Please note: These notes are fallible. Please do not rely on them to the exclusion of your own notes or to the exclusion of the text. To the extent you disagree with anything here, please do not assume I am correct and you are not.

Introductory material. In our first few meetings, we discussed several threads that came together in *The Slaughter-House Cases* (1873). For example, we asked some questions about the Constitution before 1865 and how it treated slavery. We saw that it was ambivalent on this subject. It protected slavery, but it carefully avoided using the word. We then asked whether the Thirteenth Amendment (1865) was textually competent to end slavery. We agreed that it was. Then we talked about the “Black Codes” adopted by a number of southern states just after the Civil War, and the Civil Rights Act of 1866, which Congress passed in response to those codes. We asked whether the Thirteenth Amendment authorized Congress to enact this statute. As we saw, this argument had two sides. On the one hand, one could plausibly argue that slavery is the ownership or purported ownership of one human being by another, and that discriminatory legislation is not slavery. On the other hand, one could plausibly argue that discriminatory legislation perpetuates a “badge or incident” of slavery. In any case, we saw that Congress proposed the Fourteenth Amendment at least in part to provide a firm basis for this statute.

The question then arose whether the Fourteenth Amendment did anything beyond establishing a firm basis for this act. One additional effect of the amendment might have been to make the Bill of Rights applicable to the states and their subdivisions. This brought a different set of issues to the fore. In *Barron v. Baltimore* (1833), the Court had held that the Bill of Rights did not apply to the states of its own accord. Although Barron had a good case in the abstract — the city appeared to have made his wharf unusable — the Court held that this was irrelevant to the Fifth Amendment, which by its own force only applied to the federal government.

Did the Fourteenth Amendment change this state of affairs? Plenty of historical evidence suggests that the Thirty-Ninth Congress, the Congress that proposed the Fourteenth Amendment, wanted to do exactly that.

Assuming the Thirty-Ninth Congress did intend to make the Bill of Rights applicable to the states, the question then arises: Which provision of the Fourteenth Amendment would have accomplished this? From a textual perspective, the most obvious candidate would be the Privileges or Immunities Clause, which provides that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” This clearly contemplates a body of “privileges” and “immunities” that people enjoy as citizens of the United States, and that states may not impair. This leads, then, to the more precise question: Of what do these “privileges” and “immunities” consist? Do they derive from the Bill of Rights? Do they derive from a free-standing concept of “natural law”? Both?

Enter the butchers. *Slaughter-House* gave the Court its first opportunity to interpret the Fourteenth Amendment. Louisiana had enacted a statute requiring butchers in New Orleans to
ply their trade exclusively under the roof of one company. The butchers argued that the right to pursue a common calling apart from a monopoly was a fundamental aspect of Anglo-American law, relying on a famous English case, *Darcy v. Allin*. The majority rejected their argument, concluding that, fundamental or not, this right was not a “privilege or immunity of citizens of the United States,” a category it defined quite narrowly. In fact, *Slaughter-House* could be read to say that these “privileges or immunities” consisted solely of privileges and immunities that would not exist *but for* the Constitution and laws of the United States, thus excluding such rights as the right to speak freely and the right to bear arms, which arguably existed *before* the Bill of Rights was ratified. The dissent would have held for the butchers.

About this point in the course, we spoke briefly about the first clause of the Fourteenth Amendment, the Citizenship Clause. This clause’s primary function was to overrule *Scott v. Sandford* (1857), allowing an African American to be a citizen of a state for purposes of the federal Constitution. Much later, this clause played a role in *Saenz v. Roe* (1999), where the Court struck down a California statute whereby people who had resided there for less than a year and who applied for public assistance received the benefits that they would have received in their state of origin until the end of that year. The Court justified its decision in part on the ground that the Citizenship Clause forbids establishing two levels of citizenship. (Note: We do not discuss *Saenz* every year.)

As observed above, the Court appeared to render the Privileges or Immunities Clause a dead letter in *Slaughter-House*. As of that decision, the clause protected only a small set of rights implicit in the idea of national citizenship. In *Saenz*, above, the Court may have reinvigorated this clause. The decision in *Saenz* rested in part on the effect this law had on people’s right to travel to another state and to remain there if they chose. The Court said this was a privilege or immunity of citizens of the United States. (Note: We do not discuss *Saenz* every year.)

*Selective incorporation.* Given the Court’s virtual gutting of the Privileges or Immunities Clause in *Slaughter-House*, a reasonable person might have thought the Bill of Rights would never apply to the states. After all, this clause was the most obvious textual vehicle for accomplishing this purpose. But if the Court gave people lemons, they made lemonade. Enter “selective incorporation,” under which the Due Process Clause “incorporates” (literally, “takes into its body”) select provisions of the Bill of Rights. As we saw in *McDonald v. City of Chicago* (2010), there are a few different tests for this process, but they all depend to some extent on history. For example, the Court might ask whether a right is “fundamental to [the American] scheme of justice,” “implicit in the concept of ordered liberty,” or “deeply rooted in our Nation’s history and tradition.” By now, most of the provisions of the Bill of Rights have been held to apply to the states, including all of the First and Fourth Amendments, almost all of the Fifth Amendment, all of the Sixth Amendment, and most (if not all) of the Eighth Amendment. The Court has never adjudicated a case arising under the Third Amendment, and it has specifically held that the Fifth Amendment’s requirement of indictment by grand jury and the Seventh Amendment’s requirement of trial by jury in civil cases where over $20 is at stake do not apply to the states. The Second Amendment also applies to the states, as we saw in *McDonald*, but a
majority of the Court has yet to agree on a supporting rationale. A plurality of four, led by Justice Alito, would have relied on due process, but Justice Thomas would have relied on privileges and immunities. As Justice Thomas said in his separate opinion in *McDonald*, “I cannot agree that [the Second Amendment] is enforceable against the States through a clause that speaks only to ‘process.’”

