EP Clause aggressively
                ii. "A Model for a Newer Equal Protection," Harvard LR Article (1972) → Court was so enthusiastic with rational basis review that they let the legislature do whatever they wanted with social and economic legislation – author proposes rational basis review with a bite – the Court listens, and after 1972 we begin to see more care given to rational basis review, which we did not see before [ex: *Romer v. Evans* (1996)]

c. Argued on 2 tracks: Equal Protection and Due Process
    i. Due Process (pg. 757): "The Oklahoma law may exact a needless, wasteful requirement in many cases, but it is for the legislature, not the courts, to balance the advantages and disadvantages"
        1. Court is satisfied with what the legislature might/may/could have thought or concluded
    ii. Equal Protection (pg. 508): "The problem of legislative classification is a perennial one, admitting of no doctrinal definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take **one step at a time**, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that the point has been reached here" (similar to *Railway Express* – correct the problem one step at a time)
d. Being content with what the legislature might/may/could have thought is in conflict with "<u>actual purpose</u>"

i. Actual purpose goes back to when the statute was passed
    1. Looking for actual purpose is similar to rational basis review with a bite – want to see a good reason for passing the statute, the actual purpose (not just a half reasonable reason)

XVII. ***U.S. Railroad Retirement Board v. Fritz*** (Rehnquist) (1980) [1 yr before *Clover Leaf*]
- a. Background: Congress made a technical mistake and one group of retirees did not get the benefits that another identical group of retirees did get
- b. "Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is constitutionally irrelevant whether this reasoning in fact underlay the legislative decision because this Court has never insisted that a legislative body articulate its reasons for enacting a statute"
    - i. Court accepted any plausible reason why the legislature would have made this classification
- c. *Fritz* & *Clover Leaf* = **Court will not do actual purpose for mistakes in policy making or for technical mistakes** (even with legislative history)

XVIII. ***Minnesota v. Clover Leaf Creamery*** (Brennan) (1981) [1 yr after *Fritz*]
- a. Background: challengers allege that the legislature was empirically mistaken because actually plastic is better than paperboard; the nature of the challenge is to suggest to the Court that the legislature made a statute on the basis of ill conceived reasons; challengers want to pierce the veil between the Court and the legislature to show that the means here contradicts the ends
- b. Test: rational basis review
- c. Court's response to the piercing of the veil: it is none of our business to correct legislature's mistake– go to the legislature to fix the legislature's mistake
    - i. <u>Institutional Competence</u>: Court is institutionally incompetent to decide policy
        1. In this case, Court is telling challengers not to bring policy arguments, because policy is for the legislature
- d. "The purposes of the Act cited by the legislature – promoting resource conservation, easing solid waste disposal problems, and conserving energy – are legitimate state purposes"
    - i. Footnote 7: "In equal protection analysis, this court will **assume that the objectives articulated by the legislature are actual purposes of the statute**, unless an examination of the circumstances forces us to conclude that they could not have been a goal of the legislation"
- e. "States are not required to convince the courts of the correctness of their legislative judgments …
    - i. Although parties challenging legislation under the Equal Protection Clause may introduce evidence supporting their claim that it is irrational, they cannot prevail so long as it is evident from all the considerations presented to the legislature, and those of which we may take judicial notice, that the question is at least debatable …
        1. Where there was evidence before the legislature reasonably supporting the classification, litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken"
- f. *Fritz* & *Clover Leaf* = **Court will not do actual purpose for mistakes in policy making or for technical mistakes** (even with legislative history)

XIX. Trend showing the Court telling people to come challenge and they will listen
- a. *Railway Express* (1949): beginning of the trend of deference and rational basis review without a bite) … **TO** …
- b. *Village of Willowbrook v. Olech* (2000): "a plaintiff can bring an equal protection claim even if she belongs to a '<u>class of one'</u> when she alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"

<u>Heightened Scrutiny</u> (race-based classifications are immediately suspicious, for animosity/prejudice)

I. ***Strauder v. West Virginia*** (Strong) (1880)
- a. Classification: West Virginia statute, which holds that only white men can serve on a jury (race-based classification on the face of the statute)

b. Result: statute is unconstitutional
    i. Statute is killed because people of color deserve to be in the selection pool/deserve to be able to be considered (process), not because Strauder deserves a diverse jury (substance)
c. "The fact that colored people are singled out … because of their color, though they are citizens … is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others"
    i. By excluding them the law is putting a badge of inferiority on them – where *Plessy* (1896) gets the language

II. ***Korematsu v. United States*** (Black) (1944): moment strict scrutiny was born
a. Background: this case was 10 years before *Bolling v. Sharpe*, but the Court here implies that the federal government is bound by equal protection
    i. War has been declared, so the war powers have been triggered and are active
        1. Significance of congressional declaration of war, in the law: <u>war powers are triggered and flow more freely</u> – powers of Commander in Chief are more significant – Constitution takes a different look, does not give different powers though [EP Clause still there]; declaration of war is Article I and II interacting with each other under the law
b. Classification: Japanese/Japanese origin (even if a U.S. citizen) vs. everybody else
    i. Korematsu argues this classification is overinclusive
c. Normative conflict: Executive Order (Article II) vs. Equal Protection Clause
    i. Executive Order is backed by a 1942 congressional statute (Article I) and judicial approval through precedent/stare decisis (Article III): *Hirabayashi v. U.S.* (1943) … **all 3 branches show approval of this** – all 3 in favor of this policy
        1. If the Court invalidates this, they will be going against the Commander in Chief and the Congress during war, with their own precedent facing them … that's tough
            a. If the Constitution says one thing (i.e. equality), but all 3 branches say the opposite, what should prevail? What is the duty of the Court here (*Marbury v. Madison*)?
d. Test: "most rigid scrutiny" (first time the court explicitly applies strict scrutiny)
    i. Compelling interest (end): national security, protecting against sabotage and espionage
    ii. Narrowly tailored means-end relationship: (see discussion below)
e. Result: Japanese detention was sustained
    i. Note: Korematsu's conviction was overruled in 1984, and in 1988 Congress gave restitution to the Japanese detainees because it was obvious they made a mistake
        1. But, this case was <u>not</u> overruled – it is still good law, still stare decisis (think 9/11)
f. Court is applying strict scrutiny for the first time
    i. Justice Black says the means-end relationship is narrowly tailored because the military said so ("To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue")
        1. In terms of the law, he is justifying it via <u>judicial deference on the basis of judicial incompetence</u> (Court does not know what is best during war)
            a. He is telling us he is applying strict scrutiny, but the analysis and result tell us he is applying rational basis review (deferring = rational basis review)
                i. "We cannot say it is not justified …" → double negative is a give away
g. Justice Murphy (dissent): we have a classification based on race, but rational basis review is enough here to invalidate the Executive Order – we do not need most rigid scrutiny

i. There is one exception when we should defer to the military: when martial law has been declared and the military commander is in charge of the country [test: martial law is in full force if the civil courts are closed] – suggesting Executive Order may be valid without any judicial review if martial law has been declared
    1. But since martial law has not been declared and the civil courts are open, the Court can review military decisions and enforce the Constitution
ii. Here, the end is rational (of course we want to protect national security), but the means are not rational (they are <u>overinclusive</u> because it is very clear that there are people who are not related to the conflict at all, even though they are Japanese)
    1. [We might also it is <u>underinclusive</u> – what about the Germans and Italians?]

h. Justice Jackson (dissent): "If we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient"
    i. "I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy"
        1. This Order could be reasonable from the perspective of the military, but it is still unconstitutional because the Constitution tells us we cannot distinguish on the basis of race in this way
    ii. Justice Jackson wants the majority to look at what they are doing – to remember that they are the final interpreters of the Constitution and when they sustain this Executive Order they are rationalizing something that is unconstitutional – and now this case is precedent (thought about after 9/11)
        1. "But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, the Court for all time has validated the principle of racial discrimination …
            a. **The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need**"
                i. <u>This precedent suggests that the political branches have the power to suspend the Constitution, when actually the Constitution can never be suspended and the Court's job is to defend it</u>
    iii. Justice Jackson is passive aggressive towards this Executive Order – he says that the order can stand if the military thinks it needs to (saying Court is incompetent to judge whether it is necessary), but as a civil court, we cannot enforce the Order, and tells Congress they cannot either
        1. He wants Korematsu to go home and not be criminalized, but not his job to tell the military to shut down the detention camps

III. ***Loving v. Virginia*** (Warren) (1967) (unanimous): people are using this case to argue for gay marriage rights
    a. Background: Virginia made it a felony for people to marry interracially
        i. State of Virginia argued that the law did not violate the EP Clause because the law applied equally to whites and blacks (whites cannot marry blacks – blacks cannot marry whites)
            1. They allege the legitimate interest is to preserve racial integrity (want rational basis review)
    b. Classification: people who can get married (non-interracial) vs. people who cannot get married (interracial)
    c. Normative conflict: Virginia law vs. 14th Amendment's Equal Protection Clause
    d. Test: strict scrutiny (Court explicitly rejects rational basis review)
        i. "At the very least, the Equal Protection Clause demands that racial classifications be subjected to the 'most rigid scrutiny,' and if they are ever to be upheld, they must be

shown to be necessary to accomplish some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate"

e. Result: law is unconstitutional
f. "We **reject the notion that the mere 'equal application'** of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment's proscription of all invidious racial discrimination"
    i. This law is about white supremacy (if you are Asian you can marry a black, so really law wants to preserve white 'purity'), and the Court cannot find any race-neutral objectives
g. "There can be no doubt that restricting the freedom to marry …"
    i. Think: where is there freedom to marry in the Constitution

