

Constitutional Law II Outline

Fall 1999

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1) Theories of Judicial Review -- Methods of Interpretation.

a) **Interpretivism** - literal reading of the Constitution. "Interpretivism position comprehends theories of review grounded in literalism, originalism and neutrality of principle."

i) **The Textualist Approach** (also known as literalism)

(1) This is the idea that the court should **look at the words and rely on the text**. **Note:** The wording of the constitution is often imprecise. For example, what is Equal protection? This approach should be a starting point though. Of course, you look at what the constitution says. **"The strict constructionist school instructs that documental text is the departure, and whenever possible the termination point for constitutional review."**

ii) **The Historical Approach** -(also known as originalism)

(1) In trying to interpret the judge should look at what the framers intended. Look for evidence of what they said, thought and did. Bitensky feels that although this is relevant, it is not dispositive

(2) There is a **narrow** and a **broad** originalism approach.

(a) **The narrow approach**. The judge is supposed to interpret the language the same way that the framers would have interpreted it in their day.

(b) **The broad approach**. The judge tries to interpret the language by using the general principles that the framers would have used.

iii) **The Structural Approach**

(1) **Looks to the structure of the American government:** Separation of Power, representative democracy. Try to glean from the structure those values that should inform the judiciary's job. All kinds of inferences and values can be implied and you can end up with conflicting inferences.

(a) **Note:** In Baron, *infra*, the justices used structuralism. The Court was hung up on dual federalism, which informs Marshall's interpretation of the 5th Amendment's takings clause.

b) **Noninterpretivism** - posits that the Constitution should be read relative to current social and economic circumstances.

i) **Criticism:** Judges attribute to the Constitution "value choices never actually pursued to public consensus." The judiciary works in the realm of ideas rather than ideology. **This approach suggests the judiciary should endorse a system which develops rights and liberties, even if not enumerated and therefore assumes the risk of trading in natural law.**

ii) **The Values Approach**

(1) Interpreting the constitution the justices should **look for values** not only in the constitution itself but also **outside the constitution**. They should look at the **declaration of independence**,

social traditions, and *morality*.

(2) **But what about judicial subjectivity, imposing personal views on the Constitution?**

She suggests there are good reasons for using this approach. No judge can completely divorce herself. You are never completely neutral anyway, so acknowledge it and do it in a responsible way. Also, the const itself sees to invite this.

(a) **Example.** The 9th Amendment says *the presence of enumerated rights should not be taken to mean there are not other rights taken by the people*. Invites to find un-enumerated rights, those that are not textual. What's more, so many of the rights are invitational -- Who the hell knows what they mean? Invitation to fill these meanings with extra-constitutional sources.

(i) **Note.** The 9th A, although it is not a source of rights, it provides textual justification for finding other rights.

(3) **Natural Law** was used early on. The idea that there is law that emanates from divine origins from the social compact *the sole purpose of this law is for the flourishing of mankind*. It trumps all other law.

2) **Introduction to Individual Liberties**

a) Individual liberties are mostly *addressed in the Amendments to the Constitution*. The original text contains only a few personal liberties.

i) **Examples of textual provisions protecting rights.**

(1) **Art I § 9** - writ of habeas corpus

(2) **Art I § 9,10** - *prohibit bills of attainder* --A law that would punish a person or group of people (attempt by leg to act like judiciary - can't do that). *Prohibition on ex post facto laws* - subjects someone to criminal liability for conduct that at the time it was engaged in was legal

(3) **Art IV § 2** - *P & I clause*

ii) There are several *reasons* why the original text contains only a few personal liberties.

(1) **Government of Limited Powers.** The framers thought they were creating a *government of limited powers*. The federal government can't do anything unless authorized by the Constitution - it was confined to those powers. Therefore, the government was without the authority to violate basic liberties.

(2) **State Constitutions.** They *believed in state constitutions*, they thought they would "do that job."

(3) **Problem with un-enumerated rights.** They thought by enumerating those rights they might deprive people of important un-enumerated rights.

iii) **Concern with absence of rights.** When the Constitution was adopted people were uneasy about the absence of express provisions setting forth rights. Some state requested that a BoR be added.

(1) **Consequence:** In 1791, the first Amendments had been added. These are the BoR's. (9th and 10th do not really set forth personal liberties, however.) 17 more Amendments have been added since, including the civil war Amendments, 13, 14 and 15.

(2) **Note:** The Bill of Rights, as well as the Due Process Clause are *negative rights* that protect people from interference from the government, not positive rights that guarantee people assistance from the government. This means that the government promises not to do something to you as opposed to doing something for you.

(a) **Examples.**

- (i) **Negative Rights:** The First amendment promises that Congress will not abridge freedom of speech.
- (ii) **Negative not positive:** Women have a fundamental right to abortion but not abortion funding.
- (iii) **Positive:** The seminal decision of Brown v. Board of Education entailed busing, redistricting, and having the government do all kinds of things for us.
- (iv) **Bottom line.** Negative rights are a little bit of an overstatement. Our constitution is different from other constitutions. The Italian constitution mainly consists of positive rights. Our constitution is almost entirely civil and political rights. Some of those rights are social and economic rights in other constitutions.

b) **Against whom does the Bill of Rights protect?** What entity does the right in question protect? The Individual, the national government, state, municipality, what?

i) **Bill of Rights not applied to the states - *Barron v. Mayor of Baltimore*.**

(1) **Controversy.** Except for one provision in the Amendments, Constitutional liberties do not directly protect individuals against other individuals. This is the 13th Amendment, which is the prohibition against slavery. Also, it has been clear that Constitutional liberties do protect people from the conduct of the federal government and its officers. What has been controversial is whether Constitutional rights protect people from encroachment by state government's and their agents.

(2) ***Barron v. City Council of Baltimore*** represents the pre-civil war view of this question. City was doing street construct and silt was built up by wharf. Barron argues this conduct violated the 5th Amendments takings clause. Private property cannot be taken unless there was just compensation. Of course it restrained the federal government but plaintiff argued the state of Maryland should be restrained as well. *Held*, the 5th Amendment does not apply to Maryland. The BoR does not restrain the states. The states could violate civil and political liberties. The Court said state government's were close to the people and BoR is not needed. Also, dual federalism. It is the idea that the federal government and state governments co-exist and they really shouldn't be interfering with each other.

3) **The Bill of Rights and The Civil War Amendments.** These are the 13th, 14th, and 15th Amendments to the Constitution. The 13th is the prohibition against involuntary servitude. The 14th contains three major limits on state power. §1 - the citizenship clause - "all persons born ? " The Privileges OR Immunities Clause, the DPC and the EPC. The 15 Amendment guarantees the right of citizens to vote regardless of race, etc.

a) **Pre-Civil War period.** In pre-civil war world the BoR's do not apply to the states. (See for e.g., Barron v. Baltimore, *supra*). Post-civil war we have the adoption of Civil War Amendments, which clearly apply to the states. The 14th amend PoI clause raises the question whether federal rights should also restrain the states. Those federal rights that are not enumerated, other federal rights. **What were the drafters referring to, what are PoI's?** Slaughter-House, *infra*, provides a clue to this question.

b) Initial narrow interpretation of the 13th and 14th Amendments -- *The Slaughter-House Cases*.

i) 13th - addressed to the liberation of the slaves, not to butchers. 14th EPC and DPC. EP meant to protect blacks and DP does not protect this restraint of trade

(1) **Note:** The Slaughter-House court was later overruled on all of these matters. What has never been overruled is what the court did with the PoI clause.

ii) **Significance of Slaughter-House.** P's argued their right to carry on a trade was a federal right that the states could not abridge. Was a PaI of a US citizen? The court rejected this argument and engaged in a textual analysis. The first sentence of the 14th Amendment creates two kinds of citizenships. The Court said this means there are rights of state citizenship and national and they are different. (**Note:** This seems like dual federalism creeping in). When the PoI clause says no state shall abridge a citizen of the US? the kind of rights the clause is referring to is the rights flowing from national citizenship and only those (right to go to DC, protection on high seas, etc. These are narrow, minor sorts of things.) Not the right to protect livelihood that was for the states. Most rights are for state citizenship. ***This means the court destroyed the PoI clause, rendered it a nullity.*** Folks, it protects nothing. Sure there are lots of federal rights, but those are not protected against the PoI clause. It also defeated for the moment the idea that the 14th Amendment reversed the rule of *Barron v. Baltimore*.

(1) We are arguing that the BoR applies to the states via PoI Clause and that there is a federal right at stake.

iii) **Significance of Slaughter-House today in question.** PoI clause could not be used to apply the BoR to the states. *Sans v. Roe* appears to revive the 14th Amendments PoI clause. The court struck down Ca. law that had required new residents (, 1 year) their welfare benefit level had to be the same as the state they came from. This was detrimental. Court struck down and articulated the law violated the right of a newly arrived citizen to the same PaI enjoyed by other citizens of that state. This right flows from the new resident status of California and also as a citizen of the U.S. The court seems to say there is a real federal right emanating from the PoI clause. The right in this case is that of a newly arrived citizen to enjoy the same things that Californians do.

(1) **Summary.** After Slaughter-House the PoI clause could not be used to argue that the BoR applies to the states. Slaughter-House until 1999. Perhaps the court is trying to revive PoI. Slaughter-House stands for the fact that the PoI clause cannot be a source of substantive federal rights. Also, the case stands for the fact that the BoR cannot restrain the states. In *Sans* the justices used the clause to create a federal substantive right.

c) Litigants got the idea that ***the Due Process Clause could be a vehicle*** for applying the BoR's to the states. That is, that the DPC incorporates the BoR so the states cannot abridge them.

i) Two Types of Due Process.

(1) **Procedural.** The procedures or safeguards that government must observe before depriving you of life, liberty or property.

(2) **Substantive.** Government must have a sufficient reason for depriving you of life, liberty or property.

Review: States shall not abridge the P and I → what are these? Maybe means federal rights, and therefore that the BoR are applicable to the states. This was argued by the butchers in the Slaughter-House cases. Court says the clause only means the "few puny rights" that the people had anyway. Left with the ruling the BoR did not apply to the states in spite of the Civil War, the Amendments and civil rights legislation meant to protect people against the states.

But may be it isn't such a dead letter - *Sans v. Roe* (did not overrule S-H so be careful) but the case did find the existence of a federal right in the P o I clause.

Left with the question can the PoI clause be a source of federal rights that the states cannot abridge?

Let's go back to the early 20th Century. Can the BoR be applied to the states? Litigants started to get creative and look for other language in the 14th amend that would argue that the BoR are applicable to the states. They focused on the DPC. Nor shall any state deprive any person of life, liberty or property without DP of law. Very expansive language. Which rights, if any, could be applied by virtue of the DPC against the states? Series of cases that deal with this issue. This is called the Incorporation Debate. Can the DPC incorporate the BoR so that they are enforceable against states? This area developed in the context mostly in criminal procedural protections contained in the BoR. Early on, the Court held that certain substantive first Amendment rights are also incorporated in the DPC so to be applicable to the states. The right of Free Speech, Religious exercise and the right to peaceable assembly.

4) **The Incorporation Doctrine and the debate over which liberties are incorporated.** The debate focuses on questions regarding our *history and framers' intent, federalism and whether or not there should be judicial activism or restraint*. It has been argued that the 14th Amendment Due Process Clause incorporates all of the Bill of Rights in toto, but the Court has consistently rejected this view. (See for e.g., *Adamson v. California, infra*). Instead the Court has held that the limitations contained in the Bill of Rights restrict the states only on a selective basis. In essence, this means that the Bill of Rights is incorporated by the 14th Amendment only to the extent the Court is convinced on a *case-by-case basis* that the protections and rights in question are so *essential to fundamental principles of due process of law* as to be preserved against both federal and state action.

a) **Unenumerated Rights.** If a right safeguarded by the first 8 amendments may also be guarded against state action, it is not because the right is enumerated in the first 8 amendments, but because they are of such nature they are included in conceptions of due process of law.

b) **Application of the Bill of Rights to the States.**

i) **Selective incorporation/fundamental rights approach -- *Palko v. Connecticut***

(1) **Test applied.** The *test* is whether the BoR guarantee in question is "of the *very essence* of a *scheme of ordered liberty*" and whether it is one of those "*fundamental principles of liberty and justice* that lie at the base of all of our civil and political institutions."