*Substantive due process.* As Justice Thomas suggested in *McDonald*, “substantive due process” is arguably a contradiction in terms. Under this doctrine, courts may invalidate legislation as a denial of “due process,” not because the government’s *procedures* are inadequate, but because of the *substantive* effect of the legislation. This aspect of due process has a conceptual relation to the argument the butchers made in *Slaughter-House*. As you may recall, they argued that making them slaughter animals under the Company’s roof invaded their privileges or immunities as citizens of the United States. Thus, they were making a claim about violation of a *substantive* right. Although the butchers’ argument failed in *Slaughter-House*, later litigants with similar claims prevailed, not by asserting a privilege or immunity, but by invoking due process, which they persuaded the Court to give a *substantive* twist. Sometimes, this substantive twist entailed “incorporating” something from the Bill of Rights. In other cases, this substantive twist did not depend on text elsewhere in the document, and therefore gave rise to “unenumerated rights.” In *Lochner v. New York* (1905), for example, the Court held that a statute regulating the working hours of bakers improperly invaded the liberty of contract.

“Economic substantive due process” and *Lochnerism* saw its heyday in the late nineteenth and early twentieth century. With the advent of the Depression and the beginning of the New Deal, the Court essentially changed its mind about this area of law. Since the mid-to-late-1930s, the Court has upheld regulations of economic phenomena so long as they have been rationally related to a legitimate public purpose, the most lenient test in the Court’s arsenal. In addition, such statutes are presumed by the Court to be valid, unless the Court can be persuaded otherwise. (This test is described as the “minimum rationality” or “rational basis” test.)

Footnote 4 in *United States v. Carolene Products* (1938) provides some insight into the Court’s retreat from *Lochnerism*. In this case, the Court refused to invalidate a federal statute that forbade so-called “filled milk” and that described such milk in perjorative terms. In the course of its analysis, the Court explained that it would give wide berth to ordinary economic legislation. It then inserted a footnote, where it reserved its power to use exacting scrutiny for laws that: (1) impair rights explicitly protected by the Constitution; (2) impair rights integral to the political process; or (3) isolate for adverse treatment a minority that cannot defend itself in the political process.

Although not much is left of *Lochner*, the doctrine of substantive due process as a whole is still alive. In fact, the Court has held that laws that impair so-called “fundamental” rights violate the Constitution unless they are necessary and narrowly tailored to serve a compelling public interest and are the least restrictive means of doing so. One can go through the cases to see the unenumerated rights that the Court has recognized. They include, but are not limited to:
A right to educate one’s children as one sees fit. ...................... *Meyer v. Nebraska* (1923)
.......................................................................... *Pierce v. Society of Sisters* (1925)

A right to procreate. .................................................. *Skinner v. Oklahoma* (1942)

A right to use contraceptives. ................................. *Griswold v. Connecticut* (1965)
.......................................................................... *Eisenstadt v. Baird* (1972)

A right to obtain an abortion. ................................. *Roe v. Wade* (1973)
.......................................................................... *Whole Woman’s Health v. Hellerstedt* (2016)

A right to marry. .......................................................... *Loving v. Virginia* (1967)
.......................................................................... *Zablocki v. Redhail* (1978)

A (likely) right to refuse medical treatment ................. *Cruzan v. Director, Missouri Department of Health* (1990)


These rights specifically do not include a right to the assistance of a doctor in committing suicide, unless (perhaps) a person is terminally ill, in great pain, and confronting imminent death. See *Washington v. Glucksberg* (1997) and *Vacco v. Quill* (1997). One should also note that the Court did not literally describe the rights at issue in *Casey* and *Lawrence* as “fundamental.”

The specific holding of *Loving* was that a state may not prohibit individuals of different races from marrying. The specific holding of *Zablocki* was that a state may not require an individual who is behind on child support to obtain judicial permission before marrying. The specific holding of *Obergefell* was that the state may not prohibit individuals of the same sex from marrying.

Remember too that the right to obtain an abortion is actually protected against “undue burdens,” rather than by strict scrutiny. Under this test, a regulation is unconstitutional if it imposes an undue burden on the right to obtain an abortion, that is, if its purpose or effect is to place a substantial obstacle between a woman and her ability to opt for that procedure. Also, keep in mind that the government need not pay for the exercise of a fundamental right. Thus, it need not pay for abortions, see *Maher v. Roe* (1977) and *Harris v. McRae* (1980), or provide a place where they can be performed, see *Webster v. Reproductive Health Services* (1989). By similar analysis, the government need not pay for someone’s ability to publish a book.

Here are a few abstract notes regarding substantive due process and fundamental rights: First, remember the Ninth Amendment, which may or may not confer textual legitimacy to
unenumerated rights. Although Justice Goldberg raised this issue in *Griswold*, not much has come of the Ninth Amendment. Second, keep in mind the contest among the justices regarding the appropriate level of specificity at which to identify historically protected rights (assuming one thinks history should control). If one identifies historical rights at a highly specific level, many new proposed rights will appear relatively radical. Conversely, if one identifies historical rights at a high level of abstraction, recognition of “new” rights will appear commonplace, as long as the new right fits within the general pre-existing right. For example, the “right to be left alone” covers a lot of ground and was probably recognized (at least in some form) in 1791, let alone 1868. But the judicial conservatives would insist on a much more precise definition of a right than that before engaging in historical analysis.

A good description of the flexible approach to substantive due process can be found in *Casey*, where the Court refers to “reasoned judgment.” A similar description can be found in Justice Harlan’s separate opinion in *Griswold* or in Justice Holmes’ dissent in *Lochner*. For a presentation of the more judicially conservative justices’ approach, see *Glucksberg*.

**Procedural due process.** Arguably, the most natural application of due process is that it ensures adequate procedures before the government takes someone’s life, liberty or property. (Remember, of course, that there are two guarantees of due process in the Constitution—one in the Fifth Amendment, which applies only to the federal government, and one in the Fourteenth Amendment, which applies only to the states.)