Affirmative Action

I. Narrative: it was decided in Brown in 1954 that separate is not equal – cannot classify on the basis of race; *Loving* decides that when we see a race-based classification, Court will apply strict scrutiny because race-based classifications are suspect; Civil Rights Act of 1964 makes it statutorily illegal to discriminate on the basis of race in the private sector (not just by the States); but, by the 1970's society still remains largely segregated – blacks did not make enough strides in society – it is not that blacks are inferior, but rather, they are disadvantaged and do not get the basic skills to compete in society
    a. Idea was: if we open the doors to blacks, then we will have a better society by giving them the necessary skills to be productive members of society
        i. Enter: affirmative action – affirmatively act in order to integrate the disadvantaged into society
            1. Some people thought affirmative action was imposing a **quota** (which has a bad connotation)
            2. Some call it **racial discrimination** (Scalia and Thomas, e.g.)
            3. Some call it a (legal) **tool**: it can be used for good and for bad (can be malign – do bad things, or benign – do good things)
            4. Some call it **reverse discrimination**: it is not racial discrimination, rather we are reversing it and including these historically discriminated people
II. Policy:
    a. **Pros**: to give the historically disadvantaged more opportunities; to remedy; to encourage diversity
    b. **Cons**: program may be overbroad/overinclusive (may include people who have had a lot of opportunities and can compete well without reference to race); could be underinclusive; issue of merit is being compromised (qualified people might be excluded because they are not an underrepresented minority); it is paternalistic to think these underrepresented minorities need additional help; we fought hard to get to the point where our Constitution is colorblind, so this does not further that principle; might reinforce the stigma of inferiority (those underrepresented minorities who are qualified – without affirmative action – may be stigmatized by those underrepresented minorities who are not qualified yet admitted because of affirmative action)
III. Standard of Review:
    a. Some people argued the test should be rational basis review because affirmative action is benign – it is designed to help
    b. Some people argue for intermediate scrutiny – middle ground
    c. Some people said race-based classification + neutral principles (colorblind) = strict scrutiny
        i. Neutral principle: a principle that is applied across the board; it does not invite you to think about whether the classification is a good or bad thing – apply the same standard every time, regardless of motives
            1. [Neutral principle is similar to legal formalism: we always apply the same thing – we know what the standard is and we apply it]
IV. ***Grutter v. Bollinger*** (O'Connor) (2003) (5-4)

a. Background: University of Michigan Law School (i.e. representing the State) is using race as a factor in student admissions (education = a police power of the states)
b. Normative conflict: Law School's affirmative action policy vs. 14th Amendment's Equal Protection Clause
c. Test/Standard of Review: strict scrutiny [no previous decision by Court as to what standard would apply in affirmative action cases]
    i. "**Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it**. When race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied"
        1. O'Connor is changing the definition of strict scrutiny – she is signaling that it is not always fatal (big deal)
    ii. Compelling Ends can be: (i) remedy (remedial) and/or (ii) diversity
        1. Remedy can be a compelling state interest only provided that the particular institution discriminated in the past
        2. Diversity is compelling for the good that it brings to the particular institution, racial groups, and for American society at large
d. Result: uphold the policy for the time being – open to reviewing it 25 years from now
    i. "A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race … Accordingly, race conscious admissions policies must be limited in time"
        1. Where is the majority getting 25 years? Is that in the 14th Amendment? Is that legislating from the bench? [it is pragmatism]
e. O'Connor focuses on diversity as the compelling state interest
    i. "The Law School's education judgment that such diversity is essential to its educational mission is one to which we defer" (Law School knows better how to go about achieving diversity; institutional competence)
        1. Typically, strict scrutiny ≠ deferring
            a. One explanation: simple deviation: before strict scrutiny meant really putting it under a microscope, and now it is something different (not being true to the test)
            b. Another explanation: using the tool that distinguishes between standards and rules
                i. <u>Rule</u>: something we always follow – it does not require discretion [a neutral principle – strict scrutiny should be applied across the board]
                    1. Scalia thinks everything in the Constitution is the quality of rules
                    2. Harlan: our Constitution is colorblind = a rule, apply it every time
                ii. <u>Standard</u>: something more flexible and elastic – it requires discretion in order to apply
                    1. Ex: Due Process: what does it mean – we need to think about it, and reasonable people may disagree what it means – designed as a standard not a rule
                    2. O'Connor and Kennedy prefer standards
                    3. Marshall: our Constitution must be flexible (i.e. there are standards)
                iii. Standard of Review
                    1. O'Connor treats strict scrutiny as a standard – she believes the law is about balancing, so she can inject deference into strict scrutiny when she thinks it is the right thing to do

2. Scalia treats strict scrutiny as a rule – should be applied the same for every case

f. O'Connor: "To be narrowly tailored … cannot use a quota system … may consider race or ethnicity only as a 'plus' … in a **highly individualized, holistic review** (i.e. the means) of each applicant's file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment"
   i. "**Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative** … Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks"

g. O'Connor rejects Thomas and Scalia's suggestion of using a lottery as a race-neutral means
   i. "These [race neutral] alternatives would require a dramatic sacrifice of diversity, the academic quality of all admitted students, or both"
      1. Basically, a lottery would make it difficult to retain the Law School's elite status
         a. Argument about being an elite school is that the Law School wants their diversity to reflect the American community – an elite school marries the idea of diversity to meritocracy (only the best will go there); important for the idea of means: O'Connor says the Law School will choose the means appropriate to remain an elite institution
            i. Is <u>elitism</u> an argument as a matter of constitutional law?

h. Justice Rehnquist (dissent): Law School's means are not narrowly tailored to the interest it asserts
   i. "Its actual program bears no relation to this asserted goal [critical mass of underrepresented minority students] … Stripped of its 'critical mass' veil, the Law School's program is revealed as a naked effort to achieve racial balancing"
      1. He says they deny that they are doing quotas, but when he looks at the number of blacks vs. Native Americans vs. women, etc., in the applicant pool and the we look at how many were admitted – there is a very strong correlation (based on the empirical evidence) … "far too precise to be dismissed as merely the result of the school paying 'some attention to the numbers'"
         a. Technique he uses: <u>piercing the critical mass</u> – reading through the excuses and looking at what they actually did
            i. Says 'critical mass' is a pretext (*McCulloch*) to do quotas, which are illegal
            ii. Applies strict scrutiny, like the majority, but Rehnquist is aggressively evaluating the policy (in contrast to O'Connor who is deferential)

i. Justice Kennedy (dissent): Where the corrosive category of race is a factor in decision making, we need meaningful strict scrutiny – not feigned (artificial), like the majority applies

V. ***Gratz v. Bollinger*** (Rehnquist) (2003): companion case to *Grutter*, perhaps clarified the tailoring inquiry
   a. Background: Rehnquist is in the dissent in *Grutter* (he is against the Law School's affirmative action policy)
      i. Here, University of Michigan's (undergrad) policy automatically gives a 20 point bonus for face
   b. Result: policy is unconstitutional
   c. Justice Rehnquist: the means-end relationship is not narrowly tailored – automatic point distribution, not an individualized consideration, is invalid/illegal
      i. University contends that they do not have the personnel to do an individualized assessment, like the one upheld in *Grutter*
         1. "The fact that the implementation of a program capable of providing individualized consideration might present **administrative challenges does not render constitutional an otherwise problematic system**"

d. Justice Ginsburg (dissent) (was in the majority in *Grutter*): "If **honesty is the best policy**, surely Michigan's accurately described, fully disclosed College affirmative action program is preferable to achieving similar numbers through winks, nods, and disguises"
    i. "The stain of generations of racial oppression is still visible in our society, and the determination to hasten its removal remains vital"
        1. "Without recourse to such plans, institutions of higher education may resort to **camouflage**"
e. [Note: if a university wants to give automatic points for legacies, that will get rational basis review (because no race-based classification) and the policy will be validated]

