# Constitutional Law

### Overview of Constitutional Law

1. The Constitution is vague and indeterminate. The theme of this course is “Who has the better argument?”
   1. Two reasons for necessity of Constitutional interpretation:
      1. Silence – the document does not address a specific question (functional argument)
      2. The Constitution’s broad language leaves it open to interpretation (doctrinal argument)
2. Major Constitutional functions:
   1. Establish a federal government
   2. Divide federal power (separation of powers)
   3. Allocate power between federal government and states (federalism)
   4. Limit federal government power (individual rights)
      1. Anti-federalists (Jeffersonians) emphasized small-scale, participatory democracy and occasional rebellion
      2. Federalists (Madisonians) limited power of factions through large, limited government
3. The Constitution took its form because of Articles of Confederation failures (sovereign states frequently overruled a weak central government) and implicit reaction against overreaching monarchial tyranny
4. Sources of constitutional interpretation include: 1) History/original intent, 2) Constitutional text, 3) Constitutional structure, 4) Constitutional values and 5) Judicial precedent

#### Judicial Review

1. Established in *Marbury v. Madison,* making SCOTUS a co-equal branch of government
   1. Justified because of the Constitution’s supremacy due to its “written-ness”
      1. This doesn’t cabin discretion, since Constitution may be interpreted in a number of ways
      2. Is the Constitution’s declaration that it represents the will of “We, the people” valid? (Women, African-Americans, non-propertied, etc.)
   2. Marshall also argues that the Court is the authoritative interpreter
      1. Judges have special capacities, ability to be neutral umpire, must take an oath
         1. Why does any of this matter? All federal officers take oaths, etc.
      2. Doesn’t a negative argument work better?
         1. Who else could possibly be the interpreter? Not legislature (who passed laws). Not executive (who passes/enforces laws)
   3. Also establishes political question doctrine, to avoid forcing Jefferson to act (robbing SCOTUS of power, since it would become clear the Court cannot enforce its decisions)
      1. Requires a textual commitment of the issue to another government branch
      2. No judicially manageable standards for resolving issue exists
      3. Not resolvable without initial policy determination or disrespect for another branch
   4. Frequently cited in modern cases to combat accusations of judicial activism – whenever cited, there is a good indication that the Court is “reaching”
2. Judicial review is counter-majoritarian because it permits unelected judges to strike down laws enacted by the people’s representatives
   1. Counter-argument is that legislatures are not quite democratic (subject to capture) and that the Constitution is ultimate embodiment of majority’s preferences
      1. Is Constitution representative of “We, the people”?
   2. Also problematic because a 200+ year old document may overrule will of a current majority
   3. Is the Constitution simply a set of pre-commitments, or a series of restrictions on future acts?
3. Judicial review also applies to state courts (*Martin v. Hunter’s Lessee*), legislatures and executives (*Cooper v. Aaron*)
   1. SCOTUS denies concurrent jurisdiction between federal and state in *Martin.* Uniformity, predictability and avoiding prejudice against out-of-state parties is more important than avoid risks of centralization
      1. Uniformity particularly important here, since a federal treaty is at issue
      2. The Constitution already limits state sovereignty in multiple ways – SCOTUS’ ultimate review is simply one additional limit
   2. Constitution vests ultimate judicial authority in federal (not state) judiciary
4. *Cooper v. Aaron* establishes judicial supremacy, striking down departmentalism as an interpretive theory
   1. Arkansas’ interpretation of *Brown* is not authoritative – SCOTUS’ is
      1. Does *Cooper* allow SCOTUS to change the Constitution (by making new supreme law of the land) without using the Constitution’s enumerated amendment process?

#### Separation of Powers

1. *McCulloch* holds that there are Constitutional implied powers given to the legislature – as long as the end is not unconstitutional, the means will not be second-guessed
   1. *McCulloch*’s key question is where power should reside – will of the majority (Constitution) or the physical location of the majority (the states)?
   2. An important result of *McCulloch* is expansion of N&P Clause – should be construed broadly
      1. Not freestanding – most have an underlying enumerated grant of power
      2. Exceptions if means themselves are unconstitutional, or if courts suspect ulterior motive
         1. Motive analysis mostly a dead doctrine (but might still be usable – *Hammer v. Dagenhart*)
   3. Refutes the logic of *Marbury* by arguing that the extent of Congressional power is constantly arising. Therefore, the written-ness of the Constitution is *not* actually a check on judicial power
      1. “It is a Constitution we are expounding.” Interpretation is different than a statute, which is designed to limit discretion or inhibit interpretive freedom
2. States cannot interfere with a legitimate exercise of Congressional power – there cannot be concurrent jurisdiction
   1. It is no defense that possession of power to impede Congressional action does not necessarily imply that the states will do so. The federal government does not need to rely on states’ restraint
   2. Marshall uses multiple types of arguments (original intent, values embedded in the Constitution, consequentialist fears, etc.) to justify a course of action he believes is best for the country

### Commerce Clause

#### Early History

1. *Gibbons* addresses three potential internal limits on CC power – definitions of “commerce,” “among the several states,” and “regulate”
   1. Defines commerce as “intercourse”, encompassing transportation so long as that transportation is interstate – still requires a national purpose
   2. Congress’s power is “to prescribe the rule by which commerce is to be governed.”
2. Pre-New Deal CC jurisprudence is fractured and inconsistent – uses multiple tests
   1. Tests include 1) Direct/indirect effects test; 2) Close & Substantial Relationship; 3) Stream of Commerce; 4) Commerce/manufacturing line, and 5) Congressional motive
   2. *Carter Coal* draws a bright line between commerce and manufacturing – before an article enters interstate commerce, it is not a proper subject of Congressional regulation
      1. Noteworthy, because the case relies almost exclusively on judicially-created tests, not textual analysis
      2. Followed in *E.C. Knight*, striking down regulation on sugar refinery with 98% market share, since refining occurs before interstate commerce
         1. Difficulties recognized in *Stafford v. Wallace,* where transactions “cannot be separated from movement to which they contribute”
      3. Congress includes findings linking regulation to interstate commerce in an effort to get around *Schechter Poultry*
         1. Congressional findings were discounted as mere opinions/assertions – Whether the end Congress seeks is permissible is wholly a matter of constitutional power, not legislative discretion
            1. Isn’t this an alternate focus from *McCulloch* and *Gibbons*?
      4. Next, Congress tries to get around distinction by regulating transportation of goods manufactured by child labor (*Hammer v. Daggenhart*)
         1. Rejected by SCOTUS as an attempt to regulate underlying activity, which they are not permitted to do under CC
   3. *Schechter Poultry* denies that national emergency can change Congress’ authority – the Constitution makes certain pre-commitments about our economy and form of government
      1. Very different interpretive method from, for example, Germany
      2. Denied in Cardozo’s *Carter Coal* dissent – Cardozo takes for granted that the emergency permits Congressional action, and proceeds directly to *McCulloch*’s means test
   4. *Houston, East & West Texas Railway* holds differing interstate shipping rates have “close and substantial relationship” to interstate commerce