The first question here is whether the thing the government wants to take away is “life, liberty, or property” for purposes of the clause. This is not always easy to determine. Some things are obviously property: land, a toaster. In the modern era, “property” for purposes of the clause can only consist of entitlement to benefits under a program like Medicaid, a license, or tenure. But a benefit does not become property for purposes of the clause simply because one needs it. Instead, one looks to the nature of the thing and the extent to which the government has created a reasonable expectation of entitlement on the basis of positive law.

The second question here is whether the procedures observed by the government before the thing can be taken away are adequate. To answer this question, one applies the “flexible balancing test” of *Mathews v. Eldridge* (1976). This looks like the standard comparison of costs and benefits. One can compare this test to the test used by Judge Learned Hand in *United States v. Carroll Towing*, which may be familiar to you from torts.

People often say that procedural due process requires, at a minimum, notice and an opportunity to be heard, but in emergencies the government may deprive someone of something before notice and a hearing, and provide a hearing only after deprivation occurs.

Often, the issue in a case about procedural due process will be whether the government or the private party should bear the risk of error between a simple preliminary adjudication and a subsequent, extensive review. Specifically, the two sides often argue over whether, if the
government prevails at the preliminary stage, the thing should be denied to the private party pending full review. If the thing is not denied pending full review, the private party has every incentive to request such review, and the preliminary review will not be particularly meaningful from the government’s point of view. On the other hand, if the thing is denied to the private party pending full review, that party may suffer greatly, as well as unjustifiably, if it turns out that he or she remained entitled to it. Factors that courts might take into account in deciding who should bear the risk of error between adjudications include: (1) the degree to which the private party depends on the thing; (2) the extent to which he or she can use the thing to hurt others; and (3) the scarcity of the thing, such that some other party could put it to better use. Some of these factors were at issue in Matthews v. Eldridge.

For an example of these principles in operation, consider such interim civil remedies as writs of garnishment and attachment. There are several features of such remedies that, if present, can improve the chances that a particular procedure satisfies due process. These include: (1) whether a judge or magistrate must decide to grant relief, as opposed to a clerk; (2) whether the party seeking relief must make a substantial showing of entitlement before relief is granted; (3) whether the relief may only be granted after a full hearing, as opposed to a proceeding ex parte; (4) whether the party seeking relief must put up a bond to secure the counterparty’s interest; and (5) whether the party against whom relief is granted has a prompt opportunity to contest the order. These factors are not dispositive or exhaustive, but they play a major role in determining how a particular procedure will fare on review.

The Contract Clause. Note: This clause applies only to the states. If one is upset with the federal government’s interference with a contractual expectation, one must look to the Due Process Clause of the Fifth Amendment.

The general rule regarding contracts between private parties can be found in Energy Reserves Group v. Kansas Power & Light (1983). In this test, one first asks — as a preliminary matter — whether there has been “a substantial impairment of a contractual relationship.” If not, the government wins, because not much is at stake. If there has been substantial impairment, one goes on to ask whether the law serves “a significant and legitimate public purpose.” If not, the law violates the clause, because it undermines a substantial contractual expectation and lacks an adequate justification. If it serves an adequate purpose, one then asks whether the impairment “is based on reasonable conditions and is of a character appropriate” to the law’s purpose. That is, one asks if the extent of the impairment is proportionate (my word) to the government’s justification. If the answer to these questions is “yes,” the law does not violate the clause. On this last question, the courts will generally defer to the legislature. The decision whether a law violates the clause is ultimately somewhat subjective, but there are some factors that play a role in the determination. For example, courts might ask whether the state enacted the law because of an emergency, whether the law will expire when the emergency ends, how deeply the law impairs the contractual relationship, and whether the law regulates an activity that was already subject to heavy regulation. Much of the language in Energy Reserves Group comes from Home Building & Loan Association v. Blaisdell (1934) and Allied Structural Steel v. Spannaus (1978).
If a state enacts a law that impairs one of its own contractual obligations, courts will subject it to “greater scrutiny” than they would if the law interfered only with private obligations. See United States Trust Co. v. New Jersey (1977). In such a case, courts will not defer as much to the legislature’s determinations as to whether a law is “reasonable” as they would were the state not a party to the contract. See Energy Reserves Group.

_Takings._ There are two kinds of takings — possessory and regulatory.

Almost any permanent physical occupation or confiscation of property by the government is a taking per se. For example, if the government builds a road through someone’s land, builds a dam and causes a flood on someone’s land, or even requires a homeowner to set aside space for cable TV, there’s a taking.

Nor can the government require a landowner to give up property in exchange for some form of relief, unless there’s an appropriate relationship between the landowner’s proposed change and the condition imposed. First, there must be an “essential nexus” between these two things. See Nollan v. California Coastal Commission (1987). In other words, the landowner’s intentions must implicate the same concerns that justify the condition. Second, there must be “rough proportionality” between the condition and the impact of the proposed change. See Dolan v. City of Tigard (1994). This is especially true where the rule is not one of general applicability, but instead is imposed on a case-by-case basis.

As we saw in Berman v. Parker (1954), Hawaii Housing Authority (1984) and Kelo v. City of New London (2005), the legislature has “broad latitude” to determine what constitutes a “public use” for which private property may be taken.

No possession is required to establish a regulatory taking. There are two kinds of regulatory takings. First are “per se regulatory takings.” Such a taking occurs if the government deprives a landowner of all economically beneficial or productive use of his or her land. See Lucas v. South Carolina Coastal Council (1992). This would not, however, include uses that would be classified as nuisances (or the like) at common law. If a landowner cannot qualify for Lucas, he or she may still try to establish a regulatory taking under the amorphous test of Penn Central Transportation Co. v. New York (1978). Under this test, one looks to the economic impact of the regulation, the presence or absence of “distinct investment-backed expectations” regarding what the landowner could build on the site, and the character of the governmental action at issue. In Penn Central, the Court found no taking where a city would not allow a private landowner to build a skyscraper on top of a historic train station.