(2) **Theoretical standard.** The theoretical standard is a right that is where you *couldn't imagine a system of justice without that right*. In other words, the Court is saying the *right in question must be universal*. There is no real system of justice without it. This is the court using Natural Law concepts to decide which of the BoR is incorporated.

(a) **Note:** this leaves the Court with a lot of latitude to determine which rights will be incorporated. The right as presented in this case is not *fundamental* or *universal* and shouldn't be incorporated. Just a trial "free from error." Double jeopardy rights are not being implicated.

(b) **Note also:** this ruling was later overruled. *Benton v. Maryland* (1969).

(3) **So, where are we now?** Selective Incorporation is the approach and the Court uses Natural Law standards.

(4) **Remember:** The Bill of Rights does not set *outside limits* on the concept of "liberty"

either. See, for e.g. *In Re Winship* proof **beyond a reasonable doubt** is among the essentials of due process and fair treatment. (Binding on state trials even though no specific constitutional provision).

ii) Total Incorporation -- *Adamson v. California*

(1) **Black and Douglas dissent** - Black was a proponent of Total Incorporation. He said selective incorporation using Natural Law principal "carte blanche" means that judges can impose their personal views and this gives too much power to the judges. Judges can dictate to the states. Black also argued an originalism argument the proponents thought it meant total incorporation of the BoR. The history is conflicting with respect to the drafters.

(2) **Note: Griffin v. California** (1965) overruled Adamson.

(3) One of the corollaries for total incorporation is that only the BoR would be incorporated and no other rights. This is Black's view in this very famous dissent.

(4) **Total Incorporation Plus.** Rutledge and Murphy say we should have total incorporation +. Natural Law can be used to find other rights.

(5) **Frankfurter** - let's just use natural law. This is a subjective exercise. Because NL has this long history it avoids judicial subjectivity even more than total or selective incorporation. The standards are *whether procedures against the accused offend the canons of decency that offend English people*, etc.

(a) First, he relies on textualism. He says the 14th DPC does not say anything about incorporation. That this would go against the drafter's intent. Also, he relies on originalism. There is no evidence the drafters intended incorporation. He also invokes structuralism by saying the incorporation route you are straight-jacketing the states by imposing 18th century notions of justice on state procedures, so states have no leeway to develop their own laws.

iii) The Modern Approach.

(1) **Introduction.** The Palko/Adamson approach was law until Duncan. This approach was selective incorporation of the rights of the BoR. Not because they are in the BoR but because they meet the NL standards of fundamental-ness and universality. Well, all of this leads to *Duncan v. Louisiana* → the modern court's approach to incorporation.

(a) **Prior to Duncan - the selective incorporation approach used Natural Law standards of fundamental-ness and universality to find unenumerated rights.**

(b) **The test today -- *Duncan v. Louisiana*.** Any guarantee which is "fundamental in the context of the [judicial] processes *maintained by the American states*". The 14th Amendment guaranteed the right to a jury trial in state criminal prosecutions for which the potential sentence was two years in jail. Prior to Duncan, the Selective Incorporation approach used Natural Law standard of fundamental-ness and universality to find unenumerated rights.

(c) The Court carried over the Palko/Adamson approach of selective incorporation in Duncan. Instead of the right having to be universal (no real system of justice without it), now in order for the right to qualify it has to be *essential to the American system of justice*.

(i) **Note:** Footnote 30 - Lo. Argued against selective incorporation. If the DPC was held to incorporate the 6th Amendment then states would be forced to comply with all of the decisions of the Supreme Court interpreting the 6th and that this really intrudes on Federalism.

1. **Jot-for-jot theory.** This idea, that if you incorporate BoR you are also incorporating the Supreme Court precedents is called the **jot-for-jot theory**. The Duncan court accepted jot-for-jot. When a right is incorporated so too are all of the US Supreme Court interpretations of that right. It creates consistency, so the 6th Amendment right to a jury trial will be the same throughout the United States. Are there any downsides? It constrains state legislatures and courts. Another difficulty is that over time as the Supreme Court wants to accommodate the states it will interpret the rights in the BoR in a diluted form and warp those rights by making them less strong than they should be to accommodate state procedures. Anomaly on jury trial right.

a. **Example.** In other instances, the Court has held that some provisions of the Bill of Rights apply differently to the Federal Government. In **Williams v. Florida**, the Court held that states need not use 12 person juries in criminal cases. In both **Apodaca v. Oregon** and **Johnson v. Louisiana**, the court upheld the constitutionality of **non-unanimous jury verdicts in state criminal cases**, even though jury verdicts in federal criminal cases must be unanimous.

c) **Conclusion.** Proponents of **selective incorporation won the battle but Black won the war** because in effect we have total incorporation. One last point - what happened to the idea that you could incorporate rights not even in the BoR? The court embraced the idea that such non-specified procedural rights could also be part of the DPC (un-enumerated rights), and are enforceable against the states and the government. See, for e.g., in *Re Winship*. It is a DP requirement that each and every fact that constitutes an element of the crime charged must be proven by beyond a reasonable doubt. The 9th Amendment says that the enumeration in the Constitution of rights is not meant to deny the existence of other constitutional rights. It indicates there are other rights that have constitutional status.

Incorporated	Not Incorporated	Undecided
First Amendment Establishment Clause, Free Exercise Clause, Free Speech Clause, Press, Assembly and Religion	Second Amendment Right to Bear Arms	Third Amendment Right to Quarter Soldiers
Fourth Amendment prohibition against unreasonable search and seizure, warrant clause and exclusionary rule	Fifth Amendment Right to a Grand Jury indictment	Eight Amendment Excessive Fines prohibition
Fifth Amendment Double Jeopardy Clause, protection against self-incrimination, just compensation	Seventh Amendment Right to a Jury Trial in Civil Cases	

Sixth Amendment Speedy and public trial, jury, notice of charges, Confrontation Clause, favorable witness, assistance to counsel		
Eight Amendment excessive bail and cruel and unusual punishment		

5) **Substantive Due Process**

a) **Introduction.** Conceptually, we are switching from the issue of whether the BoR can be applied to the states to the issue of whether the DPC can serve as a restraint on the substance of legislation. I.e. whether the DPC can serve as a source of substantive un-enumerated rights, not procedural ones like In Re Winship, which state (or federal) legislation cannot infringe.

i) **The Origins.** There was the idea there was a natural right to possess property or pursue an occupation. A lot goes back to John Locke. In S-H, the butchers argued that the NO monopoly was depriving them of their opportunity to pursue a trade. The Court said this is not part of DP. 1870's say historical forces at work that made S-H a problem. The development of corporations, the Industrial Revolution, ideological developments, such as the materialization of Adam Smith's Laize-Fair ideas and Spencer's Social Darwinism. People wanted to assert their rights to property, etc. In *Munn v. Illinois*, although the Court upheld state laws impinging on the ability to contract, in dicta the court indicated a new willingness to exam the substantive legislation that impinged on economic rights. The composition of the Court was undergoing change. In *Allgeyer v. Louisiana* we have a breakthrough. The Court struck down a state statute in substantive DP grounds. They thought it unreasonably interfered with a fundamental DP right to contract. Ushered in the era of economic substantive DP that would last from 1897 to 1937. The Court began substituting its ideas of what is good economic policy for that of the legislatures.

(1) **Perspectives.** Lochner was decided in 1905. During the first two decades of the 20th century the court was more sympathetic to the commerce-prohibiting technique. **1937 - NLRB v. Jones & Laughlin Steel** - manufacturing operations "substantially affects interstate commerce" **1937 - West Coast Hotel v. Parish overruled Lochner.**

b) **Steps in the fundamental substantive due process analysis.**

i) **Identify which government is acting -- federal or state.** If the state is acting, the 14th Amendment Due Process Clause applies, else the 5th Amendment applies.

ii) **Describe the interest abridged.** This is important to distinguish between economic, social and a fundamental liberty interest.

(1) **Example.** State X imposes a two-year training requirement for drivers of large trucks, a person challenging that law will argue that his or her interest in pursuing an occupation has been abridged.

iii) **Place the abridged interest in the Constitution,** i.e. assert that it is an aspect of liberty under the appropriate due process clause.

(1) **Example.** Driving a truck or pursuing an occupation is an aspect of liberty under the ___ due process clause.

- iv) **Ascribe constitutional weight to the interest abridged - is it a low level interest or a fundamental right?** Look to the Supreme Court cases to see whether the Court has accorded a specific interest the status of a fundamental right.
- v) **Set the appropriate level of scrutiny** - if a fundamental right then apply strict scrutiny, generally. Otherwise, rational basis.
- vi) **Balance the abridgement of the individual right against the proffered government interest.** Be as specific as possible when articulating the right abridged and the specific governmental interest underlying the law.

Rational Basis Review

Low level liberty interest	Legitimate government interest (within enumerated power of Congress or 10 th Amendment police power of state. <i>(Williamson v. Lee Optical)</i>)	Rationally related (arguably advances the goal sought). The goal need not be the actual purpose of the legislation, a conceivable, legitimate purpose is sufficient. <i>(Caroline Products)</i>	Stays with plaintiff. What happens to plaintiff's burden when the court applies rational basis with teeth or fangs?

Strict Scrutiny Review

Fundamental rights	Compelling government interest (very important government goal) <i>Adarand v. Peña</i>	Narrowly tailored (directly and narrowly addresses the problem - is not overbroad. Necessary to achieve means the least restrictive and least discriminatory or else it is not necessary.	Shifts to government after plaintiff has shown an abridgement of the fundamental right.

c) Economic Regulations and Substantive Due Process.

i) **Introduction.** The Supreme Court initially rejected attempts to use the Due Process Clause to protect economic rights (*see*, for e.g., Slaughter-House, *infra*, where the Court rejected the Butcher's argument that the monopoly deprived them of their right to practice a trade). Bradley, dissenting, interpreted the words "liberty" and "property" as protecting a right to practice a trade or profession, and believed arbitrary interference of these rights by the government violated the 14th Amendment. This view soon became the majority view. In *Allgeyer v. Louisiana*, the Court moved away from speaking only in dicta about due process as a limit on economic regulations, to invalidating a state law based on it. Allgeyer expressed the key themes of economic substantive due process until 1937 - to live and work where you want, to pursue a livelihood and to enter into contracts.

ii) **The Lochner Era.**

(1) *Lochner v. New York*. NY says this is reasonable legislation to carry out its police powers.

This law is impinging on our liberty to contract is what the baker's argue.

(a) The Court has two *separate lines of analysis*.

(i) **The legislative ends analysis.** The court will look at whether the state law being challenged actually *further a police power purpose*.

1. **What is a "police power purpose?"** Court says it must *serve the "total" public good*. The state law in question must not be favoring any particular group at the expense of other groups, nor must it be designed to re-distribute the wealth. Limiting the working hours of bakers had no relationship to public health.

a. **Note:** The court is responding to Laize-Fair economics here. The court is responding to groups that are weak like women and children.

(2) **The means/end relationship.** In examining the state law, the court is to ascertain the problem as follows - if the end is within the police power, then the court must look at *whether the means chosen to fulfill that end is reasonable, or "real and substantial."* Whether the means chosen is reasonable *for carrying out that end*. The court said even assuming that this NY statute served a legitimate police power the means chosen do not carry out that end b/c restricting hours will not improve their health or of the community at large. This standard appears to be very deferential to state law.