#### Post-New Deal Jurisprudence

1. There are now three categories under which commerce regulation might be appropriate: 1) Channels of IC; 2) Instrumentalities of IC; and 3) Substantially Effects IC
2. *NLRB v. Jones* marks the turning point in CC jurisprudence – the direct/indirect effects test now takes size and scale into account
   1. First CC case that is explicitly realist
      1. Legal realism – the law reflects political choices that demonstrate a preference for one set of parties over another
   2. Whether a particular activity bears a close and substantial relationship to interstate commerce is a fact-sensitive inquiry – if so, Congress may act to regulate the activity
      1. Uses this move to reject manufacturing/commerce bright-line rule
      2. As in *Carter Coal*, Congress uses a preamble to justify Congressional action
3. *Darby* overrules *Hammer v. Daggenhart* by refusing to perform a motive analysis on substantially similar facts (object of Congressional regulation was to regulate wage requirements, not impact commerce)
   1. Also holds that the 10th Amendment is nothing more than a truism
      1. Explicitly states that the only meaningful restriction on Congressional power under CC is some other constitutional prohibition – only limit is external
4. *Wickard v. Filburn* is the new high-water mark – if an activity “exerts a substantial economic effect on interstate commerce” (irrespective of ‘direct’ or ‘indirect’), Congress may regulate.
   1. Upheld in *Katzenbach v. McClung* (Ollie’s BBQ) under more questionable facts
      1. SCOTUS is very deferential to Congressional findings (as in *NLRB v. Jones*, contra *Carter Coal*)
      2. However, Court reserves right to examine Congress’ factual findings in deciding if a sufficient nexus between commerce and regulated action exists
   2. Introduces the aggregation principle, which dramatically expands the (most subjective) “substantially effects” test – SCOTUS essentially withdraws from CC inquiries

#### Modern Jurisprudence

1. CC is used as justification for Civil Rights Act
   1. Necessary because Civil Rights cases of 1883 had already decided that Congress couldn’t regulate individual behavior under the 14th Amendment
   2. SCOTUS again ignores motive analysis, since motive is clearly to end discrimination, not impact commerce
   3. *Heart of Atlanta* reaffirms that the means Congress chooses to employ will not be questioned
      1. Introduces the “rational basis” test for Congressional action (extremely deferential)
2. *Lopez* finally introduces a check on Congress’ expansive CC power by adding an economic/non-economic activity bright line rule
   1. Kennedy concurs – because accountability cannot come from any of the other branches, it must come from the judiciary
      1. This law upsets the established balance between federal and state power
   2. Thomas’ originalist argument denies the legitimacy of the “substantially affects” test
   3. Souter’s dissent argues that SCOTUS has usurped the legislature’s role, making decisions without political accountability – rational basis is an extraordinarily deferential standard
   4. Stevens dissent – instrumentalities (not substantially affects) is the appropriate test
   5. Breyer’s dissent notes that the extremely deferential “rational basis” test is more than met, and the Court cannot simply decide Congress was wrong
   6. Passed by a future congress with a simple jurisdictional hook – if gun traveled in interstate commerce, criminal violation
3. SCOTUS makes good on its *Ollie’s BBQ* threat in *Morrison* – Congress’ assertion that violence against women impacts interstate commerce does not make it so
   1. Echoes *Carter Coal*’s assertion that Congressional findings do not substitute Court’s role in determining legislation’s constitutionality
      1. Probably motivated by a slippery slope concern – where can regulation end?
         1. Attempts to introduce a conception of proximate cause to Congress’ “rational basis” inquiry
   2. What is the significance of Congressional factual findings in future analyses? Is Congress required to defend its judgment with explicit findings?
   3. Dissent accuses majority of resurrecting pre-New Deal jurisprudence to save a federalist ideal
4. The Court backtracks in *Raich* – “Congress can regulate purely intrastate [non-commercial] activity . . . if it concludes that failure to regulate that class of activity would undercut the regulation of the interstate market in that commodity.”
   1. Case that looks extraordinarily similar to *Wickard*, and is upheld despite anti-broad CC jurisprudence that had prevailed in *Lopez* and *Morrison*
      1. *Lopez* and *Morrison* challenged entire statutory scheme as invalid, where *Raich* simply challenged application of concededly valid law
         1. Can pre-existence of federal regulatory scheme in conventional area save law on CC grounds? See *McCulloch*
5. *NFIB v. Sebelius* creates an additional, formalistic bright-line rule; economic activity is capable of regulation under the CC, but inactivity is not
   1. CC majority also imposes a temporal limitation – commerce must be currently occurring – not anticipated in the future – in order to be amenable to regulation
      1. Dissent argues that this anticipated future action drove SCOTUS’ analysis in *Wickard* and *Raich*
         1. Since individual mandate is an essential part of larger economic regulatory scheme, should be upheld under *Raich*
      2. Also argues that because Congress’ factual findings show 90% of people will need health care in the next five years, the majority’s temporal limit defeats Congress’ rationally based decision
      3. Scalia dissent characterizes Ginsburg’s dissent as allowing Congress to solve un-enumerated problems
   2. Because the individual mandate has no basis under CC, it cannot be valid under N&P