_Equal protection._ We began this section of the course with a brief historical discussion of slavery. We saw the substantial role that slavery played in the debates on the Constitution in 1787, even though the delegates ultimately agreed to defer the most contentious aspects of the subject to another day. As we saw in The Antelope (1825), slavery was not inconsistent with public international law in the early years of our nation. Therefore, the United States could not
prevent citizens or subjects of foreign countries from engaging in this trade, even if it could prevent citizens of the United States from doing so. We next read Prigg v. Pennsylvania (1842). At a basic factual level, Prigg was about the pre-emptive effect of the “Fugitive Slave Act” on legislation by the states. At an abstract level, it illustrated some of the complexities of having both slave-holding and non-slave-holding jurisdictions in the same country. Finally, we read Scott v. Sandford (1857), in which the Court held that a man or woman of African descent could never be a citizen of a state for purposes of the federal Constitution, and in which the Court struck down the Missouri Compromise of 1820 as a violation of due process. Like Prigg, Scott is a vivid illustration of the complexities of having both slave-holding and non-slave-holding jurisdictions in the same country. (Note: We did not read these cases in 2017.)

Modern doctrine. When analyzing an alleged denial of equal protection, one should usually begin by asking whether the regulation divides the universe of entities subject to regulation into more than one group on the basis of a characteristic. One then asks what the nature of the distinction is. All laws draw some distinctions.

A distinction along “suspect” lines — a “suspect classification” — provokes strict scrutiny. When exercising this kind of scrutiny, courts will presume a law to be unconstitutional, and will only uphold it if it is necessary and narrowly tailored to serve a compelling public interest. “Narrow tailoring” in this context generally means that the regulation must be the least restrictive means available to the government to accomplish its compelling objective. Few regulations will satisfy this test. Distinctions on the basis of race, ethnicity and religion are examples of suspect classifications.

A “quasi-suspect classification” provokes intermediate scrutiny. When exercising this kind of scrutiny, courts will again presume a law to be unconstitutional, and will only uphold it if it is substantially related to an important public interest. A distinction on the basis of sex is an example of a quasi-suspect classification, although the Court’s requirement of an “exceedingly persuasive justification” in Mississippi University for Women v. Hogan (1982) may signal that the test of such distinctions approaches strict scrutiny. Also, many would argue that the Court covertly subjects distinctions on the basis of mental capacity and sexual orientation to heightened scrutiny. See City of Cleburne v. Cleburne Living Center, Inc. (1985); Romer v. Evans (1996) (and progeny).

A “non-suspect classification” will provoke “minimum rationality” review. When applying this test, courts will presume the regulation to be constitutional and will uphold it so long as it is rationally related to a legitimate public interest. Few regulations fail this test. In addition, the government need not identify a rational basis for a law at the time of its enactment. It suffices if the government comes up with such a basis in time to present it to a reviewing court. Distinctions on the basis of economic or social characteristics, as well as distinctions on the basis of age and wealth, are examples of non-suspect classifications. The Court has also treated distinctions on the basis of mental capacity and sexual orientation as non-suspect, although many
would argue that it covertly treats such distinctions as quasi-suspect. See Cleburne and Romer, referred to above.

*Romer v. Evans* (1996) is a case where the Court applied minimum rationality and nevertheless struck down the provision under review. The Court described the amendment to Colorado’s Constitution at issue in *Romer* as sweeping so broadly that it could not have rested on anything but invidious hatred of homosexual people, which is not a legitimate public interest. (Note: We did not read *Romer* in 2017.)

Once the government has identified the evil it seeks to eradicate, any failure on its part to regulate all sources of the evil renders a law “underinclusive.” Similarly, any failure on its part to limit its regulation to sources of the evil renders a law “overinclusive.” This is usually not a problem with minimum rationality, because courts will generally let the government take “one step at a time” against an identified evil, thus justifying underinclusiveness, and will also generally let the government paint with a broad brush where using a fine brush would be too expensive or inconvenient, thus justifying overinclusiveness. But regulations that are under- or overinclusive and that make suspect or quasi-suspect classifications will probably fail scrutiny, because the fit between ends and means will not be close enough. The Court has indicated that “administrative convenience” will not satisfy intermediate (or strict) scrutiny.

The concept of “treating similarly situated entities similarly” can be difficult to work with, but it relates to the discussion of underinclusive and overinclusive regulation. If two entities are similarly situated, in the sense that they cause the same evil, a law that affects only one of them will fail to treat similarly situated entities similarly. This gives rise to an argument that the law is underinclusive.

One can also talk about the government’s duty to treat dissimilarly situated entities dissimilarly, but this is not nearly as clear as its duty to treat similarly situated entities similarly. If two entities are dissimilar in a material way, one could argue that the government must take this dissimilarity into account. For the most part, however, courts reject this analysis. Thus, the government may prohibit both rich and poor from sleeping under bridges and stealing bread. But the argument often arises. This argument is difficult for plaintiffs to make because laws that fail to treat dissimilarly situated entities dissimilarly make no distinctions on their face. A law that makes no distinctions on its face provides no clear evidence of discriminatory intent on the government’s part, which a plaintiff must show to establish a denial of equal protection.

Given the tiers of scrutiny under equal protection, plaintiffs naturally want to establish that the government has made a suspect or quasi-suspect classification, and defendants naturally want to establish that the government has made only a non-suspect classification. Footnote 4 of *Carolene Products* (discussed above) is helpful, but not dispositive, in deciding what kind of classification the government has made. As the Court explained in this footnote, it will not presume the constitutionality of laws that: (1) impair a textual right; (2) impair a right integral to the political process; or (3) isolate for adverse treatment a minority that cannot defend itself in
the political process. In deciding what groups fit into this last category, one asks whether the minority is “discrete and insular,” whether members of the minority bear “immutable characteristics,” and whether the minority has been subjected to a “history of purposeful unequal treatment.” Justices Powell and Brennan talked about this kind of analysis in *Regents of the University of California v. Bakke* (1978).