VI. ***Parents Involved v. Seattle School Dist. No. 1*** (Roberts) (2007) (plurality opinion – no majority opinion)
a. Background: this is the Roberts Court – a different Court and a different dynamic from the 2003 Court that decided *Grutter* & *Gratz* – Justice O'Connor (likes standards) is out and Justice Alito is in (like rules); Justice Rehnquist is out and Justice Roberts is in; Justice Kennedy is the swing vote – so pay attention to what parts of the opinions he agrees with and what parts he dissents from (in plurality opinions)
    i. We have two schools involved in this case – Kentucky and Washington
        1. Kentucky had racial discrimination in the past; Washington did not
b. Classification: a racial tie-breaker in the school district's plan to distribute students to the various schools
c. Test: strict scrutiny (not just for higher education)
d. Result: plan is invalidated/unconstitutional
e. Justice Roberts says there are two compelling state interests
    i. Remedial
        1. Kentucky discriminated in the past, but in 2000 they reached unitary status – so no remedial compelling state interest here
        2. Washington never discriminated – so remedy is not a compelling state interest here either
    ii. Diversity (more complex than simply getting numbers into the classroom – idea is that if you reflect the diversity of the country in the classroom, you will develop a better body of citizens)
        1. Defendants rely on *Grutter* (precedent) and hope that that compelling state interest (concept of citizenship, e.g.) will be recognized here
            a. Court distinguishes on the basis of facts and holds that *Grutter* does not apply to this case – only to higher education
f. Justice Roberts says he is a minimalist (rule on the most narrow grounds and let public policy decide the rest), but why does he continue the opinion after deciding there is no compelling state interest?
    i. He goes on to discuss the lack of narrow tailoring: "[plans] are not narrowly tailored … the plans are directed only racial balance, an objective this Court has repeatedly condemned as illegitimate"
        1. Not narrowly tailored because alternative race-neutral means would be effective and the racial classification has minimal effect on student assignments
            a. **Is substantial vs. minimal impact relevant as a matter of constitutional law**?
                i. Formalism: could be a 3% impact, could be 99% impact – it does not matter; no exceptions; the rule is the rule, and it should be applied across the board
                ii. Pragmatism (Breyer): just 3% impact – not classifying for evil reasons – what's the big deal? Not for us to decide, let them decide
g. Justice Roberts is a legal formalist
    i. Law is ahistorical – it will always be the same thing – does not matter what century it is

1. He does not care whether the classification of race is used for a good reason or a bad reason – "Our Constitutional is colorblind" – whether race is used for good or bad is not relevant as a matter of constitutional law
2. Loyal to the "letter" of *Brown* – no classifying based on race in schools (whereas dissent more loyal to the dissent)

h. Justice Thomas (concurring): "**The Constitution is not that malleable … The Constitution enshrines principles independent of social theories**"
   i. Neutral principles

i. Justice Kennedy (concurring in part, concurring in the judgment): he is willing to look at context (thinks it is relevant)—race matters in this country – willing to balance the interests at stake; in contradistinction to Roberts who says you cannot classify on the basis of race **ever**
   i. "The plurality's postulate that 'the way to stop discrimination on the basis of race is to stop discriminating on the basis of race' is not sufficient to decide these cases"
      1. Kennedy joins the plurality because he feels that the means here are not narrowly tailored
         a. So he might find a compelling state interest, but the means are insufficient, so policy is killed
         b. NOTE: the compelling state interest: diversity in the vision of *Grutter* could have 5 supporters (4 in the dissent here and maybe Kennedy, the swing vote)

j. Justice Stevens (dissent) (part of the *Brown* Court): "It is my firm conviction that no member of the Court that I joined in 1975 would have agreed with today's decision"
   i. He is validating a form of precedent that emphasizes the spirit of the *Brown* and not the letter
      1. Stevens looks through a historical lens – ***Brown* cannot be divided from its circumstances/context** (that is how you must understand it; focus on the spirit of *Brown*)
         a. He is rejecting legal formalism and endorsing pragmatism (sensitivity to circumstances and context)
            i. Anatole France: "The majestic equality of the law, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread" = legal formalism: the law will not be sensitive to you
               1. "The Chief Justice fails to note that it was only black schoolchildren who were [ordered not to go to school based on the color of their skin]; indeed the history books do not tell stories of white children struggling to attend black schools"
                  a. This is an attack on Roberts' legal formalism

k. Justice Breyer (dissent): "This is a decision that the Court and the Nation will come to regret … I must dissent" ["must" is meaningful, compared to "I dissent" or "I respectfully dissent"]
   i. "Courts are not alone in accepting as constitutionally valid the legal principle that *Swann* enunciated – i.e. that the government may voluntarily adopt race conscious measures to improve conditions of race even when it is not under a constitutional obligation to do so"
      1. "There is reason to believe that those who drafted an Amendment [14th] with this basic purpose in mind would have understood the legal and practical difference between the use of race conscious criteria in defiance of that purpose, and the use of race conscious criteria to further that purpose
   ii. Applies strict scrutiny (because he has to) and finds a compelling state interest and narrow tailoring

iii. "**The Founders meant the Constitution as a practical document that would transmit its basic values to future generations through principles that remained workable over time**"
iv. "The last half-century has witnessed great strides toward racial equality, but we have not yet realized the promise of *Brown*. To invalidate the plans under review is to threaten the promise of *Brown*"
1. "**Never have so few, so quickly, dismantled so much**"

<u>Gender Classification: the development of intermediate scrutiny</u>

I. Narrative: Equal Protection Clause is a constitutional right of equality, but do we interpret the EP Clause independently of its history, or not?
a. Everyone knew that the EP Clause was meant to correct the institution of slavery and race-based discrimination
i. When the 14th Amendment was passed, women were discriminated against and had no rights
1. Can we now interpret the EP Clause to guarantee equality for gender too, or should we say it is for the legislature to do, not the Constitution?
a. One way around this is the 19th Amendment (women get the right to vote) – so even if you agree that the EP Clause was not historically about gender, does the 19th Amendment change it retroactively?
i. The Constitution was amended to recognize women as citizens, so can we interpret the 14th Amendment with the understanding of the 1920's (rather than of 1868) – the amendments all radiate back to the original text, so go to 1920 and that will be the moment of Framers' intent
b. Significance of the civil rights movement for women's right: people started to think about what it meant to be equal, full-fledged citizens – women's rights movement was born out of the civil rights movement

II. First woman appointed to the Court: Justice O'Connor in 1992

III. How will women get equality?
a. Constitutional amendment (Equal Rights Amendment failed)
b. Go to the legislature
c. Go to the Court and as for rights

IV. ***Craig v. Boren*** (Brennan) (1976)
a. Background: laws that discriminate against women used to be considered "social and economic legislation," and the New Deal told us social and economic legislation gets rational basis review; women want strict scrutiny for gender-based classifications (like race-based classifications)
i. This case resolves the struggle between whether gender-based classifications will get strict scrutiny (no), rational basis review like *Lee Optical* (no), or intermediate scrutiny (yes, invented in this case, but Court says we always did it that way: "our cases indicate this is the way it should go")
b. Strategy: first identify statutes that discriminate against men (such as this case) and get the Court to heighten the standard of review (make it clear to these old, male judges that there is actual discrimination against men too) – this will establish a solid constitutional base for gender discrimination before cases concerning female discrimination are brought to Court; Court will then be faced with precedent
c. Normative conflict: Oklahoma statute vs. 14th Amendment's Equal Protection Clause
d. Classification: age limit for men to buy beer, but not women
e. Test: intermediate scrutiny
i. Ends must serve important governmental objectives
ii. Means must be substantially related
f. Result: statute is invalidated

i. There was an important end (enhancement of traffic safety), but the means-end relationship was not substantially related/targeted

g. Court tells us what is **not** an important end when doing intermediate scrutiny
   i. **Administrative ease and convenience** – cannot distinguish on gender because it is convenient or expedient (economical)
      1. Cf. *Railway Express*: rational basis review was the test and Court was deferential – shows the significance of the standard of review to the ultimate result)
   ii. **Archaic stereotypes and overbroad generalizations** will not do

h. Court rejects the State's empirical evidence
   i. Brennan says empirical evidence is a "dubious business" – I can't trust is as a Court

i. Justice Powell (concurrence): "this gender-based classification does not bear a fair and substantial relation to the object of the legislation"

j. Justice Stevens (concurrence): finds a classification between the 2% of men who drink and drive vs. 98% of men who do not

k. Justice Rehnquist (dissent): wants a rational basis review test (like *Lee Optical*)
   i. If men want to discriminate against themselves, they can
      1. We should not be inventing tests here (i.e. intermediate scrutiny); we should be a deferential court and exercise judicial restraint
         a. It is OK if the legislature does not have evidence to support what they are doing (i.e. passing this statute) – just manufacture any reason that is reasonable on its face, and we'll validate it