### Spending & Taxing Clause

1. *Bailey v. Drexel Furniture* established that motive analysis carried over to the taxing power as well – on almost identical facts to *Hammer v. Daggenhart*, Court struck down legislation on underage labor
   1. Introduces the penalty/tax distinction
2. *Butler* is notable for its use of judicial formalism – “lay the statute and the Constitution side by side”
   1. Permits a broad reading of “general welfare” within the spending clause, but invokes 10th Amendment/federalism to invalidate statute as invasive of states’ rights
      1. Rejects narrow interpretation that Congress may only spend in order to effectuate other enumerated powers (a la N&P Clause)
   2. If Congress does not have power to command compliance directly, it cannot use a tax to coercively purchase compliance indirectly
      1. Dissent argues that threat of loss – not hope of gain – is the essence of coercion
      2. There is a tension between a tax designed to raise revenue and a tax that accomplishes a policy preference. If there is a broad reading of “general welfare”, how can one not bleed into the other?
3. *Steward Machine v. Davis* alters course, acknowledging that to some degree, every tax is regulatory
   1. Distinguishes coercive conduct and conditional spending. The point at which pressure becomes compulsion is the fact-driven constitutional line
   2. *Dole* is not compulsive either, since only 5% of a state’s federally allotted transportation fund was at stake – this is simply “mild encouragement”
      1. Introduces framework for analyzing spending clause powers:
         1. Must be in pursuit of “general welfare”
         2. Must unambiguously condition the States’ receipt of federal funds
         3. Must be related to the federal interest in particular national projects or programs
         4. Must not run afoul of any other constitutional provisions
      2. Medicaid expansion in *Sebelius* did not meet these requirements since the terms of the program changed too drastically for states to have had unambiguous notice
         1. The percentage of state budget (100% of Medicaid funding, up to 10% of overall state budget) is too great of a loss not to be coercive
            1. Medicaid has expanded multiple times in the past; isn’t future expansion also predictable?
         2. Dissent argues that this ties future Congress’s hands based on the actions of previous ones
4. Roberts employs a functional (not formalist) analysis of taxing power in *Sebelius* to characterize individual mandate as a tax
   1. Creates three-part test from *Drexel Furniture* to draw distinction between tax and penalty: 1) Is the tax an exceedingly heavy burden? 2) Is there a scienter/knowledge provision? and 3) Who enforces/administers the tax?
   2. Taxing inactivity is not as problematic as regulating inactivity under CC for three reasons:
      1. There is no guarantee individuals can avoid taxation through inactivity
      2. Congress’ ability to use the taxing power is limited by SCOTUS
      3. Taxing power does not carry same weight as commerce clause power – once tax is paid, governmental power is at an end

### Modern 10th Amendment Jurisprudence

1. *Darby* held that the 10th Amendment was simply a truism; could the 10th Amendment actually be a distinct limitation on federal power?
2. *National League of Cities v. Usery* held that Congress could not legislate “in areas of traditional governmental functions”
   1. Attempts to clarify in *Hodel v. Virginia* fail (federal statutes must regulate “states as states” and address indisputable attributes of state sovereignty
   2. Overruled in *Garcia v. San Antonio MTA* since *National League of Cities* test was unworkable
      1. State sovereignty is better protected through procedural safeguards rather than judicially created limits on federal power
      2. Dissents argue that SCOTUS has abdicated its responsibility to protect States’ interests from interference from the federal government
3. Court seems to walk a *very* thin line in *Printz v. U.S.*, which prohibits federal commandeering of state executive officials without overruling *Garcia* or reinstating *National League of Cities*
   1. Dissent argues that Congress can impose affirmative obligations on officers of state and local governments, as well as ordinary citizens
      1. Unintended consequence of encouraging federal government to create vast bureaucracies to enforce its policies?

### Presidential Powers

1. Under *Meyers*, the absence of “herein granted” when describing executive power implies a general grant of Presidential power that is not limited to those enumerated
   1. The majority (Black) in *Youngstown* denies inherent Presidential powers, and says that a President may act only with statutory or constitutional authority
   2. Frankfurter argues that past practice can provide a “gloss” on executive power
   3. Jackson’s concurrence identifies three “zones” of Presidential powers:
      1. Presidential authority is at maximum when a President acts with express or implied authorization of Congress
      2. A zone of concurrent authority in the absence of congressional grant or denial of authority – twilight zone
      3. Presidential authority is based only in the Constitution – *minus* any Congressional powers – when President takes measures incompatible with express or implied will of Congress
         1. Jackson places *Youngstown* in this third zone, so the seizure is unconstitutional as contrary to Congressional will
         2. This series of zones acknowledges drawbacks of strictly textual interpretation, and implies that extra-constitutional limits are necessary
   4. Douglas thinks that the President may act without express authority as long as the powers of the other branches are not usurped
   5. Vinson dissents, arguing that the President’s authority extends until he violates a specific provision of the Constitution
      1. Concerned with an inability to react to an emergency situation, even though he is the Constitutional officer best equipped to do so
2. The executive does not enjoy absolute immunity from judicial processes without showing more than a broad concern for confidential communications or assertions of separation of powers (*U.S. v. Nixon*)
3. *Curtiss-Wright* grants broad authority to the Executive in foreign matters, since the federal government is necessarily vested with powers to conduct foreign affairs
   1. This seems an oversimplification – that the federal government has foreign affairs power is not questioned – the *executive’s* authority to exercise that power is
   2. Heavily influenced by the non-delegation doctrine, which is no longer a meaningful constraint
4. Although the AUMF authorizes U.S. citizens to be detained as enemy combatants, some process is due to citizens who wish to challenge their status as enemy combatants
   1. Rules of evidence significantly relaxed to avoid burdening executive– i.e., hearsay is permissible, burden-shifting to enemy combatant after government meets initial burden of production
      1. Where does SCOTUS identify *any* rational basis for the balance it strikes? Who decides exactly how much process is due?
   2. Souter’s dissent disagrees with majority’s apparent placement of executive action in Zone 1 – the Non-Detention Act places this case squarely in Zone 3
   3. Scalia emphasizes existing method for suspending habeas corpus; this is the constitutionally required action in these circumstances
   4. Thomas places the case in Zone 1, since SCOTUS has no authority to balance away the government’s war powers
   5. SCOTUS continues to emphasize role of judiciary in post-9/11 terrorism cases
      1. Rejects military commissions in *Hamdan* as not protective of due process
      2. Rejects statute stripping federal courts of jurisdiction in *Boumediene*