A plaintiff seeking to prove a denial of equal protection must establish that the defendant intended to discriminate along improper lines. See *Washington v. Davis* (1976); *Arlington Heights v. Metropolitan Housing Development Corp.* (1977). A showing of disproportionate impact alone generally will not suffice, unless the disproportion is so striking as to preclude any conclusion other than one of intentional discrimination. See *Yick Wo v. Hopkins* (1886) for an example of such impact. The law need not discriminate on its face, however. Discriminatory application or administration of a law also implicates equal protection.

Look to *Arlington Heights* for examples of ways to prove intentional discrimination with circumstantial evidence. As the Court noted in that case, one can look to: (1) disparate impact, if any; (2) historical context; (3) the sequence of events preceding the action; (4) departures from normal procedures; (5) substantive departures (actions out of the ordinary); and (6) the legislative or administrative history of the action, such as contemporaneous statements by its proponents.

The Fourteenth Amendment’s guarantee of equal protection does not apply to the federal government, but the Court has held that the Fifth Amendment’s guarantee of due process, which *does* apply to the federal government, includes an “equal protection component.” See *Bolling v. Sharpe* (1954). In general, any distinction that would be unconstitutional for a state or local government under the Fourteenth Amendment would also be unconstitutional for the federal government under the Fifth Amendment.

*All* distinctions on the basis of race provoke strict scrutiny, even distinctions intended to help members of racial minorities. Similarly, all distinctions on the basis of sex provoke the same level of scrutiny, even if they are intended to help women. Remember, however, that affirmative action can and often does survive strict scrutiny. In *Grutter v. Bollinger* (2003), the Court expressly held that the goal of assembling a diverse body of students can be compelling. In accordance with this decision, quotas and firm goals are not permitted, but use of race as a factor in admissions is allowed.

Remember also that a court may make explicit distinctions on the basis of race in response to an identified denial of equal protection. It does this as part of its ordinary equitable jurisdiction. Similarly, parties to litigation involving equal protection may include explicit distinctions on the basis of race in decrees they submit to a court for approval. In addition, a properly constituted non-judicial governmental body may adopt a program of affirmative action to fix identified discrimination, provided it satisfies certain criteria. First, it must be appropriate to the task. Second, it must do its research to identify discrimination and determine its extent. Finally, the remedy must not exceed the scope of the identified violation. Thus, if a properly
constituted body examines a situation and discovers a denial of equal protection, it may devise a plan to address the violation identified. See *Bakke*. In evaluating such a plan, the courts will look to its flexibility, among other things. For example, they will ask whether the plan allows for waivers and relaxation of presumptions where the actual facts differ from the facts presumed to justify the plan. Similarly, they will look to the duration of the plan, that is, to whether it will end when the identified violations have been resolved. This was an important part of the analysis in *Adarand Constructors v. Peña* (1995).

*State action.* Many of the Constitution’s most important provisions do not apply to private conduct. (The Thirteenth Amendment is a significant exception.) In particular, the key substantive provisions of the Fourteenth Amendment — the guarantees of due process and equal protection — apply only to states (and their subdivisions). Similarly, the provisions of the Bill of Rights apply on their own accord only to actions by the federal government. But these simple assertions conceal a complex analysis of when an ostensibly private actor performs a state action.

There are three basic sub-doctrines of state action: (1) “public functions;” (2) “symbiotic relationships;” and (3) “nexus” (for lack of a better name).

*Public functions.* Under this doctrine, if a private entity or person performs a function traditionally and exclusively performed by the government, it’s a state actor. Because this is a hard standard to satisfy, few entities have been deemed state actors under this doctrine. See, e.g., *Marsh v. Alabama* (1946) (company town); *Terry v. Adams* (1953) (primary election). The Court has never decided whether private police perform a public function under this doctrine. See footnote 14 of *Flagg Bros. v. Brooks* (1978).

*Symbiotic relationship.* A symbiotic relationship exists where the government and a private entity have such a high degree of interdependence that the private entity’s operation is integral to the government’s operations, and vice versa. See *Burton v. Wilmington Parking Authority* (1961). If so, the entity is a subject to the same constitutional rules as the government.

*Nexus.* “Nexus” could also be described as a test of “encouragement” or “facilitation.” In applying this test, one looks to whether the government is so heavily implicated in private action that the action can be attributed to the government. To illustrate, compare *Flagg Brothers* with *Lugar v. Edmondson Oil Company* (1982). In *Flagg Brothers*, a warehouse proposed to sell goods entrusted to it for storage because the owner of the goods had failed to pay her bill. The Court held that the action of the warehouse was not action by the state. In *Lugar*, by contrast, the Court found action by the state where a sheriff attached Lugar’s property after an application by Edmondson. The difference lay in the sheriff’s role in the attachment. The government was in the background in *Flagg Brothers*.

*Shelley v. Kraemer* (1948) is a famous example of a situation where the government’s role was deemed prominent enough to implicate equal protection. In this case, private parties appeared to have agreed to a racially restrictive covenant. But only a court could enforce the
covenant. The Court held that such enforcement would constitute action by the state and violate the clause. One wonders, however, whether judicial enforcement of an agreement between two private parties not to disclose a particular fact would constitute action by the state and violate the First Amendment. As a doctrinal matter, many defend Shelley against this criticism by noting that, in Shelley, a willing seller and a willing buyer were being prevented from transacting business, whereas in the case of an agreement not to speak someone at least initially choose to give up his or her rights under the First Amendment. One might also say that Shelley simply reflects our national commitment to eradicate racial discrimination. Finally, some argue there’s a hierarchy of constitutional values, with equal protection and freedom of speech at the top, and procedural due process at the bottom, at least for purposes of deciding whether there has been action by the state. According to this view, the courts are more likely to find action by the state where discrimination is alleged, and less likely to find it where a denial of procedural due process is alleged. Compare Shelley with Jackson v. Metropolitan Edison (1974).