V. ***United States v. Virginia*** (Ginsburg) (1996)

a. Background: VMI has a male-only admission policy, and they are very reluctant to go co-ed (they think the sky is going to fall)
   i. District Court ruled for VMI; 4th Cir. reversed & remanded for VMI to institute a remedial plan; 4th Cir. approved VMI's remedial plan: opening VWIL, a separate school for women that deemphasizes military education and uses a cooperative method of education which reinforces self-esteem
      1. Note: if VMI were a private institution, it could be single-sex

b. Normative Conflict: VMI's male-only admission policy vs. 14th Amendment's Equal Protection Clause

c. Standard of review: intermediate scrutiny
   i. "Parties who seek to defend gender-based government action must demonstrate an ***exceedingly persuasive justification*** for that action" (language was taken from a previous O'Connor opinion – coalition building in opinion writing – she is luring in O'Connor and Kennedy to join her)
      1. "burden of justification is demanding … rests of the State … classification must serve **important governmental objectives** and that the discriminatory means employed are **substantially related** to the achievement of those objectives … justification must be genuine, not hypothesized (i.e. not a pretext – must be actual purpose) or invented post hoc in response to litigation … must not rely on overbroad generalizations"
         a. Is this intermediate scrutiny from *Craig v. Boren*, or is the standard of review raised with "exceedingly persuasive justification"?
            i. Rehnquist (concurrence): thinks Ginsburg is adding something new with this term to intermediate scrutiny – making the test more uncertain
         b. Ginsburg wants actual purpose – in the 19th century (pre-Civil War) the actual purpose was clear: to exclude women; now, at the time of litigation, is the actual purpose clear?
   ii. "The heightened review standard our precedent establishes does not make sex a proscribed classification … Supposed 'inherent differences' are no longer accepted as a

ground for race or national origin classification; physical differences between men and women, however, are enduring"

1. Ginsburg is telling us she is relying on precedent – she is restrained (just like Roberts in *Parents Involved*)
2. Equal protection of the law does not make sex a proscribed classification – sometimes it is OK to use gender-based classifications
    a. Ginsburg is not saying that the Constitution is gender-blind – there may be a case where we apply the same standard and we might find the classification valid [telling us sex and race are different]
        i. Might suggest affirmative action for women for benign purposes is valid

d. Result: policy invalid, "Virginia has shown no exceedingly persuasive justification for excluding all women … VWIL program does not cure the constitutional violation, i.e., it does not provide equal opportunity"
e. Virginia's first interest: single-sex education provides important benefits and the option of single-sex education contributes to diversity in educational approaches
f. Virginia's second interest: the unique VMI method of character development and leadership training for the school's adversative approach would have to be modified if women were admitted to VMI
    i. VMI has an interest to produce citizen soldiers, and claims their adversative method is not appropriate for women
g. Court's response to diversity interest: single-sex education is an important state interest, but we are going to put it under the microscope
    i. Court finds the actual purpose was sexist/discriminatory, and the interest of diversity is a pretext – not persuaded that diversity is the actual purpose, but rather a sham
    ii. Rehnquist (concurrence): VMI can change their mind re: purpose – if a statute is made for one purpose and over time this purpose dies, but the new purpose is there to justify the same statute, should we kill it because the original purpose was bad, or should we give some serious thought to the new purpose that was created over time?
        1. Ginsburg does not believe VMI honestly changed their mind/purpose, rather, she thinks they came up with the interest of diversity as a last resort
            a. "In cases of this genre, a tenable justification must describe actual state purposes, not rationalizations for actions in fact differently grounded"
h. Court's response to adversative interest: justifications for the means-end relationship cannot rely on overbroad generalizations and stereotypes (like Court said in *Craig v. Boren*)
    i. Ginsburg argues that there are women who are capable of going to VMI (might not be a lot, but some are qualified)
    ii. "**Generalizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women** …"
i. Court invalidates VMI's remedial plan: VWIL
    i. The two schools are not equal, do not compare – difference in endowment, quality of professors, resources, e.g.
        1. If VMI really wants to be single-sex, then they need to put more money and resources into VWIL and they *might* meet the constitutional standard

VI. ***Nguyen v. Immigration and Naturalization Service*** (Kennedy) (2001) (5-4)

a. Background: father (U.S. citizen) missed the deadline he could apply for his son's citizenship, which was 18 years old; mother is not a U.S. citizen
    i. Father contends the gender-based classification is a stereotype and overbroad
b. Normative conflict: a federal statute vs. 5th Amendment's Due Process (EP) Clause
    i. Will the Court exercise more deference because the norm is a federal, rather than state, statute?

ii. Congress had the power to pass this statute under Article 1, §8(4): to establish uniform rules of naturalization (an enumerated power)

c. Classification: if you are born abroad and your mother is a U.S. citizen, you are entitled to become a citizen automatically vs. if you are born abroad and your father is a U.S. citizen (and not your mother), you are not automatically entitled to U.S. citizenship
    i. Common denominator: unmarried parents, child born abroad
        1. Distinction: whether the mother or the father is the U.S. citizen
d. Test: intermediate scrutiny (important governmental interests; substantially related)
    i. Important governmental interests:
        1. Ensuring there is a parent-child relationship (blood, biological ties)
        2. Ensure there is an actual, real relationships between citizen and child and to ensure cultural ties that will educate the child to be an American
    ii. There was unanimous consent that this was the standard of review (no debate) – continuity – we learn that the standard can be applied differently
e. Result: statute is valid
f. Court upholds the distinction/classification between the mother and father
    i. We can never tell whether the father is the actual father because he does not have to be present at the birth, whereas the mother always has to be present, so we can be sure who the mother is ("In the case of the mother, the relation is verifiable from the birth itself")
        1. "Gender specific terms can mark a permissible distinction. Here, the use of gender specific terms takes into account a biological difference between the parents"
g. Court rejects petitioner's argument about DNA to verify paternity
    i. Rebuttal to 1st Interest re: DNA: "The statute does not actually mandate a DNA test … The Constitution, moreover, does not require that Congress elect one particular mechanism from among many possible methods of establishing paternity, even if that mechanism arguably might be the most scientifically advanced method"
    ii. Background: when this statute was passed in the 1920s, no one knew about DNA tests and verifying paternity was relatively difficult – how that science has changed and DNA can prove paternity relatively easily, does that translate into a legal argument?
        1. Remember, what we have to prove is the end (a good cultural relationship between parent and child so Congress can be sure the child grows up as an America) and the means is to make sure you see with your own eyes that this child is born from this mother
            a. Rebuttal to 2nd Interest re: DNA: "The importance of the governmental interest at issue here is too profound to be satisfied merely by conducting a DNA test. Scientific proof of biological paternity does nothing, by itself, to ensure contact between father and child during the child's minority" [looking for a real relationship, not just biological]
                i. "The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender"
h. Justice O'Connor (dissent, joined by Ginsburg, Souter and Breyer): thinks the majority did not apply intermediate scrutiny correctly – looks more like rational basis review
    i. When we apply heightened scrutiny we look to see if there are gender-neutral means to reach the same end – so the end is important, but what about the means-end relationship?
        1. The means-end relationship is not substantially related here because there are gender-neutral means – a DNA test, which does not require a gender-based classification between the mother and the father

a. "The existence of a statutory provision governing proof of paternity, coupled with the efficacy and availability of modern technology, is highly relevant to the sufficiency of the tailoring between the statute's sex-based classification and the asserted end"
    1. "In our prior cases, the existence of comparable or superior sex-neutral alternatives has been a powerful reason to reject sex-based classification"
    ii. "The avoidance of gratuitous (unwarranted) sex-based distinctions is the hallmark of equal protection"
2. "The claim that the statute substantially relates to the achievement of the goal of a 'real practical relationship' thus finds **support not in biological differences but instead in a stereotype**"

Due Process and Fundamental Rights, Introduction

I. Rights
    a. **Negative rights**: things the government cannot do to you
    b. **Positive rights**: the rights the government owes you
        i. Ex: right to education
II. Constitution has a lot of explicit powers and rights, but what is implied in the Constitution? how can we make something out of nothing?
    a. Ex: *Marbury*: Article III does not explicitly recognize the power of judicial review
    b. Ex: Steel Seizure case: recognized an inherent power of the Executive branch
    c. Cf: Do we have a right to health care? This is not a matter of constitutional law, but rather, a matter of statutory law – the legislature gave us the right – a matter for the electorate or political process
III. What more rights do we have – that are implied rights?
    a. Scalia: if you want the right to abortion, go to the legislature and get it there – the Court cannot make rights for you that are not in the text
        i. Argument based on politics: as citizens, you can go to the political process and agitate the legislature
IV. Theory of liberalism: the idea that we have more rights than the law of the land gives us (an old idea)
    a. Narrative: we used to be in the state of nature with no government, but needed to adopt the rule of law to make everyone equal; we shifted from the state of nature to the state of government and entered into the social contract: from now on we will give the government power, so that the government can make sure that the strong cannot step on the rights of the weak
        i. Thomas Hobbs says that when we entered into the social contract we gave away all of our rights, but in return we gained protection; the rights we have from now on are only those that the legislature/legal system give us; we do not have rights inherently
        ii. John Locke says it is not as simple as that; we did enter a social contract, but we did not give away all of our rights; rather, we have certain rights that we were born with and can never give away
            1. Declaration of Independence: "We hold these truths to be self evident (i.e. do not have to prove them), that all men are created equal, that they are endowed with certain inalienable rights, that among these are life, liberty and the pursuit of happiness"
                a. There is a tradition recognized in a fundamental document that says we have inalienable rights, which not even the legislature can take away
            2. *Calder v. Bull*: under the Constitution there are recognized rights that do not stand out in the text
            3. Ninth Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people"

b. Tradition from natural law: we had rights in the state of nature and we never gave them away
    i. Look to the 9th Amendment, Declaration of Independence, *Calder v. Bull* to see a tradition in American law that there is such a thing as natural rights
        1. Need to either show it is in the text, or if you can prove it was original intent (i.e. if the Framers recognized this right, I will too = originalism)
c. Positivism tradition: rights must be explicit in the text; there are no implied rights
    i. Law is the black letter on the books
    ii. Only the political process can give you more rights that are not in the text