### The Reconstruction Amendments

1. No person of African ancestry is a “citizen of the United States” as that term was understood in the Constitution – originalist interpretation (*Dred Scott*)
   1. Also declares Missouri Compromise unconstitutional for depriving persons of property
   2. The citizenship clause of the 14th Amendment overturns *Dred Scott*
2. The 14th Amendment is capable of three interpretive models:
   1. The race model calls for the 14th Amendment to be interpreted in light of its historical purpose and focuses on equal protection. This model is now obsolete
      1. Cases that rely on this model are the *Civil Rights Cases*, *Plessy*
   2. The citizenship model focuses on the Privileges & Immunities clause, and dies in *Slaughterhouse*
   3. The labor model calls for substantive due process and is relied on in the *Civil Rights Cases* and *Slaughterhouse*
3. The *Slaughterhouse* court limits 14th Amendment’s P&I clause to apply on to privileges protected by the federal government, not the states
   1. Animated by concerns of subjecting duly enacted state legislation to Congressional censorship
      1. Isn’t that the *entire purpose* of the 14th Amendment?
   2. Field’s dissent points out that this interpretation ignores constitutional superiority – Constitutionally guaranteed rights are already be protected from state interference
4. *Strauder v. West Virginia* introduces the concept that facially discriminatory legislation will be carefully scrutinized, since it indicates an *intent* to discriminate (anti-classification view of EP)
   1. *Strauder* might, however, minimize impact of effects analysis (anti-subordination view of EP) by indicating propriety of, for example, educational qualifications
      1. These concerns were justified in *Virginia v. Rives* – absence of blacks from juries, no matter how systemic, was not necessarily violative of the 14th Amendment
5. The *Civil Rights Cases* adopted a formalist, textual argument that applied the 14th Amendment only to states, not individual actors
   1. SCOTUS (with a straight face) says that African-American must cease to be “special favorites” of the law – less than 20 years after the abolition of slavery!
      1. *Jones v. Mayer* (1968) permits Congress to remove “badges & incidents” of slavery
   2. Regardless, Congress still lacks authority to regulate private conduct under the 14th Amendment (State Action Doctrine), with two exceptions
      1. Public Function Exception – If a private entity performs a task traditionally, exclusively performed by the government, the Constitution applies
      2. Entanglement – If the government affirmatively authorizes, facilitates or encourages unconstitutional conduct, the Constitution applies. (Government licensing, regulation, subsidies, etc.)
6. *Plessy v. Ferguson* upheld a statute that applied equally to all races and required equal accommodation, because racial separation was *not* a badge of inferiority
   1. Notions of stigma, inherent racial hierarchy, lack of true equality and political representation defects undermine *Plessy* and create undertones of racial subordination
   2. Dissent notes that motives of legislators in passing this law are unquestioned – why doesn’t Court perform a more rigorous motive analysis?

### Modern Equal Protection Analysis

1. Remember that the government discriminates *constantly* – which discrimination is acceptable is the purpose of judicial EP scrutiny
   1. Courts usually choose whether to analyze fundamental rights under EPC or DPC
2. Equal protection analysis: 1) What is the classification? 2) Does the classification target a suspect class or abridge a fundamental right?
   1. Recognized equal protection classes include: 1) Race; 2) Gender (quasi-suspect); 3) Alienage; 4) Legitimacy (quasi-suspect)
3. In instances where there is no suspect class (or the regulation is an economic one) courts apply only rational basis scrutiny (*Railway Express v. New York*, *Williamson v. Lee Optical*)
   1. However, statute must still be rationally related to a *legitimate* or plausible purpose (*Cleburne*)
   2. A law need not be totally logically consistent with its aims to be constitutional (*Lee Optical*)
4. *Carolene Products*’ footnote 4 calls for a more stringent standard of review might statutes targeting religious or racial minorities, since “discrete and insular” minorities cannot rely on the political process for protection
   1. These minorities are traditionally characterized by their political powerlessness/exclusion, immutable characteristics and history of subjection to intentional discrimination
      1. “Discrete” – physically and social separate; easy to identify
      2. “Insular” – difficult to form coalitions
   2. How can it be determined when a “discrete and insular” minority has been discriminated against, and when they have simply lost a legislative battle?
5. *Korematsu* is the first use of *Carolene Products*’ stricter standard of review – *still* comes out the government’s way, since SCOTUS applies a test that looks more like rational basis
   1. Justifies a group-based punishment on the existence of disloyal individuals within the group, and impossibility of immediately segregating loyal from disloyal
      1. Doesn’t *Korematsu* use a post hoc rationalization of Japanese internment?
   2. Murphy’s dissent applies a reasonableness standard with more bite than *Railway Express*
   3. Jackson’s dissent argues that the military judgment of necessity should be left to the military, and not validated by a civil court, so that similar measures can “legally” be taken in the future
   4. Post-*Korematsu*, can SCOTUS claim to be the ultimate protector of minority rights?
6. Strict scrutiny finally applied in *Loving v. Virginia –* equal application of a law containing racial applications cannot save it from the EPC
   1. “Racial classifications must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination . . . .”
      1. Is *Loving* a fundamental rights case, or an anti-classification case? Both