(3) **Harlan's dissent** - the working conditions of the bakers were miserable. He says this is a legitimate exercise of the law to promote health and the means chosen was reasonable. The majority, in effect, is applying strict scrutiny - a standard whereby very few state statutes can survive - there has to be compelling reasons for the statute. Although, the language is the rational relation test (reasonableness, etc) the majority is saying state only needs to show reasonable reasons, but what they are actually saying is compelling reasons. *Harlan is actually applying the rational relation test.*

(4) **Holmes dissent** - the justices are *substituting their view of economic policy for the judgment of the legislatures that do not buy into those theories*. He rejected the premise that the constitution should be used to limit government regulation and protect laissez faire economics. *"The Fourteenth Amendment does not enact Herbert Spencer's social statitics."* A constitution is not intended to adopt a particular economic theory."

iii) **Lochner Applied.** Other Lochner-izing decisions. (Freedom to contract v. valid police power)

(1) **Muller v. Oregon** (1908) court upheld state law more than 10 hours per day. Women are a vulnerable group. Regulating hours worked by women was justified because of women's physical structure and maternal function.

(2) **Bunton v. Oregon** (1917) 10-hour max day for both sexes.

(3) **Coppage v. Kansas** (1915) classic Lochner state statute struck down to prohibiting yellow dog contracts. Court employed its ends analysis, not within the police powers of the states to equalize bargaining power of employees.

(4) **Adkins v. Children's Hospital** struck down minimum wages for women and children. The Court stressed the growing equality of women, and the law did not serve a valid police power purpose.

(5) ***Tyson and Brother v. Banton***, statute struck down regulating the price of theatre tickets. An ends analysis, not within police power. Not an industry effected with the public interest. Only a business effected with the public interest may be subject to price controls. These price controls as applied to this industry violated the liberty to contract. Violates the ends analysis prong, not a valid means. This case was distinguished from *Munn v. Illinois* because it effected the public interest and price controls for grain shortage did not.

(a) **Note:** Tyson was one of a line of cases that said in order to impose price controls on a business without running afoul of economic substantive DP, the business must affect the public interest.

(6) ***Weaver v. Palmer Bros.*** (1936) Struck down a statute, which forbids making bedding out of shoddy. It was thought this was not healthy. Not reasonably related to protecting the public's health and therefore violates the shoddy business fundamental right to contract. It failed the means/end prong of the reasonable relationship analysis.

(a) **Note:** Some of these cases are ominous because it signals the weaknesses of the doctrine. Troubles were also societal - the depression. People wanted legislation to save the nation.

(7) Criticisms

(a) The Court's ***commitment to Laissez Faire economics*** was misguided and favored some (employers and corporations) over others (workers and consumers).

(b) Inconsistency

(c) Judicial Activism

Review: Economic Substantive Due Process is an approach where the court substitutes its view of what should be the countries economic and social policy. The court does this by granting the claims of those who argued that protective economic and social welfare laws violate substantive DP rights of contract and property. The courts were imposing laissez-faire economics and social Darwinism on the nation. *Lochner* advance a two-part test for determining whether a law should be struck down. ***First, it was an ends test → the court would scrutinize the legislation to make sure the end was proper***, i.e. within the state's police power - a legislative end that served the total public good. Caveat - vulnerable groups could be singled out. Now, the second part of the test was that ***assuming a proper end, the question would arise "Is the means chosen to achieve the end reasonably related to carrying out that end?"*** If either answer was no, then the statute would be invalidated as violating substantive DP doctrine. This test is a variant (a "sort-of" rational relationship test for assessing the constitutionality of a law). Rational relationship test are usually considered very deferential to the laws. When they are applied the statute is usually upheld. All the government needs to do is show the statute is rationally related to its goals or purposes. What happened during *Lochner*? It was applied to knock down statutes. The court was applying this variant on the rational relationship test but this was defacto strict scrutiny - for any economic or social welfare legislation to survive it was almost impossible because it had to meet a very high standard.

iv) The Modern Era -- Repudiation of *Lochner*. The New Deal revolution swept away *Lochner*. The repudiation of substantive due process was partly produced by Roosevelt's threat to the Court in the form of the Court packing plan.

(1) **The New Deal shift.** The New Deal Court rejected the *Lochner* position by widening the scope of legitimate governmental objectives and employing a more deferential standard of review to measure the connection between legislative means and ends. The two cases below

exemplify the process by which the New Deal Court changed its attitude.

(a) Two things

(i) *Widened the scope of legitimate government objectives*

(ii) *Deferential standard of review*

(b) **Questioning the basic premises of *Lochner* -- *Nebbia v. New York*.** The court reversed *Tyson* and that line of cases - there is no distinction between public that can - The means adopted by the statute to carry out a particular end need only be reasonable to carry out that end. ***The court rejected the ends prong of *Lochner**** - so far as DP is concerned, a state is free to adopt whatever economic policy may reasonably be deemed to promote the public welfare - it is for the legislature not the court. It is abandoning scrutiny of the ends while retaining the means/end prong. It will not look at whether the ends are a problem.

(i) **Pressures mount.** For another 2 years the court clung to EDP but pressures were mounting. There was a Constitutional crisis and during this time court struck down under the Commerce Clause. In 1936, FDR was re-elected and this was seen as a mandate to end the depression. This led to the Court packing plan. There was a switch in time that saves nine and EDP died a fairly quick death.

(ii) ***West Coast Hotel v. Parrish* (1937)** - the court upheld a state law setting a minimum wage for female employees. P argued that the law invaded ESDP by infringing his fundamental liberty to contract. ***The court rejected P's argument and said about freedom to contract - it is not a fundamental liberty DP right.*** The constitution does not speak of freedom to contract - etc. Liberty under the constitution is subject to the restraint of DP, ***regulation is (not against) Due Process.*** The ends analysis for purposes of ESDP is kaput. There is still some review. They retained the means/end component of *Nebbia* that is the regulation must be reasonable in carrying out the legislative end. The Court overruled *Adkins*. The government was not limited to regulating only to advance public safety, health or morals. ***The Court will no longer protect freedom to contract as a fundamental right, rather the government could regulate to serve any legitimate purpose and the judiciary will defer as long as it's reasonable.***

1. **Note:** Court indicates this standard will be applied *very deferentially*.

(2) The modern standard of extreme deference. The court's position in *Nebbia* and *Parrish* proved to be transitional. The Court moved to an ***extreme deference*** to economic regulatory legislation.

(a) The first articulation of the reasonable relation test for DP purposes is enunciated in ***US v. Caroline products***. Challenge to a federal statute forbidding filled milk. ***Held***, in order to uphold the statute, the court did not have the facts the court can presume that there is a proper end and assume the existence of facts. There does not have to be any evidence at all, the court can concoct evidence *sua sponte*. The reviewing court may ***hypothesize the legislative end*** regardless of what the real end might have been. What the real end was is really irrelevant. Moreover, it does not matter whether the law furthers those ends. What does matter under SDP?

(i) **Test.** In reviewing legislation that protects economic and social welfare interests (not a fundamental right) in the face of a substantive DP challenge, the Court will use

the modern rational relationship test. The court will ask whether there is an imaginable legitimate legislative end that the law might rationally be thought to further. 99% of the time statutes are upheld. (Why bother?).

(ii) ***This case is most famous for footnote 4.*** This footnote represents the doctrinal basis for constitutional jurisprudence - it is "influential dicta." It announces a ***double standard for judicial review*** under substantive DP. The court says that when laws violate a specific prohibition of the Constitution, or when laws restrict political rights such as the right to vote, disseminate information, or the right of assembly, or when the laws victimize minorities, then those laws should be subject to a stricter standard of review under due process. When legislation impinges on a fundamental constitutional right, and there is a SDP challenge, the court should use strict scrutiny. So, the rational relationship test is fine for challenges to laws that do not impinge on fundamental, constitutional rights like economic or social welfare legislation.

(iii) ***Footnote 4 presumption.*** Different constitutional claims will be subjected to varying levels of review. Generally, courts should ***presume that laws are constitutional***, however, "a more searching judicial inquiry" is appropriate when it is a law that interferes with individual rights or that restricts the ability of the political process to repeal undesirable legislation, or a law that discriminates against a "discrete and insular minority."

(3) ***Lochner is dead!*** Between 1937 and 1941, the conservative justices left the court and new justices were more with it. This is shown in ***Williamson v. Lee Optical of Oklahoma.***

(i) ***Facts.*** A law prohibited opticians from fitting or duplicating lenses, advertising frames and forbade optometrists from working in a retail establishment. ***Held***, although a law enacts needless and wasteful requirements, it is the province of the legislature to balance the advantages against the disadvantages. The law need not in every way be logically consistent with its aims to be constitutional. ***The Court will not strike down a law just because it is improvident or unwise or out of line with a particular school of thought. The people, as voters, not the courts, are the protection against legislative abuse.***

(ii) ***Note:*** people challenging the law have to guess what the legislature might have concluded in order to rebut. There is an imaginative legitimate end and there are means that a legislature rationally could have thought could carry out those ends. So long as the Court can conceive of some legitimate purpose and so long as the law is reasonable, the law will be upheld.

(4) ***Ferguson v. Skrupa.*** The *Lochner* doctrine has long been discarded, i.e. it has been abandoned. ***The Court will refuse to sit as a super-legislature.*** The court did not employ any rational relationship review. The court upholds the statute for no substantive reason at all. (See Tribe) This was an objectionable statute - gave a monopoly to lawyers. The court says it does not care. Harlan concurrence - the state law bares a rational relationship to a permissible purpose. He is saying we are still retaining some standard, aren't we?

(a) ***Note:*** Since 1937, no economic regulatory statute has been struck down as violating economic substantive DP. Laws regulating business and employment practices (economic regulations) will be upheld when challenged under the Due Process Clause if rationally related to a legitimate governmental purpose. The fact that any law can meet this

requirement is demonstrated in Skrupa and Lee. Has the court gone too far? Is a double standard justified?

d) Protection of Personal Liberties

i) **Introduction.** The liberty of contract cases have long since been overruled, but *the Court has derived from the word liberty a special constitutional protection for privacy, personal autonomy, and some family relationships requiring special justification for state infringements on those interests*. Remember, no language in the Constitution talks about privacy, family life, or personal autonomy. In terms of Due Process and Equal Protection the "right to privacy" has come to mean a right to engage in certain highly personal activities. More specifically, it relates to certain rights of freedom of choice in marital, sexual and reproductive matters.

(1) **Note:** If the law in question denies the right to everybody then due process is the best analysis. If, on the other hand, the law denies the right to some, while allowing it to others, then the discrimination can be challenged as offending either the Equal Protection Clause or the denial of the right under substantive due process.

ii) **The Ninth Amendment.** The 9th Amendment is not seen as a source of rights in that rights are not protected under it. Rather, the 9th Amendment is used to provide textual justification for the Court to protect non-textual rights, such as the right to privacy.

iii) The Basic Fundamental Rights Model.

(1) Is the interest in question one that qualifies as a *protected liberty* under the Due Process Clause? (Virtually always yes).

(a) If yes, go to (2); if no, go to (5).

(2) Is the protected liberty one that is deemed *fundamental*? (The various decisions in *Griswold* lay the foundation for this model)

(a) If yes, go to (3); if no, go to (5).

(3) Does the challenged law interfere with the fundamental liberty in a serious enough way to *impinge on* or *unduly burden* that liberty, thereby triggering strict scrutiny? (De minimus infringements do not trigger strict scrutiny)

(a) If yes, go to (4); If no, go to (5).

(4) Strict Scrutiny

(a) If a fundamental liberty has been impinged on or unduly burdened, does the law substantially further a *compelling governmental interest*?

(b) Has the government chosen the *least burdensome means* of achieving its compelling interest?

(5) Rational Basis

(a) Law will be upheld if there is any legitimate goal that a rational legislature *might* have thought the measure would further - whether or not this was actually the law's goal or whether the law actually furthers it.

iv) **Basic test of Constitutionality in assessing whether a statute violates SDP.** (Bitensky)

(1) If the statute infringes *economic* or *social welfare* interests and not fundamental rights,

then the court will use the *rational relationship test*.

(2) If the statute infringes a *fundamental right*, the court will probably use *strict scrutiny*.

(a) For the statute to survive the government must show

(i) The statute serves a *compelling purpose*.

(ii) The government has to show the statute is *necessary*, or *narrowly tailored*, or *least restrictive way* of achieving the statute's purpose.

(3) **Intermediate scrutiny**. These are cases where the statute infringes a fundamental constitutional right, but the Court singles that right out for less constitutional protection because society needs regulations on the matters protected by the right.