V. Theories of Constitutional Interpretation – Originialism and Its Critics
a. Did the Founding Fathers mean to bind us by originalism (i.e. their intent), or did they mean to give us a document and let us be?
    i. Today's Court like originalism
b. **Non-originalist approaches** (assuming arguendo you do not find an answer in originalism …) [take approaches are created to be persuasive, none are binding]
    i. Natural law: we never gave away our rights – we verify this by looking to the Declaration of Independence and the 9th Amendment – illustrates that we always thoughts more rights would be breathing than explicit in the text
        1. Certain universal rights exist (dignity, liberty, e.g.)
        2. Caution: natural law can be a great thing, but it can also be very conservative and oppressive (i.e. women might belong in the kitchen)
    ii. Moral arguments and the search for "integrity": there is some integrity in the legal system that radiates a tradition/recognition of human rights
        1. We can make moral arguments about human value, human dignity, and the equal moral worth of individuals – this entitles humans to certain implied rights (implied in *Skinner*)
            a. Umbrella: equal moral worth of individuals – inherent because we are humans
        2. From time to time, there may come a moment when the court should inject moral reasoning into the opinion and recognize and implied right
            a. Morality can be an important argument in constitutional law
    iii. Tradition: look to tradition to see if there is an implied right – what do the American people think about the right, in the name of tradition?
        1. Study the sociology of the American people and from this you will discern an argument for or against the implied right
    iv. The common law and consensus: the common law has been around since before the Constitution, so the presumption can be that we should always be loyal to the common law
        1. If you can find the right in the common law, then you can try and argue it should be recognized now
            a. This method appeals to conservatives – we did not invent the right, it came from England, e.g.
        2. Consensus: look to what the people think here and now about the implied right
            a. If you accept consensus as a valid approach, then you can make this argument
            b. Scalia rejects consensus – consensus is for Obama to worry about, not the Court
    v. Representation-reinforcement (John Ely): the court can justify judicial activism and recognize an implied right if an when an argument is made that the right involved is about the political process (representation-reinforcement); we want to keep the political channels open to make sure people can agitate the political process in order to persuade the legislature we are entitled, so the Court should make sure the clever politicians do not clog the political process (which they like to do)

1. Make an argument that the political channels are clogged and persuade the Court they need to be opened, and the Court should interfere to preserve the people's right to agitate and be represented
    a. Ely makes the distinction between process and substance – Court is not good at substance, but do know very well about process

VI. Due Process: government cannot deprive you of life, liberty, or property without due process of law
- a. When is it constitutional for the government to take away your liberty?
    - i. One camp says that if government gives you valid/legitimate process, then they can take away your liberty
        1. There is nothing absolute in substance – the only thing you need to do is give process and the government has met the constitutional requirements
    - ii. Another camp says that as human beings we have certain fundamental rights that are inherent to us, which we never gave up and which no government can take away from us
        1. **Substantive rights**: you have certain things that no one can take away from you

VII. *Lochner v. New York* (1905) [not assigned, just background]: Court held unconstitutional a New York statute that regulated the number of hours bakers could work; "It must be considered that there is a limit to the exercise of police powers of the states"; Court was protecting the liberty of contract (substantive right); this decision was extensively criticized
- a. *Lochner* was drama; instead of saying "substantive rights," people called it "Lochnerizing" (a negative term) = Court is exercising raw judicial power, usurping the power of the legislature
    - i. *West Coast Hotel* (1937) said *Lochner* was bad because it was usurping legislative power and creating substantive due process rights that are not in the Constitution
    - ii. From 1937 until 1965 (*Griswold*) substantive rights were sleeping …

VIII. If, and only if, the right is fundamental (of constitutional dimension) will the Court move forward
- a. If the right is merely a social right (no constitutional dimension; not a right as a matter of constitutional law), then you should agitate the legislature for the right; will get rational basis review

IX. Standard: Once a fundamental right is found in the Constitution = strict scrutiny (Griswold)
- a. To determine which rights are fundamental, judges do not make decisions based on their own notions, rather they look to:
    - i. Traditions and collective conscience of the people
    - ii. To determine whether a principle is so rooted there as to be ranked fundamental

<u>Due Process and Fundamental Rights, Cases</u>

I. ***Skinner v. Oklahoma*** (Douglas) (1942): the right to have offspring
- a. Normative conflict: Oklahoma's Habitual Criminal Sterilization Act vs. 14th Amendment's Equal Protection Clause
- b. Test: strict scrutiny
- c. Result: statute is killed
- d. Justice Douglas relies on equal protection argument (because still scared of *Lochner*)
    - i. "Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race – <u>the right to have offspring</u>"
        1. "[Act] fails to meet the requirements of the Equal Protection Clause of the Fourteenth Amendment"
            a. "He is forever deprived of a basic liberty"
                i. Act makes an exception for white collar crimes (but essential the same act/crime) … "The Equal Protection Clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn"
- e. Justice Stone (concurrence): relies on a violation of procedural due process

i. "A law which condemns, without hearing, all the individuals of a class to so harsh a measure as the present because some or even many merit condemnation, is lacking in the first principles of due process"

f. The entire Court stays away from substantive due process – do not want to say someone has a fundamental right to procreate/have offspring (i.e. a right that is not explicit in the text)
    i. Court is afraid of *Lochner*
        1. Note: Warren Court (1953 on) focuses on equal protection – stays away from fundamental, substantive rights

II. ***Griswold v. Connecticut*** (Douglas) (1965) (7-2): <u>the right to privacy</u>

a. Background: this case is decided during the Civil Rights movement; there is a focus on equal protection and civil rights
    i. Connecticut statute prohibits any person from using contraception; statute is not a flat ban though, there is an exception: males can buy condoms but only to prevent disease; this statute is only for married people (of course unmarried people do not get contraception, so not at issue here)
        1. The defendants before the Court are Planned Parenthood and the doctor – not the actual human beings/married couple – shows that the State is not going into the bedroom to draw the couples into the courtroom
    ii. Americans, in general, think the right to privacy is in the Constitution, but it is not

b. Standard of review: strict scrutiny
    i. If you manage to identify a fundamental right, then the State cannot take it away from you unless strict scrutiny is met
        1. Justice Harlan (concurrence): explicitly rejects rational basis review
            a. "Since the statute marks an abridgment of important fundamental liberties protected by the 14th Amendment, it will not do to urge that it is rationally related to the effectuation of a proper state purpose"
    ii. The State's compelling interest is discouraging extra-marital relationships (i.e. promote marital fidelity)
        1. However, the means-end relationship is not narrowly tailored (see Goldberg)

c. Justice Douglas: "Some arguments suggest that *Lochner* should be our guide. But we decline that invitation … 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"
    i. Rather, Douglas **reads the right to privacy and a notion of personal autonomy into a bunch of the amendments** [the right was to be found in the penumbras and emanations of other constitutional protections]
        1. First, he sees a right to association that must be recognized between the man, woman, and doctor (the right to association is from case law, has already been decided)
        2. Then, the looks at every amendment in the Bill of Rights and he sees that there is some notion/expectation/assumption of privacy, so from this he distills a concept of zones of privacy that the government cannot step in – "various guarantees create zones of privacy"
            a. Douglas is making a <u>textual argument</u>, finding an expectation of privacy throughout the amendments (not as literal as Black)
    ii. <u>Precedent</u>: "We have had many controversies over these **penumbral** rights of 'privacy and repose.' *Skinner* and other cases bear witness that the right of privacy which presses for recognition here is a legitimate one"
    iii. "Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a governmental purpose to control or prevent activities subject to state regulation many not be achieved by means which sweep unnecessarily broad and thereby invade the area of protected freedoms"

iv. Common Law: "We deal with a right of privacy older than the Bill of Rights" – implying that the right to privacy was there when the Founders were writing the Constitution (i.e. it was in the state of nature)
v. This is a limited/narrow holding
    1. The Court does not recognize an absolute right to privacy, rather a right to privacy for married people (limited)

d. Justice Goldberg (concurrence): does not use *Lochner* either
    i. "My conclusion that the concept of liberty embraces the right of martial privacy is supported both by numerous decisions of this Court (i.e. precedent), and by the language and history of the Ninth Amendment which reveal that the Framers believed that there are additional fundamental rights, protected from governmental infringement" (textual & framers' intent)
        1. "The Ninth Amendment simply lends strong support to the view that the 'liberty' protected by the Fifth and Fourteenth Amendments from infringement by the federal government or the states is not restricted to rights specifically mentioned in the first eight amendments"
            a. Note: the Court generally tries to stay away from the 9th Amendment to give judicial rights – it is too open ended
    ii. "In determining which rights are fundamental … judges must look to the traditions and collective conscience of our people to determine whether a principle is so rooted there as to be ranked as fundamental"
    iii. Finds that the State's compelling interest in discouraging extra-marital relationships is already being promoted by the State's adultery statute, so Court is questioning the means here
        1. The statute at hand is overbroad, and the State has alternative means, therefore the means-end relationship is not narrowly tailored