#### Race & Affirmative Action

1. NAACP initially focused on graduate schools (particularly law schools) to fight segregation
   1. *Missouri ex rel. Gaines v. Canada* held that Missouri had to afford black students an opportunity to attend law school in-state, rather than paying out-of-state tuition at neighboring states’ schools
   2. *Sweatt v. Painter* overruled *Fisher v. Hurst* and ordered the admission of a black student to a previously all-white school, since the facilities were inherently unequal, largely on the basis of reputation and faculty qualifications
      1. *McLaurin v. Oklahoma* similarly found that even though facilities were equal, rules restricting physical placement of black students inhibited learning ability, and were therefore unconstitutional
2. Why is educational segregation unconstitutional? Original intent cannot solve the question. *Brown I* offers several explanations: Inherent importance of education; Stigma surrounding segregated schools (is this solvable by simply removing classification, or forcing integration (anti-subordination)); social science indicating harms of segregation?
   1. *Bolling v. Sharpe* also made segregation unconstitutional by reading EPC from the 14th to the 5th
3. What is SCOTUS doing in *Brown II* with “all deliberate speed”*?* Is it an anti-classification rule (probably), or an equal treatment rule requiring affirmative action? A pragmatic acknowledgement of implementation difficulties or implicit racial preferences?
   1. SCOTUS only intervenes in massive Southern resistance to *Brown* once, in *Cooper v. Aaron*
   2. Things finally begin moving after the Civil Rights Act of 1964 allows desegregation suits to be brought by the United States, and threatens federal funding cutoffs if segregation is not ended
   3. SCOTUS establishes an affirmative duty to eliminate racial discrimination “root and branch” in *Green v. County School Board* (1968)
      1. Green factors (student-faculty ratios, facilities, transportation, extracurricular offerings) determine whether segregation is ongoing or not
      2. Districts guilty of past de jure segregation are presumed to continue violating anti-segregation laws, even if de facto segregation is all that remains; gerrymandered boundaries and busing are acceptable (and maybe necessary) integration efforts (*Swann*)
         1. If no state action, anti-classification remedy only
      3. Once a district achieves unitary status, judicial intervention should cease
   4. *Keyes v. Denver* establishes an area-wide presumption requiring an area-wide remedy
4. SCOTUS retreats from expansive rulings in *Swann* and *Keyes v. Denver* in *Milliken I* – the fact that a single school district had engaged in purposeful racial segregation does not authorize courts to reach into adjacent districts to create a remedy
   1. Further backs away in *Milliken II* by holding that integration is not the *only* remedy, but state expenditures for remedial education may also be adequate
      1. *Milliken II* is curtailed in *Missouri v. Jenkins*, where court-mandated faculty salary increases to attract whites to inner-city schools exceeded court’s remedial authority
5. Even if a facially neutral law or policy has a disproportionately adverse impact on a racial minority, strict scrutiny only applies if the impact/effect is traceable to discriminatory intent (*Washington v. Davis*)
   1. Without intent, a facially neutral law is subject only to rational basis review
      1. Title VII of Civil Rights Act reaches discriminatory impact at 80%
   2. All federal, state or local programs that include racial classifications are subject to strict scrutiny (*Adarand*)
   3. SCOTUS endorses a view of discrimination that *requires* animus and ignores unconscious (possibly systemic) bias – good idea?
6. If a decision maker selected the course of action at least in part “because of,” not merely “in spite of” its adverse effects upon an identifiable group, discriminatory intent exists
   1. What should count as a discriminatory purpose? Foreseeability, selective indifference, or a preference for a rule that benefits the majority?
      1. Extreme statistical proof, procedure deviation, legislative or administrative history, and inconsistent decisions are all indicia of discriminatory purpose (*Arlington Heights*)
7. Five affirmative action policy questions:
   1. Should beneficial policies be reviewed using same standard as harmful policies?
      1. Should affirmative action policies be reviewed under strict scrutiny (colorblindness, stigma against beneficiaries), or intermediate scrutiny (majority deprives itself, necessary to remedy past discrimination and achieve diversity)?
   2. What, if anything, justifies affirmative action?
   3. How does doctrine on AA relate to rest of EPC doctrine?
   4. Is holistic race-conscious review superior to specific racial targets/quotas?
   5. Are race-neutral means that have racially disparate impact superior to race-conscious means?
8. *Univ. of California v. Bakke* approves race as one of many diversity factors in higher education admissions, but stipulates that quotas are unconstitutional
9. Under *Grutter*, student body diversity is a compelling state interest that can justify the use of race in university admissions
   1. However, O’Conner defers to Law School’s judgment that diversity is essential to its educational mission – isn’t this antithetical to strict scrutiny?
      1. Kennedy takes issue with the Court’s deference to educator’s judgment, who are sneaking policy decisions in to affirmative action
   2. O’Conner also maintains that affirmative action might not be necessary in 25 years. Doesn’t this speak *against* diversity as the underlying rationale for the opinion and to remediation?
      1. Dissent points out that racial balancing is a far more likely explanation for Law School’s demographic proportions that are highly similar to general population
   3. Thomas tries to argue that only “pressing public necessity” such as national security (*Korematsu*) should justify racially categorized policies, harmful or beneficial
      1. Emphasizes stigma associated with affirmative action admissions and generalization that African-Americans are in need to special treatment from the majority
   4. *Grutz* pares back *Grutter* by striking down a system that gave points for racial minority status
      1. Policy was not narrowly tailored enough to meet strict scrutiny
         1. Considerations for narrow tailoring include: 1) Individualized consideration; 2) Availability of race-neutral alternatives; 3) Minimizing undue harm to other races; and 4) Durationally limited
         2. Narrow tailoring, however, does not require the exhaustion of every conceivable race-neutral alternative
            1. *Fisher* overrules this, holding a reviewing court must be satisfied that no race-neutral alternatives would produce the necessary diversity
            2. Essentially a statement that the means chosen to promote diversity and the end of diversity itself “fit”
      2. Ginsburg argues that remediation is still necessary, and Michigan’s policy is the most transparent and honest method of correcting past racial wrongs
   5. *Grutter*’s diversity rationale was limited in *Community Schools*, which held that public school assignment policies are distinct from university admissions
10. *Schuette* refuses to strike down a state constitutional amendment prohibiting state educational institutions from considering race in admissions decisions
11. *PICS v. Seattle School District* identifies the *only* two compelling interests justifying racial classifications: 1) Remedying past discrimination associated with segregation, and 2) Diversity in institutions of higher learning (plurality)
    1. Kennedy would find a compelling interest in avoiding racial isolation and attainment of a racially diverse student body (even in a public school context)
       1. Race-neutral measures with race-conscious objectives are permitted, and race-conscious measures may be used if race-neutral measures fail
       2. Essentially believes that racial imbalance cannot be adequately addressed by judiciary
    2. Dissent tries to use dicta from *Swann* for the proposition that a district’s administrators can go so far as to reflect the general demographics in public schools
       1. Also identifies a compelling interest in producing an educational environment that prepares children for life in a pluralistic society
12. The results of a race-blind merit exam cannot be disregarded even when result is racially disproportionate (*Ricci v. Destefano*)
13. Disparate impact is a permissible claim under the Fair Housing Act, but the plaintiff must prove causality between impact and defendant’s policies, and any remedy ordered must be Constitutional (*Texas Department of Housing v. Inclusive Communities*)