(a) **The test**: for the statute to survive the government must show

(i) The statute serves a *substantial*, or an *important* interest

(ii) The statute is *closely tailored* to carrying out that interest

v) **Early Cases**. US recognized there were fundamental non-economic unenumerated rights flowing from the Constitution and specifically flowing from Due Process.

(1) **There are two Lochner-era cases frequently cited.**

(a) **Meyer v. Nebraska (1923)**. The right to teach German and the right of parents to engage him were held within the zone of Constitutionally protected liberty. Parochial school teacher challenges a statute in Neb. Prohibiting the teaching of foreign languages to kids who had not yet passed the 8th grade. The purpose was to foster Americanism. Learning German would poison kids' minds. *Held*, for teacher. Statute is invalid. **There is a substantive due process fundamental right that children have to obtain an education without governmental interference. There is a sub DP right that parents have to rear their children as they see fit. The teacher also has a sub DP right to teach.** Finally, the parents and teacher have a sub DP right to contract with each other for educational services. The statute did not serve the purpose of civic development, it was too draconian. Further, there was no emergency to know Americanism.

(b) **Pierce v. Society of Sisters (1925)**. The effect of an Oregon statute requiring parents to send children between 8 and 16 to public schools unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. *Held*, parents have a fund DP right to direct the upbringing their children, especially with regards to education.

(i) **Note**: these are unenumerated rights. These two cases (only ones) that survive with their holding in tact from the Lochner era. Still good law. **Meyer, Pierce and Footnote 4 serve as the doctrinal basis for the court to forge ahead in more modern times to recognize fundamental unenumerated rights.**

(2) **The idea**: There are certain non-economic rights that are so fundamental that they are part of the liberty guaranteed by the Due Process Clause. Lochner ended 1937, nothing much happened with SDP from 1937 - 1965. Any form had the Court felt uneasy. A blip on the radar screen foreshadowed things to come.

(a) **The right to procreate as a fundamental right -- Skinner v. Oklahoma (1942)**. The

Court held invalid under the Equal Protection Clause a statute providing for compulsory sterilization of criminals convicted two or more times of moral turpitude. In striking down the statute, the Court said the Constitution protected as one of the fundamental rights of man the right of marriage and procreation. The court said it was using stricter scrutiny - stricter than the rational relationship test because this fundamental right was being impinged. The court is protecting an unenumerated fundamental right. Reason for the case was political. There was concern the statute sounded like what the Nazi's were doing. Any attempt to impose involuntary fertilization must meet strict scrutiny.

(i) **Significance of Skinner.** It *established the basis for "fundamental rights" analysis* under the Due Process and Equal Protection guarantees by finding that some rights deserved special judicial protection from the majoritarian process. Also, even though the opinion never mentioned the "right of privacy" relating to sexual matters, *it established interests in marriage or procreation as ones of special constitutional significance.*

vi) **Modern Interpretations.** Things were quiet on the SDP front until the next case.

(1) **Freedom from disclosure ⇔ Privacy as a Fundamental Right -- *Griswold v. Connecticut*.** The executive director of Planned Parenthood League and its medical director, a licensed physician, were convicted under a Connecticut statute which made it a crime for any person to use any drug or article to prevent contraception. They were charged and convicted for giving married couples information about preventing contraception and then, following physical examinations, prescribing contraception. *Held*, although privacy is not specifically mentioned in the Constitution, it is a "right" that accrues to the American people and that is entitled to the Court's protection. The specific guarantees have *penumbras formed by the emanations* of those guarantees. (1st right of association (which is itself unenumerated), 3rd, 4th, 5th and 9th - the rights enumerated should not be taken to deny or disparage others). *The right to privacy is implicit in the provisions of the Bill of Rights. This was an attempt to avoid a substantive due process analysis.*

(a) **Note:** He is using textualism and values. Clearly, he is injecting values. This is pretty attenuated reasoning here. Court applied an extremely strict standard of review. Not only is the statute struck down, the court does not even mention the state's justifications for the law.

(b) **Note also:** this emanations theory was severely criticized and *never used again*. Gives very little guidance on how to find unenumerated rights - too much judicial subjectivity. Consider whether this is any more vague than any other theory the court has come up with.

(c) **Significance of Griswold.** Privacy is given the status of a Constitutional right. It is the precursor for Katz and Roe. Its emphasis on individual rights and limited power of government.

(i) In addition to creating a new substantive right, [*Concurrence*] the case emphasizes the 9th Amendment in the expansion of citizen's protections against government. (Saying substantive due process is ok because we are not using economic rights). Use the 9th Amendment as a rule of Constitutional construction. It tells you how to understand and interpret the Constitution.

(ii) The right to marital privacy is a fundamental due process right] [*Concurrence*

Harlan, also says this is SDP, but these rights you need to consult Natural Law. ***These rights are of the essence of ordered liberty (Selective Incorporation guided by Natural Law).***

(iii) [Dissenters] are *strict textualists* and say nowhere in the Constitution is there a marital right of privacy, albeit the law is "silly." Majority is dangerously reviving the SDP of the *Lochner* Era. ***All agree the Constitution protects certain unenumerated fundamental rights that deserve special protection, i.e. a stricter scrutiny.***

(d) By 1973, all of the justices accepted this principle. ***Although the Douglass opinion tried to avoid reliance on SDP, in retrospect Griswold reinstates the beginning of a revival of substantive DP.*** But, of SDP, to protect non-economic fundamental rights. The Douglass view did not prevail over the long-run. It is the Goldberg, Harlan White view that did.

(i) The case also established marital privacy as a fundamental Constitutional Right. Two meanings

1. Freedom from disclosure, and
2. Autonomy of choice.

(2) **The right to control reproduction as a fundamental right - *Eisenstadt v. Baird*.** *Griswold* focuses on the first definition. Since, this concept has expanded. For example, seven years later in *Eisenstadt v. Baird* the court made the right an individual right as well as a marital right by invalidating a statute that prohibited distribution of contraceptives to unmarried persons because a majority found that this separate treatment of unmarried persons violated the equal protection clause. The Court did not rely on the fundamental rights-strict scrutiny analysis, instead finding no rational or legitimate way to distinguish between uses of contraceptives by married or unmarried persons. The statute tried to limit birth control to single people. A year later in *Roe*, it became clear that the privacy right is also one of autonomy of choice. Most modern decisions focus on this second autonomy of choice.

(3) **Interpretation of Rights.** The Court's Interpretation of the Constitution in *Eisenstadt*, *Roe* and *Griswold* focuses on the fact that a basic right, such as the ability to control reproduction, is constitutionally protected even though it is nowhere mentioned and not considered by the framers.

vii) **Family and Marital Relationships.** Laws restricting individual choice regarding marriage or divorce will be subjected to "strict scrutiny" under the due process or equal protection clauses. The Supreme Court first recognized the right to marry as a fundamental right in *Loving v. Virginia*, *infra*. The Court said that it is a ***vital, personal right, essential to the orderly pursuit of happiness by free men and is fundamental to our existence and survival.*** In general, the Court has held that a person's decisions about how to conduct family life often rises to the level of a fundamental right. Therefore, for example, the government may not pass zoning regulations which impair the ability of family members to reside together, even if the family is an extended rather than a nuclear one.

(1) *Moore v. City of East Cleveland, Ohio*. *Held*, [plurality decision] there is an unenumerated fundamental right under DP for a family of related people to live together. This is regardless of whether this family is nuclear or extended. This is the right of autonomy of choice. Note, that the court employs an intermediate standard by saying "important." (Although, he then says the goals are "legitimate.") ***The Court will be very ready to find no infringement of the statute to preserve some space for the legislature to regulate family***

living conditions. We need to regulate how people live together. Wants to give this right less protection, we do not want to strike down under strict scrutiny how people live together. There is controversy as to the approach the Court used to strike this statute down. Either this is intermediate scrutiny **or** strict scrutiny with a loophole. The loophole is that the court does not have to find infringement of the "fundamental right."

(a) **Significance of Moore.** *There is a fundamental unenumerated SDP privacy right of people who are related to each other to live together in one household, as either a nuclear or extended family.* The Court in reviewing under SDP statutes that impinge in this right, will use mush. Mush is either intermediate scrutiny (which is what Bitensky thinks it really is) or strict scrutiny combined with a reluctance to find infringement (which is what Chemerinsky thinks it is).

(b) **Note:** this is a plurality decision. The dissenters felt that the right of members of an extended family to live together was not "fundamental" and that therefore the rational basis test should be used. Note that **Justice Stevens concurred** on the grounds that that the ordinance had no substantial relation to any state interest, and violated the plaintiff's property rights. The question remains therefore whether a lessee would have the same right.

(2) **Zablocki v. Redhail.** He was indigent and could not get a court order to pay to get married. Majority treated the case as an Equal Protection claim. Under EP doctrine, if a statute impinges on a fundamental right, so as to cause invidious discrimination, the Court will use strict scrutiny to review that statute. BTW, the test is the same as the strict scrutiny test under Due Process. **The right to marry is a fundamental, unenumerated Constitutional right under the precedent of Loving v. Virginia.** Also, the court looks again at societal values. It said if we recognize a right to childrearing we better recognize the right to marriage. This is a functional analysis. The Court spends a lot of time on whether this statute infringes on the right to marry. This is unusual. Redhail is completely cut off from being able to get married, and this is quit a big impingement. The down and out can never marry under the statute. The prerequisites seem to be fulfilled. Fundamental rights and infringement. To be continued ?.

(a) **Held,** the right to marry is a fundamental due process right. Substantial is intermediate scrutiny. We have language from rational relationship test and strict scrutiny as well. The court also uses the words closely tailored. We have mush again. There are policy reasons for why the Court wants to be unclear. This does not mean that you cannot legislate on the topic of marriage. In this respect, this case is like Moore, *supra*. This is an example of intermediate scrutiny or strict scrutiny with a lot of attention to impingement because this creates wiggle room for the court through the impingement issue.

(b) **Note:** the court does not adopt intermediate scrutiny, it is really unclear what the court is doing. There are two things

(i) The decision suggests there is a fundamental right to marry and

(ii) Either Intermediate Scrutiny or Strict Scrutiny with a lot of impingement rhetoric.

(c) Concurrence would amazingly strike down the statute under the rational basis test. He felt there was no fundamental right to marry.

(d) **Indirect interference not subject to strict scrutiny test.** Not every law that impacts the right to marry has been declared unconstitutional. There must be a **direct and**

substantial interference with the right to trigger heightened scrutiny. (see Chemerinsky) *Califano v. Jobst*. The opinion noted that where a regulation only had some incidental effect upon the ability to marry, and did not significantly interfere with that ability, the Court will use the rational basis test. For example, in *Califano v. Jobst*, the Court applied the rational relationship test to a Social Security Act provision which cut off benefits to a dependent child upon the parent's marriage to someone not covered by the Act. The provision did not place a direct legal obstacle in the path of persons desiring to get married and did not significantly discourage marriage.

viii) **How should the Court recognize fundamental unenumerated substantive due process rights? I.e., is tradition determinative and if so, must it be a tradition stated at the most specific level of abstraction?** According to Michael H., the Court should protect rights under the Due Process Clause only if there is a *tradition, stated at the most specific level of abstraction, for safeguarding the liberty*. The general tradition of protecting unmarried fathers' rights was found to be irrelevant in Michael H. because there was no specific tradition when the child was conceived as a result of adultery.

(1) **Criticism:** This ignores the reality in which our Constitution exists. We are not an assimilative, homogenous society, rather a facilitative, pluralistic one.

(2) *Michael H. v. Gerald D.* Michael wants a parental relationship with his daughter and Gerald and his wife do not want him in the picture. California Court denies his request to parental visitation rights. § 621 establishes the presumption that is a child was born and conceived during marriage then the kid is conclusively presumed to be the offspring of that marriage. Moreover, the only way that presumption can be rebutted can be blood evidence within two years of the date of birth of the child and the motion can only be made by the husband or wife, not by a guy like Michael. Gerald and Carol do not make the motion, and Michael brings suit claiming a denial of both his procedural and substantive due process rights. He claims a fundamental due process relationship with his child. **ALERT:** there is precedent that indicated that a guy like Mike, who was actively participating in the life of the child, did have this right. Scalia focuses on tradition in this case. (See, for e.g., Stanley v. Illinois, where the Court *held* unconstitutional a state law that automatically made children of unmarried mothers the wards of the state at the time of her death). This relationship does not fall within the tradition of the marital family.