e. Justice Harlan (concurrence): **rejects literalism** as the appropriate approach to constitutional interpretation – the text is only an outline – this is a Constitution was are expounding (*McCulloch*) – the Constitution is a charter not a legal code [this is in response to Justice Black's literalism]
    i. "Tradition is a living thing" → we do not just look at the tradition we continue, but we also look at the tradition we departed from
    ii. Harlan is not afraid of *Lochner*; he thinks the proper constitutional inquiry takes you back to the term "liberty"
        1. "**The Due Process Clause of the Fourteenth Amendment stands, in my opinion, on its own bottom**" … it has substance in and of itself, and it protects more than process and can accommodate a right to privacy [Due Process Clause was used by *Lochner*]
            a. He is telling the others in the majority/concurrence that they do not need to resort to the 9th Amendment or the creative approach of Justice Douglas
            b. "Judicial self-restraint will not be brought about in the 'due process' area by the historically unfounded incorporation formula long advanced by my Brother Black. It will be achieved in this area only by continual insistence upon respect for the teachings of history, solid recognition of the basic values that underlie our society, and wise appreciation of the great roles that the doctrines of federalism and separation of powers have played in establishing and preserving American freedoms" → all of this will ensure you will not succumb to subjective values; do not be afraid of subjectivism – it has constraints in history and values [Justice Black's concern]
    iii. Recognizes that this right to privacy is not absolute

1. Safety valve: In dicta he suggests though what the state can regulate: adultery, homosexuality, fornication and incest
    a. But state cannot regulate married people and conception

f. Justice White (concurrence): **minimalist** – he stays away from using rhetoric about fundamental rights – judicial restraint, yet he gets the same result as Justice Douglas [but, since this holding is so narrow, no rhetoric to use to extend this case in the future]
    i. Standard of review: rational basis review (and will kill the statute)
        1. End is legitimate/permissible, but the means are not fairly related to the end
            a. State is not enforcing this statute and the State has criminal statutes (i.e. alternative means) to accomplish the same deterrent purpose – this statute is not helping to deter because it is not enforce, therefore it is not rational

g. Justice Black (dissent): says the majority is Lochnerizing (i.e. creating substantive due process rights), even though they says they are not
    i. "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision"
        1. The right to privacy is not explicit in the text, so Black will not hold it is a substantive right in the substantive due process clause
        2. He makes a distinction between law and morality/policy: he likes privacy as a matter of policy, but as a matter of constitutional law, there is no right to privacy
        3. Institutional Competence: He will not substitute his judgment for the legislature's even though he may not like their decision – will not project his values into the Constitution
    ii. Criticizes the majority for claiming they are not deciding on based on their personal and private notions … "One may ask how they can avoid considering them. Our Court certainly has no machinery with which to take a Gallup Poll. And the scientific miracles of this age have not yet produced a gadget which the Court can use to determine what traditions are rooted in the 'collective conscious of our people'"
        1. Black is rejecting the theory of consensus and tradition
        2. "I realize that many good and able men have written about the duty of this Court to keep the Constitution in turn with the times … For myself, I must with all deference reject that philosophy"
    iii. Note: Justice Black did the same thing in the Steel Seizure case: he has a fundamental text, reads it and applies the right if it is explicit … does not do more because that is not his job]

h. **Summary**: Court revives the idea of substantive due process (which was abandoned in the 1930's) by recognizing the right to privacy, but the Court is fractured because the Justices in the plurality find different methodologies to get to the same conclusion

Abortion

I. How do you reason a right to abortion, since the right is not explicit in the text?
    a. Equal Protection Clause: discrimination against women
    b. Due Process Clause: it is a fundamental right
    c. Citizenship
    d. Right to Autonomy

II. ***Roe v. Wade*** (Blackmun) (1973) (7-2)
    a. Facts: Texas' criminal statute prohibits abortions, with one exception: medical necessity to save the mother's life (exception for life, not health) – statute is overbroad (no exceptions for rape, incest, social conditions, e.g.; these are indication solutions); Roe is asking for an absolute right to abortion: for any reason at any time, that she alone chooses (strongest argument in favor of personal autonomy)

b. Normative conflict: Texas' anti-abortion statute vs. Constitution (14th or 9th Amendment)
c. Standard of review: strict scrutiny (for fundamental rights, we know from *Griswold*)
d. Result: Texas statute is invalidated, but also, the right to abortion is federalized
    i. Why? (1) efficiency: Court does not want to hear 50 of the same case; (2) policy: this issue affects everyone, not just this plaintiff; and (3) equal protection: this is a fundamental right in all Americans
e. Justice Blackmun: I know everyone is agitated by this case, but "our task, of course, is to resolve the issue by constitutional measurement free of emotion and of predilection" → I'm only doing constitutional law here, not legislating (think: Marshall in *McCulloch*)
    i. Arguments:
        1. History: exhaustively reviewed the history of abortion from ancient attitudes through English law (finds the right at common law before "quickening") through American history and to the present
            a. There were not prohibitions on abortion at the time of the Constitution; founding fathers knew about this and they were not concerned – it was not an issue (similar to originalism, even though originalism not born until 1980's to facilitate overruling *Roe*)
            b. Common law is important because the Constitution mitigated the common law; if you do not see it in the Constitution explicitly, then the common law stays, and abortion was permitted in the common law
        2. Medical science: he described the development of medical technology to provide safe abortions – he places some emphasis on empirical evidence from the medical field, telling us law should be informed by real science (Cf. *Brown*: just using social science) – medical science is objective, not personal
            a. Blackmun uses science as his guiding principle and he is sure that if he does science, everyone will agree (but he turns out to be wrong)
        3. Text/Precedent: after reviewing earlier cases dealing with family and reproductive autonomy (i.e. precedent), Blackmun concludes: "The **right to privacy**, whether it be founded in the Fourteenth Amendment's concept of personal liberty as we feel it is, or in the Ninth Amendment, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"
            a. Blackmun mitigates the lack of an explicit right in the Constitution by using precedent to recognize the right – we know from case law that there are fundamental rights (marriage: *Loving*; procreation: *Skinner*, contraceptives: *Griswold*, *Eisenstadt*)
            b. Blackmun also talks about certain health concerns and social conditions (i.e. stress, tax on mental and physical health, stigma of unwed motherhood, e.g.) which point to the right of the woman being in charge of the decision, rather than the legislature → focus on the woman and her personal autonomy
                i. He is bringing political science/sociology/psychology arguments into the law
            c. Note: law does not recognize fetuses as "persons" (as Government argues) because everywhere else "person" is used would only make sense if used post-natally (textual)
                i. Other areas of the law have been reluctant to recognize a fetus as a person (comparative law)
                ii. If fetus deemed a person, then would have the right to life.
    ii. "The Court's decisions recognizing a right to privacy also acknowledges that some state regulation in areas protected by that right is appropriate … Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be

justified only by a compelling state interest and that legislative enactment must be narrowly drawn to express only the legitimate state interests at stake"

1. "Compelling" point: end of the first trimester
2. Viability: beginning of the third trimester
3. Trimester solution (**Court slides from strict scrutiny to balancing**)
    a. First trimester: absolute right to abortion – State police powers are their lowest ebb (cannot regulate abortion)
    b. Second trimester: State can regulate abortion only for the purpose of protecting maternal health (uses language of rational basis review)
    c. Third trimester: In the interest in the potentiality of human life, the State may regulate, and even prohibit, abortion except where it is necessary for the preservation of the life or health of the mother
4. Balancing: because the State's interests in protecting the health of the woman and an interest in protecting the potential life – and each becomes more compelling as the pregnancy progresses (enter: trimester solution)

f. Justice White (dissent): finds nothing in the Constitution to support the majority's opinion who he thinks exercised raw judicial power
g. Justice Rehnquist (dissent): wants rational basis review from *Lee Optical* – manufacture a reason and I will sustain the statute – since he see this as social/economic legislation; thinks the majority is Lochnerizing
    i. Does not think there is a right to abortion from the right to privacy
h. Alternatives?
    i. Limited the right to abortion only in the first trimester, after that let the States regulate
        1. Is the trimester solution too much judicial activism? Think about federalism: the Court made a decision, dictating the way to behave to all 50 States (Court made that decision, not Congress ..)
    ii. Focus on viability: pre-viability, let the woman decide; post-viability: let the State decide
    iii. Minimalist (narrow holding): just say TX statute was overly broad
    iv. Tell the States the woman has a right to abortion, but let the States decide/experiment how to best implement that right
i. Controversy after *Roe*:
    i. Right to abortion; claim of women to equal share in American society; role of the Court to make a decision for us; revival of religious interest in the U.S., which was slightly down in the 50's & 60's; and there was an effort to overrule *Roe* via judicial decision – from the moment Reagan was in office, abortion changed the judicial nominees' behavior and Senate confirmation