#### Gender

1. Historic cases failed to recognize sex discrimination under P&I or EPC (*Bradwell v. Illinois* – denies women right to practice law; *Minor v. Happersett* –denies franchise; *Muller v. Oregon* – distinguishes *Lochner* because women need greater protection; *Hoyt v. Florida* – upholds exclusion of women from juries)
2. Although no level of review is given in *Reed v. Reed,* gender gets intermediate scrutiny due to *Frontiero v. Richardson*’s assertion that gender frequently (but not always) is *not* indicative of ability
   1. Clearly established in *Craig v. Boren* (discrimination against 18-21-year old men)
      1. Fit between objective (traffic safety) and gender-based discrimination is too tenuous
      2. Stevens concurrence – there is one EPC; there should be one standard of review
      3. Rehnquist dissent – Men are not entitled to a stricter standard of review under EPC
3. Overarching gender discrimination question is if the gender classification is based on actual biological differences (permissible) or social stereotypes and gender roles (impermissible)
   1. Unanswered question: what if a gender classification reflects *both*?
   2. Pregnancy excludable from list of compensable disabilities because not all women become pregnant (*Geduldig v. Aiello*)
4. Single-sex military academy constitute sex discrimination (*U.S. v. Virginia*)
   1. Virginia’s alternate solution – VWIL – is not comparable to VMI. This constitutes discrimination, in the line of *Sweatt v. Painter*
   2. Does Ginsburg’s “exceedingly persuasive justification” raise the standard for sex discrimination?
   3. A governmental purpose in discrimination must be real, not merely a post hoc justification (so VMI’s diversity rationale fails)
   4. Potential destruction of adversative model because of diminished physical requirements, privacy accommodations, etc. do not qualify as an exceedingly persuasive justification
      1. If a single woman qualifies but is denied admission on the basis of gender, a constitutional violation has occurred – the degree of accommodation is secondary
      2. *Why* is a male-centric educational model necessary?
5. Two identifiable governmental interests in *Nguyen v. INS*: 1) Assuring that a biological parent-child relationship exists; and 2) Ensuring that the child and citizen have some demonstrated opportunity or potential to develop a meaningful relationship
   1. Kennedy is also concerned with the consequences of a policy that allows citizenship through fathers
      1. Subscribes to a stereotype of men that “spread their seed” whenever possible?
   2. Dissent doesn’t think that an “opportunity” to develop a relationship is an important interest
      1. Isn’t the argument that such an opportunity exists through presence at birth for the mother but not the father the definition of a gender stereotype?
6. *Califano v. Goldfarb* majority focused on detrimental impact on (deceased) working women, who received less protection for their spouses solely because of their sex
   1. Rehnquist argues that administrative costs and convenience justify the differential treatment of widows and widowers
      1. Administrative convenience can never be a justification for discrimination (*Frontiero*)
   2. However, women’s social security payments could be subject to different rules than men’s under a remedial rationale (*Califano v. Webster*)
      1. How can a stereotype that “benefits” a minority be acceptable, when a stereotype that “harms” is not?

#### Other Classifications

1. *Graham v. Richardson* established that alienage, like race, is a suspect classification under 14th Amendment
   1. 14th Amendment DPC and EPC protect “person[s],” not citizens, so aliens are protected (*Yick Wo v. Hopkins*)
   2. However, *illegal* aliens are not a protected class under *Plyler v. Doe*
      1. Children of those who enter the country illegally, however, cannot be denied free public education
   3. Vital public functions, self-government and federal interest are all exceptions that may make a statute subject to only rational basis review
      1. Because the federal government decides naturalization processes, it may legislate on social programs and other benefits that will not be shared with non-citizens
      2. State law may be preempted by federal immigration policies (*Arizona v. U.S.*)
   4. Can suspect class status be justified under political process defect theory if aliens are frequently denied the right to vote? Why isn’t *this* legislation subject to strict scrutiny? Has it simply passed?
2. Although state’s interest in having an employee of undivided loyalty is substantial, prohibition of alien civic employees in *Sugarman v. Dougall* was both underinclusive (did not include high political offices) and overinclusive (included janitorial staff)
   1. Rehnquist’s dissent emphasizes the non-immutability of the alien’s status – if they desire, they can apply to become citizens
   2. Rehnquist seems to be concerned that *any* minority the Court feels worthy of protection can be identified through crafty lawyering if not limited by, *inter alia*, immutability
3. A way to distinguish the alienage cases may be on the grounds of the distribution of economic benefits (strict scrutiny) or political community membership (rational basis)
4. Although facial discrimination against indigents is unconstitutional, wealth is not a suspect class, and only fundamental rights are protected from an inability to pay (i.e., transcripts to indigents in a criminal appeal – *Griffin v. Illinois*)
   1. *San Antonio Independent School District v. Rodriguez* implies two distinguishing characteristics making poverty a protected class: 1) a complete inability to pay for a desired benefit, and 2) an absolute deprivation of a meaningful opportunity to enjoy that benefit as a result
      1. *San Antonio v. Rodriguez* also declines to find that education is a fundamental right, despite its connections to the franchise and freedom of speech
      2. Only where a fundamental right or suspect class is at issue must a state choose the least restrictive alternative; otherwise, a rational relation will suffice
      3. Marshall’s dissent articulates a sliding scale of EPC cases according to 1) the character of the classification and 2) the importance of the interest adversely affected
         1. A sliding scale is probably more accurate an intellectually honest than a two-tiered system
         2. Used in the rational basis plus cases of *Moreno* and *Cleburne*?
5. Despite illegal aliens not being a suspect class and education not being a fundamental right, the Court in *Plyler v. Doe* struck down a statute denying free public education to the children of illegal immigrants under rational basis, since the statute targets unaccountable children
   1. Burger’s dissent blasts the majority’s unabashedly results-oriented approach
      1. EPC does not preclude legislators from classifying on the basis of characteristics beyond their control (mental illness, etc.), and it is not “irrational” to deny benefits to illegal immigrants as compared to legal aliens
   2. *Kadrmas v. Dickinson Public Schools* further limits *Plyler*, holding that a busing fee was not an impermissible burden on poorer students
6. Mere negative attitudes or fear are not permissible bases for discriminating against a definable subgroup, such as the mentally ill (*City of Cleburne v. Cleburne Living Center*)
7. “[A] bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (*U.S. Dep’t of Agriculture v. Moreno*)
8. Fundamental rights under equal protection must be explicitly or implicitly guaranteed in the Constitution
   1. *Skinner v. Oklahoma* recognized a fundamental right to procreate and applied strict scrutiny to invalidate a law that discriminated between types of crimes
   2. *Harper v. Virginia State Board of Elections* held voting a fundamental right that could not be burdened by a poll tax of any size
      1. *Harper* does not indicate that states may not have other qualifications that speak to a citizen’s ability to participate intelligently in the electoral process
      2. This case probably turns on whether voting is a fundamental right or not – if not, analyzed under rational basis where it probably succeeds (raise revenue, increase incentives to further state’s welfare when voting, etc.)