**Licensing and regulation.** Being licensed or subject to regulation by the government — even if the regulation is quite close — is usually not enough to render an entity a state actor. See Moose Lodge v. Irvis (1972) (liquor license); Jackson (regulated utility).

**The Second Amendment.** It’s hard to know exactly what to make of District of Columbia v. Heller (2008), a fairly recent decision on the Second Amendment. For sure, the Court resolved the long-standing issue of whether the amendment affords only a collective right, or a right that can be asserted by individuals as such, in favor of an individualist interpretation. In reaching this conclusion, the Court also resolved the subordinate question of whether the amendment’s prefatory clause limits the scope of the operative clause, holding that it does not. The Court also held that the amendment protects an individual’s right to “keep and bear Arms” commonly held by law-abiding citizens for purposes of confrontation and self-defense, particularly in the home. In Heller, this meant that the District of Columbia could not categorically prohibit Heller from possessing a usable handgun in his home. Beyond this, Heller left many questions unanswered. For example, the Court has yet to decide what standard of review governs laws that implicate the amendment. The Court has determined, however, that the Fourteenth Amendment makes the Second Amendment applicable to the states and their subdivisions, either via the Due Process Clause (as per Justice Alito and three others) or via the Privileges or Immunities Clause (as per Justice Thomas). See McDonald v. City of Chicago (2010). McDonald, by the way, provides a useful review for much of this course’s introductory material.

**The First Amendment. — Why protect expression?** There are several reasons to protect expression. One is that expression is the means by which the people inform themselves. In a democracy, the government is the people. An advantage of this theory is that it has obvious support in the structure of the Constitution. A disadvantage is that the political significance of much expression is at best remote. Take, for example, a work of instrumental music, or a work of abstract art. Although such works may have ultimate political significance, their primary significance is emotional or aesthetic.
Another theory for the protection of expression is that expression is conducive to “self-actualization.” In other words, by expressing ourselves, we become more fully the people we are destined to be. The problem with this approach is that many non-expressive activities — such as slaughtering cattle, or working long hours as a baker — are also plausible means of “self-actualization.”

**Incitement.** Government may not punish abstract advocacy of violent or illegal acts. Instead, it may only punish speech that is: (1) directed to inciting or producing imminent lawless conduct; and (2) likely to do so. Despite the apparent clarity of this test, it has some unresolved issues. For example, it isn’t clear what “direction” means, although the Court has interpreted this aspect of *Brandenburg v. Ohio* (1969) to require intent to bring about the evil in question. See *Hess v. Indiana* (1973). Should courts should parse the words of the speaker? Should they consider the gravity of the potential harm at issue?

**Prior restraint.** The Court has said that prior restraints are subject to the strictest of scrutiny. This is because, if a prior restraint is imposed, the speech under restraint is never available to the public, which needs to hear the speech to fulfill its role as the real government in a democratic system.

**National security.** National security can justify a prior restraint in rare instances, but the government must meet a very rigorous standard. To get a feel for the standard, see Justice Brennan’s concurring opinion in *New York Times v. United States* (1971), in which he said that a prior restraint must rest upon at least “allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea.” Similarly, Justice Stewart said that the Constitution would require a showing that “direct, immediate, and irreparable damage” would result from publication of the information at issue. Several justices indicated, however, that a carefully drawn act of Congress authorizing a prior restraint in particular instances might have helped the government’s case.

**Permits for parades.** Statutes and ordinances governing the issuance of permits for parades and the like must have “narrow, objective, and definite standards” for administration, to prevent inappropriate exercise of discretion by public officials, and they must allow for relatively quick appellate review. *Shuttlesworth v. City of Birmingham* (1969).

**The collateral bar rule.** Generally speaking, one must adhere to a prior restraint imposed by a court, even if the restraint is predicated on an unconstitutional statute, unless the order is “transparently invalid” or has only a “frivolous pretense to validity.” *Walker v. City of Birmingham* (1967).

An order restraining the press from publishing information pertaining to a pending criminal prosecution must satisfy a heavy burden. See *Nebraska Press v. Stuart* (1976). Nevertheless, a reporter who defies such an order almost certainly cannot rely on the First
Amendment as a defense, given the collateral bar rule. (Note: We do not discuss *Nebraska Press* every year.)

*The public forum, etc.*

<table>
<thead>
<tr>
<th>Type of Forum</th>
<th>Standard for Regulations of Speech by Content</th>
<th>Standard for Regulations of Speech by Time, Place or Manner</th>
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<td>Traditional public forum (or private property).</td>
<td>Strict scrutiny: the regulation must be necessary and narrowly tailored to serve a compelling public interest, and must be the least restrictive means of doing so.</td>
<td>A form of intermediate scrutiny: the regulation must be narrowly tailored to serve a significant public interest, and it must leave open ample alternative channels of communication. “LRM” does not apply. Instead, the government need only show that the regulation serves a substantial public interest that would be served less effectively without the regulation. See <em>Ward v. Rock Against Racism</em> (1989).</td>
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<td>Designated public forum. (In its broadest form, the DPF differs from the TPF only in that the government may close an DPF. The government may also restrict a DPF to certain neutral categories of users, causing it to function much like a limited public forum. See below.</td>
<td>A regulation of speech in a limited public forum is valid if it is reasonably designed to preserve the forum for its intended purposes and neutral as to point of view.</td>
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*New traditional public forums?* We are not likely to see new TPF’s, in light of the Court’s statement in *ISKCON v. Lee* (1992) that the government does not create a traditional public forum by inaction.

*Symbolic conduct.* This kind of conduct is protected under *United States v. O’Brien* (1968). Under this test, a law is constitutional if: (1) it rests on a legitimate governmental power (such as the power to raise an army); (2) it promotes an important or substantial public interest; (3) the interest it serves is unrelated to the suppression of expression; and (4) the incidental restriction on expression is no greater than is essential to promote the government’s interest. In later cases, the Court has observed that this test is essentially the same as the test for regulations of speech according to its time, place or manner (see above).
**Defamation.** The First Amendment does not protect certain forms of defamation. See *New York Times Co. v. Sullivan* (1964). The law in this area is fairly complicated, and depends on several factors.