(a) **Footnote 6.** The sorts of traditions Michael needs to identify to establish a fundamental right to a relationship to Victoria has to be *the most specific level of tradition* protecting or denying protection to the asserted right. Caveat: footnote 2 - he does not mean to say the identified tradition must take the form of a Constitutional or statutory provision, although it can.

(b) Notice how he formulates the question. It has to be a really tight fit and track the factual pattern the claimant is bringing to the suit. Since there is no such tradition does Michael have such a right? No. § 621 is ultimately upheld and a rational relationship test is used. *They are adopting this standard of tradition for recognizing fundamental unenumerated rights to avoid judicial subjectivity. If they use a more general level it allows the judges to inject their own subjectivity into these types of determinations.* There were dissenting opinions. The other justices disagree they never used this specific level of tradition, and this approach will be unwise in the future. Traditions should not be the sole source of guidance in recognizing fundamental rights. The definition is too narrow and tradition should not be the sole source of defining fundamental rights. *Tradition is*

problematic - fails to recognize the dynamic nature of rights discourse - fails to accord with stare decisis, traditions are also often wrong (for example, slavery). Look to social and economic data. They would hold that there is a fundamental right - the more general right to rear children.

(c) **Deciding the content of fundamental rights and the significance of Michael H.** Lays out the various schools of thought among the justices on how the Court should go about recognizing unenumerated fundamental substantive due process rights. They all agree that tradition should be used in finding these rights. But, they disagree on the level of generality of the tradition and they disagree on whether tradition should be the only criteria for recognizing these rights. The case also addresses the question of who has a constitutionally protected interest in a relationship of a child. The judgment supports the idea that perhaps only marital partners have that right, where the wife bears the child illegitimately. The state may create a rebuttable presumption that a married woman's husband is the father of her child, even though it negates all of the biological father's rights. Biological fathers do not have a liberty interest in their relationships with their children because there is no such tradition protecting fathers' rights when the mother is married to someone else.

(d) *"This is not the stuff of which fundamental rights are made."*

(e) **Note:** this is a plurality decision

ix) Personal Autonomy

(I) **The right of Privacy as a protected liberty under the Due Process Clause -- Women have a fundamental substantive due process right to an abortion -- *Roe v. Wade*** [\[D11\]](#). Roe, an unmarried pregnant woman, filed a class action suit seeking a declaratory judgment and injunction against statutes barring abortion except to save a woman's life. The Court treats this issue as a medical question, rather than a moral, religious or ethical question.

(a) **The Court adopts a trimester approach.** The first trimester sees the woman's interest maximized, and the state may regulate abortion only for the purposes of protection of her health. At the beginning of the second trimester, the state's interest becomes more compelling and the state may proscribe abortion except when necessary to preserve the life or health of the mother. They use history in the sense of consulting it, but this history is conflicting.

(b) **[Dissent]** says since there is **A** tradition against abortion this should be the end of the discussion.

(c) **The Methodology the Court uses is values.** The decision has been criticized for being too much non-interpretivism. Where does this decision have any grounding in the Constitution. The Court was hell-bent on finding this right. Non-interpretivism is a common way the Court finds unenumerated fundamental substantive due process rights. The level of scrutiny the Court applied is strict scrutiny.

(d) **Balancing.** The state had two competing interests → maternal health and potential life. Neither of these interests are compelling at the outset of pregnancy. The interest in protecting the mother's health becomes compelling at the end of the *first trimester*. This means that the state can impose restrictions that are necessary to ensure that the abortion procedure is safe, but cannot justify a total prohibition on abortion. The state's interest in

protecting potential life does not become compelling until roughly the end of the second trimester (when the fetus is viable).

(e) **Significance of Roe.** A case that protects individual rights from government intrusion. **The trimester framework affects the nature of the fundamental right of abortion. The woman under Roe has a substantive due process fundamental right to abortion only up to viability (first two trimesters)** because after that the state can prohibit it. After that the preservation of life must require it.

(f) **Query:** Did the Court just write a statute and substituting policy-making powers for that of the state legislatures? (See, *Lochner*, *supra*).

(g) Life could begin before viability or maybe not - the Court does not decide. They do not know when life begins. As a const matter when life begins is not legally significant - only viability is legally significant.

(i) **Note:** The claim for abortion rights, or any of these rights, seeks access to the necessary services, while failing to address the social relations and sexual divisions around which responsibility for pregnancy and children is assigned.

(ii) **Note also:** The right to abortion is in a matryshka doll.

(h) **Alternate theories**

(i) **"Bad Samaritism":** Forcing the woman to render assistance to another flies in the face of the C/L.

(ii) **Sex Discrimination:** Current law nowhere forces men to sacrifice their bodies and by forcing women to the state is turning a biological difference into a social disadvantage.

I. Note: feminist commentators widely believe that the Court's **distinct theoretical articulation** of reproductive control as a right to privacy separate from equality **constrains political analysis** on both a practical and ideological level and **reinforces ideological separation** of deeply interrelated oppression.

(2) **The modification of Roe by Casey: Abortion law today -- *Planned Parenthood of Southeastern Pennsylvania v. Casey*.** Five abortion clinics challenged the Pennsylvania Abortion Control Act requiring a woman to give her informed consent prior to the abortion procedure, and specifies that she be provided with certain information at least 24 hours before the abortion. Married women were supposed to consult their husbands and the statute imposed certain reporting requirements.

(a) **Essential holding of *Roe* upheld [5-4].** The Court upheld the "essential holding" of *Roe*, *supra*, which has three parts.

(i) The **right** of the woman **to choose** an abortion before viability without undue interference from the state.

(ii) State's **power to restrict abortions** after fetal viability, if the law contains exceptions for pregnancies endangering the woman's life or health.

(iii) A recognition that the state has a **legitimate interest** from the outset in protecting **maternal health** and the **life** of the fetus.

1. **Note.** In *Casey*, the waiting period restrictions were subject to an exception for medical emergencies, defined as situations where an immediate abortion is

required to avert serious risk of death or major bodily impairment to the women.

(b) **Stare decisis.** The principle of stare decisis creates limitations on overruling Roe, because neither the factual underpinnings of Roe's central holding have changed nor our understanding of it. The Court cannot pretend to be re-examining the prior law with any justification beyond a present doctrinal disposition to come out differently from the 1973 Court. Overruling Roe, would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the ROL. Even if Roe is wrong, the error involves only the strength of the state's interest in fetal protection, not the liberty of women.

(c) **Viability.** The right to terminate before viability is the most central principle of Roe.

(d) **The Court ruled [7-2] to allow states to regulate more strictly**

(i) **Trimester framework overruled.** Even though a woman has the fundamental due process right to choose abortion **before viability** such that any regulations must survive the undue burden test (not strict scrutiny), the state can take steps to ensure an informed and thoughtful choice. This is true even at the earliest stages of pregnancy, the state may promulgate rules and regulations that encourage a women to know the philosophic and social arguments in favor of keeping the pregnancy. The trimester framework **misconceives the nature of the woman's interest and undervalues the state's interest in potential life.** That is, the trimester approach did not do enough to take into account the potential human life. The new test is more fetus-friendly. State measures designed to discourage abortion before viability (by making it more costly, difficult to obtain, etc.) should survive undue burden scrutiny. Expressions of respect for the unborn, persuasions to choose birth. Incongruity here? **But note:** these are calculated to prohibit abortion.

(ii) **Undue Burden → The line is drawn at viability.** Under this approach, a law that serves a valid purpose not designed to strike at the right of abortion itself may be sustained even if it makes it more difficult or more expensive to obtain an abortion, unless the law imposes an undue burden on the ability to make an abortion decision. The state may further its interest in potential life, but at the same time cannot place a **substantial obstacle in the path** of a woman's choice. After viability, the woman only has a fundamental due process right to abortion if her health or life requires it.

1. **Note: The undue burden test is brand new.** Normally, the court will use strict scrutiny for fundamental rights that have been impinged. In this sense, Casey is a retreat from Roe. This is not as difficult a test to meet. Not the deviation from strict scrutiny that will be applied in abortion cases.

(iii) **Fundamental Rights and Strict Scrutiny.** The majority implicitly rejected Roe's view that the right to abortion is a fundamental right and that every pre-viability restriction must survive strict scrutiny.

(e) **DEFINITIONS:** "purpose" means calculated to hinder; "effect" means the statute is trying to prevent or prohibit abortion.

(f) **If a regulation is not an undue burden then use the Rational Relationship test.** A state measure designed to persuade a woman to choose childbirth over abortion will be upheld if reasonably related to that goal.

(g) **The statute.** There was a medical emergency requirement that was held to impose no undue burden on the abortion right. The Court next considers the informed consent requirement. The Court held that this did not pose an undue burden either. Requiring that a woman be informed of the availability of information relating to fetal development and the assistance available should she decide to carry the pregnancy is a reasonable measure to insure an informed choice. The 24-hour waiting period does not impose substantial obstacles. Physicians can exercise their medical judgment. The spousal notification requirement does impose an undue burden on a woman's choice to undergo an abortion and cannot be sustained. In well functioning marriages, *the spouses discuss important intimate decisions such as whether to bear a child, and the notification requirement adds nothing. The potential for abuse does impose a burden.* The parental consent requirements and reporting requirements are also permissible.

(h) **Concurrence and dissent [Stevens].** The state's protection of the fetus is not grounded in the Constitution but reflective of pragmatic and humanitarian concerns. The 24-hour requirement should not be upheld because it presumes the decision is wrong and must be reconsidered. [Rehnquist, Scalia, White and Thomas], stare decisis is no reason to retain Roe. States may regulate abortion in a way rationally related to serve its purpose, and the act should be upheld in its entirety. This is a liberty not protected by the Constitution. The Court perpetuates the premise of Roe, which is a value judgment, not a legal matter. Roe should be overruled as incorrectly decided.

(i) **Significance of Casey.** The case ensures that a women's right to decide whether to terminate her pregnancy will be an interest that receives special constitutional protection. The state may not simply *forbid* all abortions, or even abortions occurring in the second trimester. Further, the state may not forbid all pre- viability abortions except those necessary to save the life or health of the mother. Any such restriction would be an "undue burden" on abortion. On the other hand, state provisions that in some way regulate abortion are much more likely to be sustained than they were prior to Casey. Only the most severe regulations will constitute an obstacle that will be found to be an "undue burden."

x) **Sexual Orientation and Relationships -- No consensual right to homosexual sodomy -- *Bowers v. Hardwick*.** Upheld a state sodomy law that criminalized homosexual activity. There was no basis to determine that sodomy was a basic fundamental constitutional right that should be judicially protected from legislative limitations. *The Court said that any claim that the right to practice homosexual sodomy was "implicit in the concept of ordered liberty or deeply rooted in the nations traditions is at best facetious."*

(1) **Note:** This decision seems inconsistent with prior Supreme Court decisions and therefore the Court's decision's do not match its rhetoric .It is the right to make certain decisions free from government interference, not the right to engage in any particular conduct, that is central to the right of personal autonomy. Compare Roe, supra, where the issue was not framed in terms of a right to abort a fetus rather the issue was cast in terms of the right to make highly personal decisions. Roe and Eisenstadt would have supported a broader fundamental right here.

(2) **Constitutional protections are designed to protect anti-majoritarian sentiments** usually, but this clearly is not the case here. Does Hardwick signal the end of substantive due process? The Court did go out of its way to make a broad statement about the proper role of the Court in handling assertions that new fundamental rights should be recognized. *The Court is most*

vulnerable when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. Therefore, there should be great resistance to expand the reach of the due process clause, particularly if it requires redefining the category of rights deemed to be fundamental.