III. ***Planned Parenthood of Southeastern Pennsylvania v. Casey*** (O'Connor, Kennedy, Souter) (1992)

a. Normative conflict: Penn. Abortion Control Act (5 provisions) vs. 14th Amendment's Due Process Clause
b. Test: undue burden (not strict scrutiny from *Roe*)
    i. A more relaxed test – the burden cannot be undue; so since we do not have to do narrow tailoring, if there are alternative means, that's OK
c. Plurality: "After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of stare decisis, we are led to conclude the essential holding of *Roe* should be retained and once again reaffirmed"
    i. "Constitutional protection of the woman's decision to terminate her pregnancy derives from the Due Process Clause of the Fourteenth Amendment. **Although a literal reading of the Clause might suggest that it governs only the procedures by which a State may deprive persons of liberty, for at least 105 years, the Clause has been understood to contain a substantive component as well**"
        1. <u>Recognizing substantive due process rights and rejecting literalism</u>
        2. Plurality is switching justifications for the right to abortion
            a. Blackmun found the right to exist under the right to privacy (*Roe*)

b. Plurality shifts from the right to privacy – to – **the right to autonomy** (right of the woman to control her destiny/agency; bodily integrity) in the substantive due process clause
    i. "[The mother's] suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role … The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society"
        1. Women should not sacrifice their own conception of themselves for the State's abstract conception of motherhood
            a. There is also an issue of equality (equal protection) here: cannot ask the woman to sacrifice, just like you do not ask the man to sacrifice

ii. Reliance: "The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed"

iii. Overruling *Roe's* central holding would reach an unjustifiable result under principles of stare decisis, and would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law
    1. Frequent overruling would overtax the country's belief in the Court's good faith
    2. Court discussed the importance of stare decisis and explained that the Court is warranted in overruling precedents if the earlier decision had proved unworkable, if there was an evolution of legal principles that undermined the doctrinal foundation of the precedent, or if there was a change in the factual predicate for the decisions
        a. The joint opinion concluded, "that the basic decision in *Roe* was based on a constitutional analysis which we cannot now repudiate"

iv. "We reject the trimester framework, which we do not consider to be the essential holding of *Roe* … in its formulation it misconceives the nature of the pregnant woman's interest, and in practice it undervalues the State's interest in potential life" [plurality is balancing; they distinguish between the central holding: right to abortion, and the peripheral holding: trimester solution)
    1. TEST: "the **undue burden** standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty" [Ask: Is there a substantial obstacle/undue burden on the woman's right?]
        a. "A finding of undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a ***substantial obstacle*** in the path of a woman seeking an abortion of a nonviable fetus"
            i. Uphold viability as the dividing line – before viability: right to abortion, but the State is entitled to impose burdens, provided they are not undue (no substantial obstacle); after viability: State can prohibit the right to abortion, exception if the life or health of the mother is at stake

d. Justice Stevens (part concurrence/dissent): "*Roe* is an integral part of a correct understanding of both the concept of liberty and the basic equality of men and women"
    i. He agrees with the plurality that the concept of liberty encompasses the woman's right to make a decision, but also adds that if men and women are to be equal, cannot ask women to make sacrifices that men cannot make

e. Justice Scalia (part concurrence/dissent): rejects the right to abortion as a constitutionally protected liberty because: (1) the Constitution says absolutely nothing about it, and (2) the longstanding traditions of American society have permitted it to be legally proscribed
    i. Scalia does not close the door on substantive due process rights: might recognize a fundamental right if you make an argument that the text or tradition of American people support the right you are arguing for – otherwise go to the political process
        1. Scalia is limiting fundamental rights (i.e. implicit rights) as much as he can though
    ii. Scalia, again, wants to apply the rational basis test to this statute

IV. ***Gonzales v. Carhart*** (Kennedy) (2007)
a. Background: Gonzales is the AG of the Bush Administration; he is representing the Government and defending a federal law; (remember: President nominates AG and President takes care that the laws are faithfully executed; President decides what laws he wants to support and defend)
    i. Since *Casey*: Roberts replaced Rehnquist and Alito replaced O'Connor = a 5 member majority that could overrule *Roe*
        1. Note: Kennedy was in the majority of *Casey* & is writing this opinion
b. Normative conflict: Partial-Birth Abortion Ban Act of 2003 vs. 5th Amendment's Due Process Clause
    i. Federal Government bound by equal protection of the laws (*Bolling v. Sharpe*), so we argue on the basis precedent that the 5th Amendment's Due Process Clause incorporates an equal protection component
    ii. Challenge: a facial challenge (vs. as-applied) that the federal statute is unconstitutional because it does not have an exception to preserve maternal health (arguing from precedent)
        1. *Roe*: Texas statute that did not protect the health of the woman was invalidated
        2. *Casey*: must take the health of the woman into account
    iii. Note: this is a federal statute, but none of the justices answers the question: where is the (enumerated) power for Congress to pass this statute? Is this even within congressional powers?
        1. Justice Thomas says he's leaving it for another time …
c. Standard of review: balancing/undue burden
    i. Kennedy strategically sprinkles the opinion with rational basis language (permissible, legitimate, e.g.), but he does not explicitly say the standard of review from now on will be rational basis
        1. "*Casey* struck a balance … [it] was central to its holding. We now apply its standard" (**thinks *Casey* is about balancing, more so than undue burden**)
            a. Kennedy loves balancing (i.e. as a judge, balancing the conflicting interests in American society)
                i. Scalia hates balancing (formalism: if something is explicit, cannot balance it away) but signs to this opinion because he is doing politics – wants a majority, not just a plurality, and wants to eventually overrule *Roe*
    ii. Interests: Reasons Congress decided to prohibit intact D & E? (even if no strict scrutiny, still need to satisfy rational basis review, i.e. legitimate ends)
        1. Protecting physicians and their reputations
        2. Protecting the fetus (even though the statute does not prohibit abortion?)
        3. Preventing the woman from regretting the decision
            a. Counter: this is an overbroad generalization (*Craig v. Boren, VMI*)
            b. Counter: paternalistic – not allowing the woman to choose (autonomy from *Casey*)
            c. Counter: argue liberty is a rejection of paternity
            d. Counter: woman might suffer more if she is forced to have the baby

4. Justice Ginsburg (dissent): "The notion that the [Act] furthers any legitimate governmental interest is, quite simply, irrational"

d. Result: federal statute is sustained – it is facially valid
    i. If you want to challenge the lack of an exception for the health of the woman, need to do so through an as-applied challenge
e. Justice Kennedy's response to challenge:
    i. There are two bodies of empirical evidence (one from the medical profession re: this procedure is something necessary for the health of the woman; another from Congress re: this procedure is not necessary, there are alternative procedures), and this indicates uncertainty – as a judge, I cannot tell which one is right, and since I am confused, I defer to Congress [balancing + deference = reminds us of rational basis review]
        1. Because of the uncertainty they do not want to overrule the statute on its face (because this is a facial challenge)
        2. Also makes a *de minimus* argument: these "certain cases" when the procedure might be necessary are so limited
        3. Note: the 8th, 9th, and 11th Cirs. all invalidated the statute – looking at all the evidence, came to the conclusion that the medical profession evidence was better
f. Justice Ginsburg (dissent): we were right in *Roe* that there was a right, but it is not rooted in the right to privacy, rather, it is rooted in the woman's autonomy to determine her life's course, and thus to enjoy equal citizenship
    i. She makes a textual argument from the 14th Amendment, §1, 1st clause: every U.S. citizen is entitled to equal citizenship (men & women)
        1. Privacy is not in the text, but equality is
        2. Equal citizenship means: let the woman make her own decisions, or else she will not be able to grow as a full citizen (i.e. cannot advocate in the political process like Scalia wants her to do if she is not a full citizen)
        3. Have to let women control their own destiny
    ii. Ginsburg agrees with the medical profession's evidence that in some cases this procedure is best for the health of the woman, not the alternative procedures Congress finds
        1. "The Court upholds an Act that surely would not survive under the close scrutiny that previously attended state-decreed limitations on a woman's reproductive choices"
            a. Precedent: "*Casey* stated with unmistakable clarity that state regulation of access to abortion procedures, even after viability, must protect the health of the woman"
                i. "Ultimately, the Court admits that 'moral concerns' are at work … by allowing such concerns to carry the day and case, overriding fundamental rights, the Court dishonors our precedent (i.e. *Casey*)"