**Plaintiff is a public official.** If the plaintiff is a public official, he or she cannot recover damages for a defamatory falsehood relating to him or her unless he or she shows by clear and convincing evidence that the statement was made with “actual malice” — that is, with knowledge that it was false or with reckless disregard as to whether it was false or not. “Public officials” includes candidates for public office. It also includes individuals fairly far down the public pyramid, although it does not include *everyone* who works for the government.

**Public figures.** The standard for public officials also applies to so-called “public figures,” that is, individuals who for all purposes or for limited purposes become involved in public controversies. (By the way, some surmise that there can never be an “involuntary” public figure. That is, some believe that a person can become a public figure only by voluntarily inserting him or herself into the maelstrom of public opinion.)

**Private plaintiff, matter of public concern.** If the plaintiff is *not* a public official or figure, but the story is a matter of public concern, the standard for liability for compensatory damages (as opposed to presumed or punitive damages) need not be that of *New York Times*. Instead, it can be whatever a state wants, so long as it isn’t strict liability. In these circumstances, however, the standard for presumed or punitive damages remains *New York Times*. See *Gertz v. Robert Welch, Inc.* (1974).

**Private plaintiff, not a matter of public concern.** If the plaintiff is *not* a public official or figure, and the story is *not* a matter of public concern, the state *may* be able to hold defendants strictly liable for false and defamatory statements. See Justice White’s concurrence in the judgment in *Dun & Bradstreet v. Greenmoss Builders* (1985). I say that the state “may” be able to adopt this standard because the Court did not expressly resolve this issue in *Dun & Bradstreet*. In that case, however, the Court *did* hold that a private plaintiff bringing an action for speech that is not a matter of public concern need not meet the standard of *New York Times* to obtain presumed or punitive damages. The Court did not state what the standard must be, however. Presumably the plaintiff would have to establish some form of fault to obtain punitive damages. Another unresolved issue is whether a state must require a private plaintiff to establish falsity where the statement in question does not implicate a matter of public concern. There is some indication that the answer to this question might be “no.” In other words, the common law may survive in this context, if a state so desires, leaving the defendant to make an affirmative defense of “truth.”

**Fighting words, etc.** Technically, the government may punish fighting words, but such prosecutions often fail because of vagueness in the statute. In *Cohen v. California* (1971), the Court described fighting words as “personally abusive epithets which, when addressed to the ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent
reaction.” The most famous case of “fighting words” was *Chaplinsky v. New Hampshire* (1942). In *Hustler Magazine v. Falwell* (1988) and *Snyder v. Phelps* (2011), the Court gave wide berth to speech on matters of public concern over against civil actions for intentional infliction of emotional distress. Because the First Amendment protected the speech at issue in both cases — notwithstanding its offensive nature — liability could not attach. (Note: We do not discuss *Hustler* and *Snyder* every year.)

*Freedom of association.* Under the opinion of the majority in *Roberts v. Jaycees* (1984), the government may not require a private expressive association to accept members it does not want, unless the requirement serves a compelling public interest and the government lacks a significantly less restrictive means of accomplishing its objective. In practice, this analysis becomes an assessment of whether requiring an association to accept a particular member would impose a sufficiently heavy burden on the association’s ability to express itself to justify protection under the First Amendment. In *Roberts*, the Court was skeptical as to how requiring the Jaycees to admit women would impair its message.

We talked a little about Justice O’Connor’s separate opinion in *Roberts*. Under her approach, when assessing a statute or ordinance that threatens to interfere with the membership of a private association, one would first ask whether the group is predominantly commercial or expressive. If it’s predominantly commercial, the government may regulate its membership as long as the regulation satisfies minimum rationality. If it’s predominantly expressive, she appeared to argue that the government may not regulate its membership at all, or at least not without satisfying strict scrutiny.

*Commercial speech.* This is a form of “lesser protected” speech. There is no single definition of commercial speech. Many people look to the factors set forth by Justice Marshall in *Bolger v. Youngs Drug Products Corp.* (1983): (1) whether the material is conceded to be an advertisement; (2) whether it refers to a specific product; and (3) whether the speaker has an economic incentive for the speech. The test for regulation of commercial speech is the somewhat lenient one of *Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980). Under this test, one first asks whether the speech concerns lawful activity and is not misleading. If it concerns unlawful activity or is misleading, the First Amendment doesn’t protect it and the government may prohibit it outright. If it concerns lawful activity and is not misleading, the next question is whether the government’s interest is substantial. If it is substantial, one next asks whether the regulation “directly advances” the government’s interest. If it does directly advance that interest, one next asks whether the regulation is no more extensive than necessary to serve that interest. Note that the Court has held that “least restrictive means” is not part of *Central Hudson*. See *Board of Trustees v. Fox* (1989).

Keep in mind that, under *Central Hudson*, the government may not isolate commercial speech for negative treatment on a ground that applies equally to non-commercial speech. See *Cincinnati v. Discovery Network, Inc.* (1993). This arguably repudiates the Court’s much earlier decision in *Railway Express Agency, Inc. v. City of New York* (1949).
Political campaigns. We (briefly) discussed the intersection of speech, money and politics, using Citizens United v. FEC as our vehicle. Under the statute at issue in Citizens United, neither a corporation nor a union could use money from its general treasury to run ads in the electronic media within 30 days of a primary or 60 days of a general election in which they said the name of a candidate for federal office. Although Citizens United argued that the statute was invalid as applied to what it had in mind, the Court was uncomfortable resolving the case on such narrow terms and declared the provision invalid on its face, meaning that strict scrutiny applies as much to a regulation of speech by a corporation or union as it would to a comparable regulation of speech by an individual.