### Substantive Due Process

1. SDP cases are controversial because the rights granted are not explicitly granted in the Constitution
   1. The old SDP cases include Field’s dissent in *Slaughterhouse* and *Lochner*
   2. New SDP cases tend to be non-economic, such as *Griswold*, *Roe*, *Bowers*, and *Lawrence*
2. The incorporation controversy decides to what extent the 14th Amendment incorporates the Bill of Rights against the states
   1. Best argument for incorporation is the original intent of the Framers and authors of 14th Amendment, since Bill of Rights does not directly apply to states (*Barron v. Baltimore*)
   2. *Twining v. New Jersey* identified the test for incorporation as whether a right is “a fundamental principle of liberty and justice which inheres in the very idea of free government.”
      1. *Palko v. Connecticut* expanded by identifying an incorporated right as part of a system of “ordered liberty”, and “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental”
         1. Judicial ideas of fundamental fairness animate this test
   3. In *Adamson v. California*, Black argues that total incorporation is a more precise method
      1. Compromise reached through selective incorporation – if a right is incorporated against the states, the Bill of Rights determines the full scope of that right (*Duncan v. Louisiana*)
      2. Modern test is “whether a procedure is necessary to an Anglo-American regime of ordered liberty.” (*Duncan*)
      3. Another formulation of the test is whether a right is “deeply rooted in the Nation’s history and tradition” (*Washington v. Glucksberg*)
         1. Simply a question of how abstractly the Court wants to reason – for example, is there a right to bodily integrity, or a right to homosexual activity?
   4. SCOTUS holds the 2nd Amendment incorporated against the states in *McDonald v. Chicago*
      1. Also includes a Scalia-Stevens debate on textualism or modern interpretations of the Constitution, allowing judges to exercise “reasoned judgment” as to whether a right is fundamental for SDP purposes
3. *Lochner*, the first SDP case, was founded on theories of laissez faire capitalism, equal bargaining power and a fundamental right in “liberty of contract”
   1. Also performed a degree of motive analysis
      1. Under what circumstances can courts inquire into the policy decisions made in a duly-enacted law?
   2. Harlan’s dissent points out that bakeries are actually very dangerous, and legislature, not court, should be fact-finders
      1. What should courts do in the face of warring statistics? See, e.g., *Gonzales*
   3. There are three primary critiques of *Lochner*
      1. SCOTUS makes policy decisions that should be left to legislature
      2. Right to contract is problematic (but other SDP rights are not)
      3. DPC cannot support substantive protection of un-enumerated rights
   4. *Lochner*’s freedom of contract is repudiated in *West Coast Hotel v. Parrish*
   5. Other non-economic cases from this period include *Meyer v. Nebraska* (establishes rights to establish home, bring up children, worship God, marry, all things necessary to the pursuit of happiness) and *Pierce v. Society of Sisters* (right of parents to control children’s education)
      1. Does the *Meyer*-*Pierce* combination introduce a privacy right more thoroughly even than *Griswold*?
4. Post-*Lochner*, SDP analysis follows four basic steps: 1) Does the law impact a fundamental right? 2) Is the right infringed? 3) Is there a sufficient justification for the law? 4) Is the means sufficiently related to the law’s purpose?
   1. If the right is fundamental, strict scrutiny is applied
      1. The end must be a *compelling* goal not prohibited by the Constitution and accomplished in the least burdensome way
   2. SDP rational basis test is that a law is permissible if the court can perceive *any* constitutionally permissible goal, and the means bear a rational relationship to that goal

#### Privacy

1. *Griswold v. Connecticut* creates privacy “penumbras” around multiple amendments that combine to create a general “right to privacy”
   1. How is doctor prescribing birth control to married couple protected by that couple’s right to privacy within the home?
   2. Goldberg’s concurrence relies on the Ninth Amendment to justify a right to privacy
      1. Also points out that the state’s asserted interest (preventing extra-marital sex) is only tangentially related to the means chosen to encourage that result
         1. White’s concurrence agrees – no relationship to the state’s interest
   3. Harlan’s concurrence argues that the DPC stands on its own bottom, and that marital privacy is implicit in ordered liberty
2. *Eisenstadt v. Baird* extends *Griswold* to include birth control to unmarried couples under EPC
   1. *Griswold* grows further under *Carey v. Population Services* – people other than pharmacists may distribute contraceptives

#### Abortion

1. *Roe v. Wade* holds that a woman’s right to privacy encompasses an unrestricted right to terminate a pregnancy during the first trimester
   1. During the first trimester, the state has no compelling interests and cannot legislate
   2. During the second trimester, the state has a compelling interest in maternal health, and may *regulate* abortions if reasonably related to women’s health (strict scrutiny review)
   3. During the third trimester, the state has a compelling interest in both maternal health and potential human life
      1. The state may prohibit (as well as regulate) abortions as long as an exception for the woman’s life/health is maintained (strict scrutiny review)
   4. *Roe* is also controversial because it strikes down most states’ anti-abortion laws; are federalism concerns implicated?
      1. The trimester framework rejects argument that life begins at conception. Can the Court foreclose state legislatures from making this policy decision?
      2. Is the trimester framework too similar to a legislative pronouncement?
   5. *Roe* follows Harlan’s SDP concurrence – the 14th Amendment can stand alone
      1. Possible because the Court’s level of abstraction (bodily integrity) is difficult to counter
   6. The term person, as it appears in the Constitution, does not include pre-natal life
   7. Rehnquist dissent notes that the fact that a majority of states have criminalized abortion to some degree makes it clear that abortion is not a historically-based fundamental right
2. *Casey v. Planned Parenthood* rejects *Roe*’s trimester framework and replaces strict scrutiny with an “undue burden” test – is a “substantial obstacle” placed in the path of a woman seeking an abortion?
   1. Continues to prohibit states’ ability to limit abortion pre-viability
   2. Allows states to use propaganda to discourage women from having abortions
   3. O’Conner argues that the facts underlying the *Roe* decision have not changed, and that a sense of judicial restraint forbids the Court from overturning it
      1. Did the facts in *West Coast Hotel* and *Brown*, or did the politics surrounding the issues change?
      2. Rehnquist argues simply that the majority’s understanding of the law changed; if one interpretation is better than the other, that should be the one that is settled on
   4. O’Conner also articulates a reliance interest that counsels against overturning *Roe*
      1. Reliance on what? The availability of abortions so women can exercise sexual freedom?
3. *Gonzales v. Carhart* upholds federal partial-birth abortion ban since it does not place an undue burden on late-term, pre-viability abortions
   1. How does *Gonzales* square with *Stenberg*, where both laws do not contain an exception for the mother’s health, which was one of the primary rationales for striking down the *Stenberg* law?
      1. Congressional findings control in the face of scientific uncertainty
   2. *Gonzales* allows a state to have a compelling interest in a woman’s psychological health, made possible by *Casey*’s upholding of informed consent
      1. Isn’t this bare paternalism? The government knows a woman’s probable response to knowing ex post facto the manner in which her fetus was killed, so may prohibit it?
   3. Kennedy also emphasizes the Act’s respect for the dignity of human life and interest in maintaining reputation of the medical profession
      1. How is removing a fetus intact and then killing it less respectful than dismembering it and removing the fetus piece by piece?