(3) **Unresolved Question of Bowers.** Perhaps the Court will rule that persons in a traditional, legally sanctioned marital relationship have a constitutional right to autonomy in sexual matters, whereas persons involved in a nontraditional relationship have no similar right.

xi) **The right to die - *Cruzan v. Director, Missouri*** Department of Health. Cruzan's parents sought a court order directing the withdrawal of their daughter's artificial feeding and hydration equipment. The Supreme Court of Missouri held that her parents lacked this authority.

(1) **Holding.** The Supreme Court assumed that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment and that this can be inferred from prior decisions. But this does not end the inquiry as to an incompetent person because an incompetent person is different. They are not able to make an informed and voluntary choice to exercise a hypothetical right to refuse treatment. Some sort of surrogate has exercised such a "right" for her. Missouri has recognized that under certain circumstances a surrogate may act for the patient in having hydration withdrawn, but has established a procedural safeguard to assure that the action conforms to the wishes of the patient while competent. This is a higher evidentiary standard of clear and convincing evidence. Upholding this depends on what interests the state may seek to protect - Missouri relies on human life.

(2) **Note.** If there was no such fundamental right to refuse unwanted medical treatment then this holding does not make sense because the states would not be able to set a higher evidentiary standard for an incompetent person.

(3) **State Interests v. Individual Interests.** Generally, states can demonstrate their commitment to life by suicide prevention. States have an unqualified interest in the preservation of human life weighed against the constitutionally protected interests of the individual. Missouri has sought to advance those interests through the adoption of a clear and convincing standard. This is permissible, albeit it may frustrate the not yet fully articulated intent of Cruzan.

(4) **Substituted Judgment rejected.** Petitioners also argue that their judgment should be substituted relying on Michael H. However, the due process clause does not require the state to repose judgment on these matters with anyone but the patient himself.

(5) **Incompetent Patient.** If the patient is incompetent, the first question to ask is: has the patient previously expressed clear wishes either: (a) that she does not want medical treatment under the circumstances like those now existing; or (b) that she wishes some designated other person to make such decisions for her in the event of incapacity? If the answer is no, then we know from Cruzan that the state may refuse to discontinue the procedures even though all concerned agree that the best interest of the patient would be to discontinue the treatment.

(6) **Clear expressions of intent.** The state is constitutionally required to honor the patient's wishes in the event there is clear expression of intent of a competent adult (such as a living will). As evidence is the fact that 8 justices held that a competent adult has the right to refuse unwanted medical treatment. But note, the issue will be whether the state has a countervailing interest in protecting life that will outweigh this, which seems unlikely in light of Cruzan.

xii) A distinct issue is whether there is a fundamental right to take active steps to commit suicide: No right to commit suicide - *Washington v. Glucksberg*. The state may forbid the person himself as well as others (like doctors) from this type of conduct. This case involved Washington's ban on "promoting a suicide attempt." The state defined this crime as "knowingly cause[ing] or aid[ing] another person to attempt suicide," and made it a felony.

(1) Two prong test for determining whether asserted right is a fundamental right

(a) Guarantees (from the incorporation cases) essential in ordered liberty, neither liberty or justice exists without → rooted in history and tradition

(b) Right has to be given a careful description. Right has to be identified at the most specific level. If use this criteria - avoid judicial subjectivity.

(2) **Broad level of generality.** Rehnquist phrased the issue very broadly: whether the liberty specially protected by the Due Process Clause includes a right to commit suicide which itself includes the right to assistance in doing so. The Court rejected the 9th Circuit's narrow phrasing of the issue: whether there is a liberty interest in determining the time and manner of one's death.

(a) **Note.** In *Glucksberg* the right is broadly construed cf. *Michael H.* and *Bowers*.

(3) **Support.** Rehnquist noted that for over 700 years there has been a C/L tradition that either punished or disapproved of both suicide and assisting suicide. Today, virtually every state it is a crime to assist in suicide.

(4) **Not a fundamental right.** Only rights that are deeply rooted in this nations history and tradition could be fundamental and the asserted interest does not come close to this deeply rooted test. In contrast, the right in *Cruzan* stemmed from the tradition of protecting the right to refuse medical treatment.

(5) **This is the type of Issue that should be settled by public debate.** Why was the Court determined not to find a fundamental due process right to physician assisted suicide? Why go out of their way to distinguish *Cruzan*, *Casey* and *Roe*?

(a) Focus on the big **public debate** on this, rather than preempting the debate. Let the people battle it out in the legislatures.

(b) **Right asserted** ⇔ The right of the competent adult, terminally ill persons to physician assisted suicide.

(i) No support recognizing physician assisted suicide. Court not eager to recognize this right - did not want to interfere with a nationwide debate.

1. Strange that in *Roe*, much public debate acknowledged in the opinion

(6) The test applied was the **rational relation test**

(a) **Are the ends legitimate? Washington's interests** →

(i) **Protect the vulnerable.** Those emotionally depressed, in a lot of pain - such feelings misconstrued and could be treated.

(ii) **Slippery Slope.** Feel that legalizing physician assisted suicide would set the Court down the slippery slope towards voluntary and maybe involuntary euthanasia. For example, Netherlands.

(iii) **Protecting the integrity of the medical profession.** They are perceived as healers than as harmers. Also, in managed care, they might succumb to financial pressures

(iv) **Preserving human life.** The state has a unqualified interest in protecting human life.

(v) **Combating societal indifference.** Instead of finding a cure for cancer, just knock 'em off.

(7) Are the means rationally related to carrying out that legitimate end?

(a) Yes, passes the rational relationship test.

(i) Court can't think of factual situation where should be struck down - on its face and as applied to competent terminally ill adults who wish to engage in physician assisted suicide.

(8) Open Questions.

(a) **Glucksberg** ⇔ The right to die

(i) Whether there is a right of an adult competent terminally ill person to have a physician give them pain relieving medication that might hasten death - to receive medical treatment administered to ease pain. The intent would not be to kill but ease pain.

1. WA statute had an exception to physician assisted suicide - doctor could give medications to patient even though it would hasten death

(b) **Cruzan**

(i) Cruzan left open the question of whether there is a fundamental substantive due process right in an adult competent person who is terminally ill to refuse life-saving treatment. Not answered in Cruzan.

(c) **How does this case square with other privacy cases?**

(i) Compare right to die with right to abortion

1. How does Glucksberg square with Casey? Remember woman has a fundamental due process right to physician assisted abortion without unreasonable state interference.

2. Glucksberg does not allow physician assisted suicide. Why is abortion important enough that it is fundamental right before viability but right to die is not a fundamental right?

a. Dignity is a constitutionally protected value

(d) **Upshot of case.**

(i) **What we know.**

1. As of today, there is no substantive due process right to commit suicide

2. There also is no substantive due process fundamental right to commit physician assisted suicide

(ii) **Regulation necessary.** Need governmental regulation - less dangerous than the way it goes now. Even more dangerous now because if person friendly with doctor - the decision is made there with no regulation.

➤ A competent adult may have a Fourteenth Amendment "liberty" interest in *not being forced to undergo unwanted medical procedures*, including artificial life sustaining measures.

- But question whether this may sometimes be outweighed by the state's interest in protecting life

➤ The state has an important countervailing interest in *preserving life*. At the very least, this interest entitles the state to require, before it allows "pulling the plug," "*clear and convincing evidence*" that a now- incompetent patient would have voluntarily declined the life- sustaining measures.

➤ Terminally- ill patients do *not* have a general liberty interest in "*committing suicide*." Nor do they have the right to *recruit a third person* to help them commit suicide (e.g., a physician who would proscribe a fatal dose of drugs).

- Note that states are free to permit assisted suicide if they want.

xiii) **Summary of substantive due process analysis. First question is whether the asserted right is fundamental? And then whether it is infringed?** Make a note that under modern substantive due process, fundamental rights do not include the right to contract or other economic rights. If you say "No" to either of these two questions, the level of scrutiny used to review the statute is the rationale relationship test. If the answer is "yes" to both questions then you use some form of heightened scrutiny to review the challenged statute. The most common form of heightened scrutiny is strict scrutiny. The types of fundamental rights for strict scrutiny are the right to use contraceptives, the right to beget a child, the right to rear a child, the right to obtain education without governmental interference. For certain fundamental rights, the court has engaged in a Bitensky "mush." These rights are the right to marry and the right of related people to live together in one household. This is subject to mush because it depends how you look at the tests the Court has used. Some scholars feel that the Court uses intermediate scrutiny. Others think the Court is using strict scrutiny and a reluctance to find impingement. Then there is a "fly in the ointment" to this scheme. The right to abortion is a fundamental right up to viability. Abortion has its own test - before viability use the undue burden test. After viability the state can prohibit abortion unless it is needed to protect the health and life of the mother. The criteria the Court uses for recognizing fundamental due process rights. Some justices (Scalia, Rehnquist and Thomas) want to use tradition only. Most other justices want to use a combination of looking to tradition and other sources. These "other sources" include societal values and/or looking to see whether the asserted right is implicit in another recognized fundamental right. The Court uses tradition by looking at the C/L, statutes and Supreme Court precedent. Its guidelines in searching for traditions - Scalia and Rehnquist suggest using the most specific level of tradition protecting an asserted right. Later on he changes this to say we use a "careful description of the right" and look for a tradition that bears on that careful tradition. Other justices take a "loosey goosey" approach - a broadly framed tradition will do just fine.

6) Equal Protection and the Reasonableness Requirement

a) **Scope.** § 1 of the 14th Amendment provides that "No state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws." This has never been interpreted as outlawing all forms of discrimination. Instead, the Clause prohibits government from engaging in arbitrary or invidious discrimination, i.e. employing classifications that cannot be justified on the basis of any legitimate governmental interest and that are adopted for the sake of haring a particular group.

i) **Paradox in law.** All laws both benefit and burden someone at the same time. Some are constitutional and some are not.

b) **Remember Slaughter-House**, *supra* where the Court *held* the Equal protection clause only protects blacks. This narrow reading of the clause has been abandoned. ***This means that all legal classifications are fair game under the Equal Protection clause.***

c) **Basic Roadmap for Equal Protection Cases.** This simplifies things to the point where this is not entirely representative of the law, and refinements will be in order.

i) **Step 1.** Ask what is the class that is made subject to discrimination by the challenged law? What type of discrimination is involved? There are two ways that a statute may subject a class to discrimination.

(1) ***It may do this on its face, meaning the very text of the statute discriminates against the class.***

(a) **Example.** Statute says that only blue-eyed people may become electricians. Notice the wording does not have to be so blunt.

(b) **Example.** No descendents of slaves may become electricians. It obviously means no black people and thus is facially discriminatory.

(c) **Note that not all members of the group have to be burdened equally.** For example, law says "Aliens may attend the University only after living in the state for 10 years" discriminates facially on the basis of alienage, and the fact that the law also discriminates within the class of aliens by classifying on the basis of length of residence does not alter the fact that the measure, on its face, singles out aliens for adverse treatment.

(2) ***The statute is facially neutral but it can be shown to have a discriminatory purpose and discriminatory effects.*** There are two ways this can be shown

(a) ***By Design - a facially neutral law may have been designed to cause discrimination of a certain type. If the law disproportionately burdens a particular group and it can be shown that the discrimination was part of the purpose or design .***

(i) **Example.** Statute says no one may practice law in MI unless licensed by the Bar. Seems neutral What if P can show that the purpose and effect of this statute is to discriminate against Asian-Americans (a particular class). Ask, okay, we have class discrimination so what is the proper level of scrutiny for this discriminating statute. [Caveat: this particular question get much more complicated.] It depends on the particular people or activities targeted by the statute. If the statutory classification discriminates against a suspect class or impinges on a fundamental constitutional right, the Court will review the statute by using strict scrutiny. (The same form used in due process analysis).