Obscenity. The basic test for obscenity is that of Miller v. California (1973). This test has several parts: (a) whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest (AP — CCS — TAAW — PI); (b) whether the average person, applying contemporary community standards, would find that the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law (AP — CCS — DOD — POW — SCSD); and (c) whether the work, taken as a whole, applying the standard of a reasonable person (not community standards), lacks serious literary, artistic, political, or scientific value (RP — TAAW — LSV). The Court has given examples of the kind of “sexual conduct” that the state can define for purposes of part (b) of the test. Also, independent appellate review must be available when necessary to hear constitutional arguments relating to the status of speech as obscene or protected. Please also bear in mind that, in a criminal prosecution for obscenity, the government must establish that the defendant knew the contents of the work at issue.

Child pornography. The test for child pornography is much more lenient, from the government’s point of view, than the test for material not involving depictions of actual children. The trier of fact need not determine that the material appeals to the prurient interest of the average person; the state need not require that sexual conduct be portrayed in a patently offensive manner; and the work need not be considered as a whole. But the material must involve a live performance or some kind of visual reproduction of such a performance (such as a photograph). The forbidden acts must be defined with sufficient precision to put people on notice of what is forbidden. The Court has not fully resolved whether a depiction of a child engaging in sexual conduct would be protected if it had serious value. See New York v. Ferber (1982).

Zoning adult entertainment. A majority of the Court finally came up with a rationale for allowing the zoning of adult entertainment according to its content in Renton v. Playtime Theatres, Inc. (1986). Under Renton, the Court evaluates facially content-based zoning of adult entertainment establishments according to the test for content-neutral regulations set forth in United States v. O’Brien (1968), on the ground that the government does not seek to suppress the speech itself, but only to regulate its unwanted “secondary effects,” such as diminution in the value of property. The Court also held in Renton that a municipality need not conduct its own empirical study to justify such an ordinance, but instead may rely on the studies of others. Keep in mind the difference between “secondary” and “primary effects” of speech. In Boos v. Barry...
(1988), the Court said that regulation of speech to prevent embarrassment or offense would be regulation according to speech’s primary effect, and would not qualify for Renton. (Note: The Court’s decision in Reed v. Town of Gilbert (2015) may ultimately undermine the logic of Renton, but the Court did not discuss Renton in Reed.)

**Pacifica.** The standard of review for regulations of the broadcast media seems to be more lenient than the standard of review for books, movies, or speech in the park. This reflects a variety of considerations — the scarcity of frequencies in the electromagnetic spectrum (although this is becoming irrelevant), the ease with which children can see or hear indecent language or imagery on these media, and the broadcast media’s long history of regulation. See FCC v. Pacifica Foundation (1978). The Court was careful to distinguish cable from the broadcast media in United States v. Playboy Entertainment Group Inc. (2000). The First Amendment appears to protect the Internet as much as a book or magazine. See Reno v. ACLU (1997). The Court appears to have said something similar about video games in Brown v. Entertainment Merchants Association (2011). (Note: We do not discuss Pacifica or Playboy every year.)

**Establishment.** The main test for evaluating laws attacked as establishments of religion is that of Lemon v. Kurtzman (1971). Lemon has three prongs, each of which the law must satisfy: (1) it must have a secular purpose; (2) its primary effect must be neither to promote nor to inhibit religion; and (3) it must not foster excessive entanglements between church and state. Although the second prong of Lemon appears to contemplate an empiric investigation, the modern Court emphasizes more than anything else the formal neutrality of the government’s policy — that is, whether the government literally treats similarly situated religious and non-religious entities dissimilarly. See Zelman v. Simmons-Harris (2002); Mueller v. Allen (1983). In Zelman, the Court upheld a program adopted by the State of Ohio whereby vouchers were made available to poor families in Cleveland to send their children to participating private schools, which could be religious or secular. Because (according to the Court) the parents had a “genuine and independent private choice” (“GAIPC”) to send their children where they wanted, because the state did not define recipients of its aid by reference to religion (“DR”), and because parents had a meaningful secular option (“MSO”), the program was not an establishment of religion. As noted above, the Court has put increasing emphasis on formal neutrality as a means of resolving cases arising under this clause.

**Free Exercise.** Under Employment Division v. Smith (1990), neutral rules of general applicability need only be rational, even if they impose incidental burdens on free exercise. But there are a few exceptions to Smith. First, a law must be truly neutral and generally applicable. If it makes a secular exception, but not a similarly situated religious exception, one could plausibly argue that it is not neutral and generally applicable. Second, no law may regulate pure belief. Third, laws that impair “hybrid” rights, such as a combination of free exercise and free speech, will still be subject to strict scrutiny. Finally, there’s something left of Sherbert v. Verner (1963) (which appeared to apply strict scrutiny), but not much. Perhaps Sherbert still controls for benefits for the unemployed, or for cases where individualized assessments are feasible. In addition, the Religious Freedom Restoration Act of 1993 (“RFRA”), which purported to override
Smith and which the Court struck down in part in City of Boerne v. Flores (1997), appears still to apply to the federal government. The standard under RFRA is strict scrutiny, including a requirement that the government adopt the “least restrictive means” to achieve its goal. In striking down the part of RFRA that applied to the states, the Court said that Congress had exceeded its power to enforce the substantive provisions of the Fourteenth Amendment.

Congress rejoined these issues with the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”). This statute re-establishes strict scrutiny as the operative test for policies by states and local governments, but it is limited to actions that: (1) are supported by federal funding or substantially related to interstate commerce; and (2) pertain to the use of land or institutionalized persons. The constitutionality of RLUIPA is not entirely certain, but the Court has upheld the aspect of RLUIPA pertaining to institutionalized persons as not constituting an establishment of religion, at least not on its face. See Cutter v. Wilkinson (2005).

Courts do not like to assess the centrality of a particular practice to a religion, nor will they assess the wisdom of beliefs. But they will investigate the sincerity of beliefs, if necessary.