#### LGBT Rights

1. *Bowers* distinguishes the privacy cases by narrowing the Court’s level of generality – there Is no constitutional right to sodomy, and sodomy is not implicit in the concept of “ordered liberty”
   1. How does the Court ignore *Eisenstadt*’s admission that sex between unmarried persons without the object of procreation is still constitutionally protected?
   2. Dissent characterizes the fundamental right very differently – a right to be left alone or make intimate decisions
   3. Underlying question in these cases is whether legislatures can base laws on concepts of morality
      1. Court basically answers yes (with a cost-benefit analysis in the form of strict scrutiny)
2. *Lawrence* overrules *Bowers* and finds that a statute forbidding sodomy is unconstitutional under SDP
   1. How the Court arrives at this conclusion is very unclear – SCOTUS does not establish a fundamental “right to sex”
      1. Kennedy simply seems to imply that there is no legitimate state interest
         1. If morality is insufficient, what other laws must be struck down?
   2. Kennedy’s use of international norms to justify the result in *Lawrence* is disconcerting to some, especially since fundamental rights analysis under SDP is supposed to follow the traditions and history of *this* nation
   3. Kennedy cites *Casey* for the proposition that the SDP right of liberty broadly relates to marriage, procreation, contraception, family relationships, etc. and *Romer* for equal protection for homosexuals
   4. O’Conner concurs, basing her opinion in the EPC; also agrees that moral disapproval is not a legitimate state interest standing alone
   5. Scalia dissents, arguing that if *Bowers* is ripe for overrule, so is *Roe*
      1. Scalia argues that *Griswold* and *Eisenstadt* didnotrely on SDP, but constitutional penumbras; therefore, there cannot be an established “right to privacy” from the 14th Amendment exclusively
      2. Uses Kennedy’s words against him – an “emerging awareness” cannot be “deeply rooted in this Nation’s history and traditions”
3. *Romer v. Evans* analyzed a state constitutional amendment stripping special status from homosexuals – SCOTUS strikes down the amendment under rational basis
   1. How should the Court define the group of homosexuals? Those with homosexual tendencies? Those who publicly hold themselves out to be homosexuals? Only those who are in relationships with members of the same gender?
      1. Does the *Carolene Products* analysis of “discrete and insular minorities” apply here? What about the immutable characteristics test – is homosexuality a “lifestyle choice”?
      2. How can the difference between discrimination and an exercise of moral judgment be differentiated?
   2. Majority essentially accuses Coloradoans of irrational animus towards homosexuals
   3. Scalia attempts to reframe the issue as removing the ability of a minority to receive preferential treatment under the law
4. Can sexual orientation be thought of as a class of sex discrimination, subject to intermediate scrutiny?
5. *U.S. v. Windsor* held that DOMA was unconstitutional under the EPC for denying marriage benefits to individuals based on the sex of their spouse
   1. Even though *Windsor* cites *Loving* for the proposition that marriage is a fundamental right, SCOTUS declines to analyze *Windsor* under strict scrutiny. Why?
      1. Kennedy finds no legitimate state interest sufficient to overcome “the purpose and effect to disparage and injure” homosexuals
      2. What standard is Kennedy using? Rational basis, or rational basis with bite (a la *Moreno*)
         1. Also emphasizes stigma of second-class marriages, similar to *Brown*
   2. Scalia warns majority against ascribing “bare desire to harm a politically unpopular minority” to Congress and the President
6. *Obergefell* continues SCOTUS’ obfuscation on standard of review (see also *Romer, Lawrence, Windsor*)
   1. Standard *seems* to be rational basis with bite
   2. Kennedy finds that amendment violates *both* the DPC and EPC of 14th Amendment, but heavily relies on SDP
   3. Creates a new test for determining a fundamental right – a court’s “reasoned judgment” as in Stevens’ dissent in *McDonald v. Chicago*
      1. Why does Kennedy need this if *Loving* established that marriage is a fundamental right?
      2. Kennedy also gives homosexuality as an immutable characteristic – yet there is no reliance on *Carolene Products*
   4. Kennedy attacks dissent’s argument that legislature is more appropriate avenue of change – individuals need not wait for legislative action to assert a fundamental right
   5. Roberts’ dissent points out that (as in many other cases from this class) although the policy case is strong, the legal argument is weak
      1. The privacy cases cannot apply here, since the plaintiffs seek public recognition of their marriage, *not* to be left alone
      2. Distinguishes *Loving* since homosexual marriage is fundamentally different from the understanding of marriage in *Loving*
         1. Also argues that the majority forces the Constitution to enact a particular theory of marriage
      3. Notes that the most analogous case is *Lochner* – the only limiting principle is the values held by the judiciary
   6. Open questions about *Obergefell*:
      1. Implications for other SDP cases, e.g., abortion, new un-enumerated fundamental rights?
      2. Impact on formal equality debate, e.g., EPC challenges, ENDA
      3. Transgender rights
      4. Popular rejection of broadly-worded ordinances
      5. Push culture toward acceptance of LGBTQ community or create backlash?
      6. How to square *Schuette* with *Obergefell*
      7. Impact on *Fisher v. Texas*
      8. Relationship to First Amendment religious freedom protection

### Congressional Enforcement Power

1. Does Section 5 allow Congress to create *preventive* remedies, before a violation actually occurs, i.e., before a determination of unconstitutionality?
2. *Katzenbach v. Morgan* held that Congress could expand – but not reduce – judicially defined rights under the DPC
   1. Doesn’t this elevate Congress to SCOTUS’ role as interpreter of the Constitution? Can Congress *create* new rights without waiting for SCOTUS’ permission?
3. *City of Bourne* retreats from this position, holding that Congress cannot create new rights under § V
   1. Congress tries to force strict scrutiny on a facially neutral law burdening religion (disparate impact)
   2. Introduces congruence and proportionality as limiting agents for Congressional legislation
      1. Congruence – Legislation must be consistent with a substantive definition declared by the Court
      2. Proportionality – Legislation must not overcorrect or over-enforce right
   3. Does this overrule *Katzenbach*, or simply act as a limiting principle?
   4. Why can’t Congress create new rights, subject to the ever-present threat of SCOTUS disagreeing and striking the law as unconstitutional?