(b) ***As Applied - a facially neutral law that was not adopted for the purpose of discrimination but is discriminatory as applied.***

(i) **Example.** A statute makes it illegal to drive over 55 does not discriminate on its face or by design against any group of individuals. The law could be challenged if the police were only ticketing women drivers.

ii) **Step 2.** Has the plaintiff established a prima facie case of discrimination? The plaintiff must show two things:

(1) The law has a ***disproportionate or disparate impact*** on a particular group; and

(a) This means that it ***burdens one group more heavily*** than others

(2) The ***impact is intentional*** in the sense it results from a discriminatory purpose or design

(a) **Note.** The prima facie case is made out if the law is facially discriminatory otherwise discriminatory purpose must be shown, which is difficult to prove. ***If plaintiff cannot prove both disparate impact and discriminatory purpose then the rational basis test will apply. Further, the impact and the purpose must be directed toward a specially protected classification.***

(i) ***Suspect classes.*** Race, alienage, nationality. (RAN)

(ii) ***Quasi suspect classes.*** These groups have immutable characteristics. They are politically vulnerable and have not been able to easily protect themselves through the political process. Also, they have historically been the object of discrimination. If the statute does not discriminate against a suspect or quasi-suspect class, and the statute does not impinge upon a fundamental right, the Court will use the rational relationship test to review the statute.

(b) **Defendant can rebut.** If successful, then apply rational basis test.

(c) **[Aside] Fundamental Rights.** Rights set forth in the BoR, a substantive due process right or a fundamental right recognized as a function of equal protection analysis. If a statute does not impinge on a fundamental right, but it does discriminate against a quasi-suspect class, the court will use intermediate scrutiny. Basically, this test is also the same. Instead of saying closely tailored the court says substantially related to a particular purpose.

iii) **Step 2 -- Does the governmental law fulfill the requirements of the appropriate level of scrutiny?** If it does, it will be upheld, if not, it will be struck down. A factor in answering this question is whether the legal classification is overinclusive or under-inclusive.

(a) **For example, a statute requires all policemen retire at the age of 50.** There are several possibilities.

(i) **Perfect Fit.** All officers under 50 are in good health and over 50 are in poor health.

(ii) **Perfect lack of correlation.** All officers under 50 are in poor health and all over 50 are in good health.

(iii) **Over-inclusive defined.** The law applies to more people than are needed for the government to achieve its purpose. All officers in poor health are over 50 but some officers over 50 are in good health.

(iv) **Under-inclusive defined.** The law applies to some people but not others who are similarly situated. It may be that some person who have a Trait contribute to the harm, but that persons without the Trait also contribute to the Harm. For instance, if all officers over 50 are in poor health, but some under 50 are also in poor health.

1. **Not dispositive.** A statute that is subject to the rational relationship test is not invalid merely because it is under- inclusive because the legislature is allowed to take "one step at a time." *Williamson v. Lee Optical.*

(v) **Over- and under- inclusive.** Some officers over 50 are healthy (overinclusive) and some under 50 are unhealthy (underinclusive).

(b) **When does this stuff apply?** When you are analyzing the second prong - the means/end prong. (Narrowly tailored, or is statute rationally related to carrying out the government's purpose, etc)

(i) **Rational relations test.** Either under or over will by itself not cause the statute to be struck down. However, with strict and intermediate scrutiny over or under inclusiveness might well cause that statute to be struck down. This is because it will be less likely to be narrowly tailored or substantially tailored to carrying out the government's purpose.

(ii) In many cases, the Court will adopt a test that seems to hover in between two of the tests - the mush.

<i>Suspect Classes</i>	<i>Quasi-Suspect Classes</i>	<i>Non-Suspect Classes</i>
Race	Gender	Age
Ethnicity	Illegitimacy	Wealth
Alienage		Mental Status
		Sexual Orientation
		Socio-Economic
		Alienage

d) Laws impinging on suspect classifications.

i) **Facial impingement.** Before Civil War the Constitution protected slavery. In 1856, in Dred Scott the court held that black slaves were property and the slave owners have a substantive due process right to own slaves. This was the first substantive due process case, and said black people were not citizens. This helped sparked the Civil War. 1865 13th Amendment was adopted and abolished slavery. Former slaves were grossly mistreated, nevertheless. For example, Black Codes - AA could not appear in town unless in menial jobs. In response, Congress adopted the 14th Amendment in 1868. The first sentence overturns Dred Scott. It says "all persons born or naturalized in the US ? are citizens of the United States and of the state in which the reside." The EP clause was designed to ameliorate the injustices that were being perpetrated by the Black Codes and other governmental practices.

(1) **The mere fact that a statute applies equally to both races is not enough to establish there was no discriminatory intent -- Loving v. Virginia.** Statute prohibited interracial couple

from marrying elsewhere and going back to live in Virginia.

(a) **Equal Protection.** According to Virginia, the statute did not illegally discriminate against blacks because it applied equally to both races. The statute criminalized the conduct for both white and black partners. The Court says that if the statute has a racial classification that this is unacceptable. Conduct engaged in normally acceptable conduct is made criminal when engaged in by a white and black together. ***This is a racial classification that is discriminatory on its face.*** Therefore, the court used strict scrutiny with the language of very heavy burden of justification. The Court applies this form of strict scrutiny by saying there is no good justification for it. Virginia suggests that white supremacy is the justification. This is not a proper police power objective. Because the statute classifies according to race (a suspect class) the statute is subject to strict scrutiny. A statute that classifies according to race cannot survive strict scrutiny just because it is applied neutrally. ***Professor Tribe has called this argument "the fraudulent equality of a symmetrical prohibition on interracial marriage."***

(b) **Substantive due process.** There was a fundamental due process right to marry. And then whether it was impinged which it was because two people could not marry. Therefore, you could use an intermediate scrutiny under Moore, *supra*.

(c) Virginia state tourist board adopted that Virginia is for lovers.

ii) **Japanese Curfew and Evacuation Cases.** Roosevelt authorized military commanders to prescribe military areas from which any or all persons might be excluded as a security measure.

(1) **Hirabayashi v. US. Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.** However, persons of Japanese descent presented such a danger in the war context that the curfew is upheld. Determining on a case by case basis to determine loyalty is not feasible.

(2) **Last case to survive strict scrutiny (1944): Race as a suspect class triggering strict scrutiny -- Korematsu v. US.** An American of Japanese descent convicted for violating the order. Held, There was evidence of disloyalty within the population although no evidence by Korematsu. Pressing public necessity may sometimes justify the existence of such restrictions. One of the first enunciations regarding whether strict scrutiny should be used when the law discriminates against a suspect class. Classifications of race and national origin are suspect and likely to be impermissible. Such legal classifications should be subject to rigid scrutiny. In order to justify the statute the government must show the statute is necessary, serves public necessity. "Isn't it ironic." Guess what, there was never such a necessity. This was racial animus, the government attorneys misrepresented.

(a) **Note:** The supreme Court messed up big time morally and analytically.

(3) **Were DeWitt's orders over-inclusive?** Yes. Most of the Japanese population were perfectly innocent of any complicity of the Japanese yet they are covered by this legislation. It was also under-inclusive, how come German ancestry was not made the subject of the statute.

(a) **Note:** There is very little tolerance for over- or under- inclusiveness in modern strict scrutiny analysis. The means/ends fit must be tight.

(b) Note that a mere 40 years later these cases were vacated. (Check)

iii) Racial Segregation in schools and other public facilities.

(1) State-mandated racial segregation

(a) Separate but equal doctrine - *Plessy v. Ferguson*

(i) **Initial Response.** The Supreme Court's view initially was that separate but equal treatment did not violate equal protection. The Court upheld a Louisiana law calling for separate but equal accommodations for white and black railroad passengers.

(ii) **Rationale.** Laws such as the one at issue related only to social equality, not to political or civil equality. *Social equality was not a goal of the Equal Protection Clause* and could be attained only through *voluntary action*.

1. **Not a badge of inferiority.** The law did not stamp the colored race with a badge of inferiority. If African Americans felt inferior it had nothing to do with the law, but because they put that construction on it.

(iii) **Dissent. Get real, Camille!** Even though facially neutral, everyone knows the purpose was to exclude black people from coaches occupied by whites.

1. The Constitution is color-blind.

(2) Rejection of the separate but equal doctrine - *Brown v. Board of Education* (unanimous)

(a) **Rejection.** The Court rejected the doctrine, at least as far as public education was concerned.

(b) **Rationale.** Even where all black and all white schools were equal in terms of "tangible" factors, intangible factors prevented black children from receiving equal educational opportunities. In particular, racial segregation generates a "feeling of inferiority." Separate educational facilities are inherently unequal.

(i) **Factors that figured prominently in the Court's Holding.** The Court relied on the opinions of psychologists and educators. The Court did not rely on the legislative history of the 14th Amendment because at the time it was adopted blacks in the South were not educated at all and in the North there was no compulsory public education for whites, let alone blacks. Therefore, nothing clued the Court as to legislative intent. Governmentally mandated segregation in public elementary schools is inherently unequal and violates the equal protection clause.

1. Note: Non-governmental segregation will not violate under *Brown*. Racial segregation okay in private institutions.

a. **De jure segregation.** Government purposefully caused the discrimination.

b. **De facto segregation.** Segregation was caused by other factors, factors that are not purposeful government conduct.

i. *Brown only forbids de jure racial discrimination on the public schools.*

(ii) **Criticism.** If the Court was relying primarily on social science and empirical data (factual evidence that segregation causes harm), what happens when new findings suggest that African Americans not only do better in segregated schools but want them because for example they are being subjected to hostility from the white majority. And

is it not a possibility that this opinion actually furthers psychological segregation between white and black people - by forcing them to acknowledge the importance of cultural pride?

(c) **Applicability to the federal government.** On the same day as Brown was decided, the Court held that the federal government could not be permitted to operate racially-segregated schools any more than the states could. *Bolling v. Sharpe*. Such segregation was not reasonably related to any governmental purpose and to hold otherwise would be unthinkable given that such state conduct is unconstitutional.

(3) Implementation of Brown - *The One Shot Rule*

(a) **Swann v. Charlotte-Mecklenburg.** The Board of Education had a long history of maintaining a dual set of schools in a single system in order to perpetuate discrimination. The District court ordered D to establish a plan.

(i) **Must have de jure segregation.** The federal courts may not order a school board to adjust the racial composition of any of its schools (no matter how great the imbalance) unless there was **officially mandated segregation**. The court may not order de facto segregation to be cured.

(ii) **Racial Quotas.** Once official segregation is found, the court in fashioning the remedy may consider the ratio of white to black students.

(iii) **Single-race schools.** This fact does not necessarily mean that desegregation has not been accomplished. But such schools must be carefully scrutinized, and **it is up to the school to show that the racial concentration is not due to official segregation but to other causes (residential patterns)**.

(iv) **Rezoning.** This is permissible for remedying segregation.

(v) **Busing.** The court approved busing but indicated that busing would not be upheld if the time or distance of is so great it would pose a health threat or impinge on the educational process.

(b) **Desegregation in the North.** There was little need to distinguish between de facto and de jure desegregation or to proscribe methods for determining whether a school board had intended to segregate because all racial imbalance could be linked to statutorily-required segregation. In the North this did not hold true and the courts began laying some rules for determining a de facto/de jure distinction. **"Isn't it ironic?"** Therefore they had to show discriminatory effect and discriminatory purpose. Effect is not so hard, but how do you show discriminatory purpose? There is a lot of disagreement on how you show it ?

(c) **Purpose.** If the government does not have the intention to discriminate against a suspect class then its not really de jure discrimination. Under Brown I we know the only kind of discrimination that is proscribed is de jure. If a statute is facially neutral and they have proof of discriminatory effect, is that de jure discrimination if they cannot show governmental intent to discriminate? No.

(i) **Hypo.** Assume there is a residentially fully integrated school district. The state adopts a law that children in this district must attend their neighborhood schools. Then, one of the areas major private employers begins to experience financial difficulties. This employer is racist but has kept its attitudes hidden until these economic problems

arose. Employer lays off its entire black workforce. Ultimately, these black families have to move out of the school district. The district becomes "lily white." There is a challenge to the statute, is the statute facially neutral or discriminatory? Neutral. Does it have a discriminatory impact? They could probably show that because the neighborhoods are white. Is the discrimination de jure or de facto? De facto. Can plaintiff's succeed? No.