Sexual Orientation

I. ***Bowers v. Hardwick*** (White) (1986) (5-4)
    a. Background: gay rights movement began in the 1970s, on the heels of the women's rights movement, which was on the heels of the civil rights movement; facts: Ds caught in their own bedroom (think *Griswold*); charged with a Georgia state law that outlawed sodomy; Ds argue there is a substantive due process right to engage in sexual activity in your own bedroom – regardless of whether you are homosexual or heterosexual
    b. Normative Conflict: Georgia statute vs. 14th Amendment's Due Process Clause
    c. Result: statute upheld
    d. Constitutional Question Justice White is asking: "The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence

invalidates the laws of many States that still make such conduct illegal and have done so for a very long time"

i. White is choosing a low level of abstraction: Constitution does not confer a right to sodomy
ii. Argument 1: if we answer the question in the affirmative, then that will result in invalidation of the laws of many States; Court does not want to engage in extensive invalidation
iii. Argument 2: precedent, "none of the rights announced in such cases as *Pierce*, *Griswold*, and *Roe*, bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy"
    1. This "right" claimed is not about family, procreation, or marriage – just about homosexual sex
        a. White rejects the argument by analogy because he does not see a resemblance between the cases – because he chooses a low level of abstraction
iv. Argument 3: history/tradition, "Proscriptions against this conduct have ancient roots. To claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit on the concept or ordered liberty' is facetious"
    1. We've always proscribed, so we're going to continue to proscribe it
v. Argument 4: judicial restraint/institutional competence, "Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. **The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution**"
    1. White is saying it is not the Court's job to give new rights; and Court cannot discover new rights because they are not competent to do so
        a. Court comes nearest to illegitimacy because of the separation of powers – does not want to enter the domain of the legislature
            i. Note: in *Marbury v. Madison*, Marshall made a judicial competence argument that the Court was capable of review constitutionality because that is their job ("it is emphatically the duty and province of the judicial department to say what the law is")

e. Chief Justice Burger (concurrence): focuses on morality (history/tradition of moral thought and teaching), "To hold the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching"
    i. Burger mentions Blackstone because Blackstone represents the common law and he argues that the framers intended to keep the common law, subject only to changes they introduced into the Constitution; by quoting Blackstone, Burger is saying this decision is in line with the common law
    ii. Sodomy has a history of condemnation in Western civilization and Judeo-Christian ethical and moral standards
f. Note: White makes legal, secular arguments; Burger makes morality arguments
g. Dissent (not in text): high level of abstraction – the question is whether the Constitution allows the right to be left alone, not to have interference by the State with a certain private space of the individual
    i. Constitution confers upon people the right to be left alone, and under this umbrella we can also put homosexuals

II. ***Lawrence v. Texas*** (Kennedy) (2003) (6-3): right to liberty/autonomy/dignity
a. Normative Conflict: Texas statute criminalizing homosexual sex vs. 14th Amendment's Due Process Clause
b. Test: standard of review is not explicitly stated, but Kennedy is sprinkling the opinion with language of rational basis review

i. Remember: Kennedy used rational basis review to kill the statute in *Romer*

c. Result: statute invalidated
   i. Narrow opinion: adults, consensual relationships, privacy of the home (no adults + children, no coercive relationships, no public places)

d. Constitutional Q posed by Kennedy: "whether the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment" [Q of fundamental liberty: high level of abstraction]
   i. *Bowers*: right to sodomy? Framers did not think about that
   ii. *Lawrence*: right to liberty and self autonomy? Framers likely thought about that
      1. Liberty is explicitly mentioned in the 14th Amendment

e. Justice Kennedy: "Liberty protects the person from unwarranted government intrusions into a dwelling or other private places … In our tradition the State is not omnipresent in the home … **Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct**"
   i. Argument 1: stare decisis/precedent overruled, "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled" [i.e. White failed to appreciate the extent of the liberty at stake]
      1. Kennedy says that stare decisis is important, but it is not an inexorable command
         a. Lack of Reliance: distinguishes *Lawrence* from *Casey* because people relied on *Roe* to give them the right to abortion, but no on relied on *Bowers* – people just continued to do what they wanted to do
         b. *Casey*: *Plessy* was right when it was decided, but things change over time and therefore the Court must be ready and willing to change constitutional analysis as a result
            i. Note: *Marbury*, "should be adjusted for the crises of human affairs"
         c. *Lawrence*: Constitution confers this right and has always conferred this right; *Bowers* was wrong when it was decided
   ii. Argument 2: philosophical argument re: personhood, dignity, "The liberty protected by the Constitution allows homosexual persons the right to choose to enter upon relationships in the confines of their homes and their own private lives and still retain their **dignity** as free persons"
      1. Everyone has the right to dignity as free persons
      2. Dignity is not in the Constitution, but it is a fundamental right that is implicit in the "liberty" (which is in the 5th & 14th Amendments and the Preamble)
      3. This is an extension of the idea of autonomy and "personhood" we saw in *Casey*
   iii. Argument 3: history, tied to tradition, "At the outset it should be noted that there is no longstanding history in this country of laws directed at homosexual conduct as a distinct matter" (i.e. White was wrong when he said history was determinative) [**history is indeterminate**]
      1. Cultural identity: homosexual was not a distinct category until the 19th century
         a. Identity and cultural history is fluid
      2. "Early American sodomy laws were not directed at homosexuals as such, but instead sought to prohibit non-procreative sexual activity"
         a. In those days, it was the business of the State to be involved in matters of morality; now it is not the business of the State to limit sexual behavior to procreation only – not within the police powers
      3. History of enforcement: the laws were enforced against predators – not consenting adults in private

4. "Infrequency of prosecution makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private by adults"

iv. Argument 4: he looks to what the States are doing to judge the position of the American people; only 9 out of 50 states have criminalized this (different than doing a Gallup Poll, because he is looking at what the State legislatures have actually done)

v. Argument 5: the power (or lack of) of the State to criminalize what it thinks is immoral
   1. "The issue is whether the majority may use the power of the State to enforce these views (i.e. ethical and moral) on the whole society through operation of the criminal law"
      a. Argument of constitutional design: the States do not have the power, nor does the federal government, to regulate morality through criminal sanctions
         i. There are limits on democracy and majoritariaism in constitutional design (ex: *Marbury*: majority can pass statutes, but SCOTUS can kill it (anti-majoritarian); 2 senators per state – big and small; Presentment: majority can want something, but the president (one person) can say no & veto)
         ii. Limit added here: we do not want the tyranny of the majority to tyrannize the minority (there is a limit in constitutional design to protect the minority)
   2. Laws/Tradition: "We think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex"
      a. "**History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry**"
      b. Homosexuals are emerging as human beings and deserving of rights (emerging recognition/awareness: minority we used to suppress, now are willing to recognize them as human beings and give them rights)
         i. Tradition is a living thing (think Harlan, *Griswold*)
         ii. Counter: how do you prove emerging awareness – no Gallup Polls?
         iii. Answer: could have found re: MPC does not criminalize private consensual sex, other countries recognize homosexual rights (i.e. comparative laws)

vi. Argument 6: Kennedy looks to Europe to see what they are doing
   1. Looking to foreign law caused an uproar
   2. Kennedy is not saying it is binding, just persuasive

vii. Note: "The *Casey* decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education"

viii. Argument 6: safety value, "The present case does not involve …"

ix. Summary**:** "The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. **The right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government**"
   1. Framers' Intent: "As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom"
      a. When Framers used the terms due process and liberty, they did not mean to be specific, "They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress"

b. Constitution holds concepts, not conceptions; it is the duty of the Court to inject conceptions into the concepts – Framers left it open enough for us to inject meaning into it

f. Justice O'Connor (concurrence): applies equal protection (where Kennedy does substantive due process)
    i. "Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause" (i.e. morality is not a legitimate state interest)

g. Justice Scalia (dissent): says Kennedy gave a speech in *Casey* about the greatness of stare decisis and being bound by precedent, so what is he doing here overruling precedent that is not that old?
    i. Court is (should be) bound by *Bowers*, so let Texas do what they want to do

I. Interpreting the Constitution

A. Basic techniques
   1. Text !
      a. Formalism - look at the explicit black letter text
         i. Law is independent of politics
         ii. Don't look at context
      b. Implicit or police powers
      c. Structure of text
         i. Where is the text placed? What's the context of the text? Limits or expands?
   2. Caselaw and precedent
      a. But we have new situations that arise
   3. Framer's intent [FI + text = originalism]
      a. Which framer?
         i. They're a diverse group
      b. Decision might just be a general concept to be fleshed out over time (concept vs. conception)
      c. Times have changed
      d. Look at what the Framers were trying to avoid over in UK
      e. What if we have an issue that they didn't think about?
         i. It's not in the Constitution, period.
         ii. We should add it to the Constitution
   4. First principles
      a. Arguments based on principles are stronger than empirical arguments
   5. Moral reasoning, principles, values, philosophy
      a. Natural Law- the way things ought to Be
      b. Can be either restricting or liberating
   5. Tradition and history
   6. Political Climate / Social Consensus
      a. Collective conscious of the American people
   7. Science/medicine/technology
      a. Empirical arguments are not as strong as those based on principle
   8. Sociology
      a. Empirical arguments are not as strong as those based on principle
      b. Social science data can change, leaving holding vulnerable
   9. Comparative law (i.e. what the States are doing, "everyone else," foreign law)
   8. Balancing tests
   8. Comparative analysis
   9. Majoritarianism
      a. Court should not overrule the majority's wishes
   10. Institutional competence
   11. Context
      a. This is a Constitution we are expounding
      b. Not a code, but a shifting document
      c. It must adapt itself to the various crises of human affairs

<u>Look for</u>

- Safety valves
- Pretext