(ii) **Keys (The Denver Case).** Segregation in Colorado had never been statutorily required. The District Court found that Denver school authorities had used gerrymandered attendance zones, school construction policies and other devices to keep the schools segregated. Plaintiff's were challenging facially neutral governmental action and so their burden was to establish that the government engaged in intentional acts of creating or maintaining segregated schools and that segregated schools resulted from those governmental actions. Burden on plaintiff's to show de jure discrimination. The Court noted this is a terrible burden, how do you show this? Court threw plaintiff's a bone called the Keyes presumption. The idea is that some of what plaintiff needs to prove vis-à-vis intent is going to be presumed and so it will be easier for plaintiff's.

1. **Keyes presumption defined.** If plaintiff can show intentionally segregative school board action in a meaningful portion of the district then it will be presumed that other segregated schools in other parts of the district are also the result of governmental intention to segregate. Government must prove the other segregated schools in the district are not the result of intentional governmental action or that past discrimination didn't contribute to the existence of the segregated schools. This may water-down the de jure requirement because it relieves plaintiff's of showing intent. In fact, two justices wrote separate opinions urging the abandonment of de jure/de facto distinction. All segregated schooling is ultimately the responsibility of government. This is a results approach - segregation in the schools. Douglass does not care who caused it, it is the government's responsibility that is does not continue.

2. **Modern Applications.** The Court then threw another "bone." *Columbus Board of Education v. Penick* and *Dayton Board of Education v. Brinkman*, the Court watered the requirement down even further by saying that if plaintiff's can show that in 1954 when Brown I was decided there was de jure school segregation then the school district is under a continuing duty to desegregate even though plaintiff's cannot show that the school board's subsequent conduct involved intentional discrimination.

a. **Longitudinal and Horizontal applications.** Think of the Keyes presumption as going horizontal and this one as longitudinal - in time.

3. **De jure requirement maintained.** Would be found only when there was an intent to segregate.

4. **Segregation of one part of district.** The effects of finding intentional segregation in one district have two important consequences for the plaintiff's:

a. **Dual System.** The finding of intentional segregation of a substantial portion of the district would create a prima facie case that there was a dual school system, i.e. that the entire school system was segregated. This could be

rebutted only be a showing that the segregated part should be viewed as separate and had no effect on the others.

b. Probative of segregative intent. Even if the school could show this the finding of segregative intent as to one area would create a presumption that segregated patterns in the other areas were intentional. This could be rebutted if the school showed

i. Segregative intent was not a motivating factor in the board's actions as to the other areas; or

ii. Past segregative acts did not create or contribute to the current segregated condition.

c. Aggregated minorities. *In determining whether a school is segregated, the court should consider the aggregation of all minorities.* The Court defined segregation as any school having a combined predominance of AA and Hispanics. These groups suffered identical discrimination. This has the effect of identifying more segregated schools than if AA enrollment were alone considered.

i. Note: Isn't the flip side of this true?

(d) May school desegregation orders extend beyond school district lines? Whether a Court can impose an area-wide multi-district remedy as relief for segregation within a single district? *Interdistrict remedies.* If the inner city is shown to be de jure desegregated can the District Court order a remedy which includes suburban school districts?

(i) Four factors

1. Evidence that school district boundaries were drawn by the state with segregative intent.

2. Evidence that any school district had caused racial segregation in another school district.

3. Evidence that any of the surrounding school districts had segregated school systems.

4. Evidence that any of the suburban school districts had been given an opportunity to be heard on the propriety of a multi-district remedy.

(ii) *Milliken v. Bradley.* Litigations sought desegregation in Detroit school district. The trial judge found numerous actions were taken for the purpose of maintaining segregation by both the school board and the State. The judge then determined that only a inter-district remedy would solve the problem and ordered one. He also ordered the State to purchase buses. On appeal this was affirmed. The Supreme Court reversed. Desegregation does not require any particular racial balance. School district lines cannot be ignored - local autonomy is essential. The district court's remedy would alter the structure of public education in MI. Before these inter-district boundary's are set aside it must first be shown that there is a constitutional violation within one district that produces a segregative effect in another. The Constitutional right is to attend a unitary school system in that district. Unless the lines were drawn discriminatorily they were under no duty to make provisions for black students to attend schools in other

counties.

(iii) The Court left open whether in other situations the court can issue multi-district remedies, but the lower court cannot issue a multi-district remedy in this case. (Look at the four factors, *supra*)

(iv) **On remand.** The State appealed having to pay for the compensatory education programs that were remedial. They argued the court's decree must be limited to redressing the unlawful segregation. The Court rejected this argument noting that discriminatory student assignment policies can breed other inequalities which the federal courts cannot close their eyes to.

(e) **Justification and significance.** The Court is saying federal courts cannot decree relief simply to produce area-wide integrated schools in a metropolitan area. **The big reason is the tradition of local autonomy in the control of schools and school districts.** Dissent says local autonomy should not take precedence over the EP rights of these children. The result is that racial segregation has persisted along city lines in major metropolitan areas.

(i) **Comparison to Keyes.** Milliken is arguably inconsistent with Keyes, *supra*. In Keyes, the Court was willing to allow proof of segregation in one part of the city to establish a presumption that there were segregative effects in other parts of the city. Yet, the Milliken majority is unwilling to allow the same presumption to apply to establish segregative effects outside the city. There is **no logical reason for this other than the political consequences that may arise.**

(ii) **General Equitable Principles.** The scope of the remedy is determined by the nature and scope of the constitutional violation. Cross district remedy only if cross district wrong.

1. **racially discriminatory acts of one district provides racial segregation in another**

2. **district lines are drawn on basis of race**

(f) **Federal Courts have no authority to draw whites back from the suburbs absent proof that the original segregation itself caused the white flight → Missouri v. Jenkins (III).** Can remedy the low level of education caused by segregation but not too much. The federal court had ordered programs like magnet schools and Kansas City wanted to create a magnet school so wonderful it would attract children from all over. The district court had no evidence of de jure inter-district desegregation but it did have evidence that there had been "white-flight" pursuant to previous school desegregation orders. The Supreme Court said white flight is not de jure desegregation and the magnet school is multi-district relief and therefore inappropriate. You can upgrade the inner city schools, but not because there has been white flight. Milliken and Jenkins reinforce the de jure requirement.

iv) Classifications Based on Gender

(1) **Intermediate Standard throughout.** Any gender-based classification must be "**substantially related**" to "**important**" governmental objectives. This is the intermediate level of scrutiny. Now we begin at the beginning of the story.

(a) **The test today.** In 1996 the Court, in *Virginia v. US* applied the intermediate scrutiny standard in a rigorous way, making it closer to strict scrutiny than to mere rationality

review. Defendant's must show an "*exceedingly persuasive justification*" for the scheme and the Court will apply "*skeptical scrutiny*."

(i) The classification serves important government objectives that do not rely on archaic or overbroad generalizations about the different talents, capacities or preferences of males and females

1. **Note:** A gender-based scheme that stems from a traditional, stereotypical way of thinking about gender roles is especially likely to be invalidated.

(ii) These objectives are genuine in the sense that they describe actual state purposes; and

(iii) The discriminatory means employed are substantially related to the achievement of these objectives

(b) Traditional deference by Court -- *Goesaert v. Cleary*: The constitutional does not require legislatures reflect sociological insight or shifting social standards.

(2) Stricter review in the 1970s.

(a) *Reed v. Reed*. A statute preferring men over women as administrators of estates was struck down. The Court purported to apply the mere rationality test. In rejecting the state's contention that the preference reduced the workload of probate courts by eliminating hearings on the merits, the Court was clearly putting more bite into the traditional standard than it had previously done. Note the verbiage of a *substantial* relation. Administrative convenience not enough to justify the goals under the rational relationship test applied with teeth.

(b) **Explicit strict scrutiny.** The mere rationality standard was rejected in *Frontiero v. Richardson*. *Held*, classifications based on sex, like classifications based on race, alienage or national origin, are inherently suspect and subject to strict judicial scrutiny. *Saying that administrative convenience is a compelling state interest as did the defendants here, simply "drives the justices wild."*

(3) **Retreat to intermediate standard.** The Court then settled on intermediate scrutiny for gender-based classifications, whether benign or not.

(a) *Craig v. Boren*. This case involved a successful challenge to an Oklahoma statute forbidding the sale of 3.2% beer to males under the age of 21 and females under 18. The standard was that classifications based on gender must serve important governmental interests and must be substantially related to achievement of those objectives. The statute was defended on the grounds that it promoted traffic safety, since statistically, 18- to 20-year old males were arrested for drunken driving much more frequently than females (2% to .18%) in the same age group. The majority found that this was an important objective but found the statistics to be insignificant. First, *maleness cannot serve as a proxy for drinking and driving (small portion of males arrested)*. State's regulation was not reasonable since that beverage was supposedly non-intoxicating. The statute prohibited only the selling and not the drinking of beer. The overall fit between the means and the ends was too tenuous to constitute the required substantial relation between means and ends. Oklahoma could have taken other measures to achieve its purpose - restrict the use of all alcohol or stronger alcohol. Also, restrict *use*, not just by males but by everybody. The government must show important government interest and that the statute is substantially

related or closely tailored to carrying out the states objectives.

(b) **Significance of Craig.** Intermediate scrutiny and quasi-suspect class for gender classifications (no matter what the gender). The Court could not leave this alone. Maleness cannot be a proxy for drunk driving since a small portion of males in the relevant age group were convicted. It was under- inclusive, for e.g., it only prohibited selling, not drinking. Also, 3.2% beer was supposed to be non-intoxicating. ***The overall fit was too tenuous to constitute a substantial relation between means and end.***

(c) **Mississippi University for Women v. Hogan.** The government burden under intermediate scrutiny is to provide an exceedingly persuasive justification for its gender classification. Everybody got futuz and things went to mush. A slightly more intensive classification that intermediate scrutiny while still not being strict.

(d) In **JEB v. Alabama** we see this language again. Gender discrimination in the use of preemptory challenges violates the Equal Protection Clause. The Court reiterated the standard above.

(4) Today's Intermediate Scrutiny Standard -- *US v. Virginia.*

(a) **Issues (see outline)**

(b) The test is now "**intermediate scrutiny plus**" because we now need an exceedingly persuasive justification + the state's objectives must be **real** and must not be **based on stereotypical** thinking about gender.

(i) **Governmental Objectives:** The governmental objectives that Virginia asserted were that if women were admitted VMI would have to change the adversative approach. Also, diversity in education available to Virginians such as attending a single sex school that uses these types of methods. It is an important objective to have single sex schools. Having to change the adversative method - the Court says there is no evidence that this would have to be changed if women were admitted so this is ? to be continued. The exclusionary policy fails the first part of the analysis - important and real and not based on stereotyping. The ends part, the Court did not even get to the means/ends part of the analysis. Virginia tried to implement a remedy - VWIL. If you had VMI only men and VWIL only women and they are equal and there is an EP challenge on the basis that this is gender discrimination, the Court would assess the constitutionality of this by using intermediate scrutiny. The standard of review used with separate but equal in a racial context is strict scrutiny. VWIL does not have the same funding, prestige adversative model, etc. It is a much inferior institution. VWIL cannot survive enhanced intermediate scrutiny so it is struck down as a remedy. Enhanced intermediate scrutiny standard for gender classifications. The test used is the Court's current test. ***If the government tries to set up single sexed schools after VMI the fate of those programs is meeting the enhanced intermediate scrutiny standard.***

I. Note: this is not impossible, but not easy either. Girls and math - problem passing the stereotyping prong. The majority leaves open the question whether the government could create separate but really equal single sexed schools? VWIL did not pass muster because it was not really equal. It would have to pass this intermediate scrutiny standard. Scalia - he thought enhanced is strict scrutiny parading as intermediate. He is very pessimistic - a whole educational tradition was decimated by this holding.

(ii) Determining gender discrimination can be 'tricky'

1. *Bray v. Alexandria Women's Health Clinic*. Whether persons blocking entry into an abortion clinic were committing gender discrimination in violation of the EPC? Among those blocking entry were women, and of course, mostly women were trying to get in. *Held*, there were women on both sides so no gender discrimination. Considering that only women can get abortions and that pregnancy is a sex-based characteristic. The Court could have gone the other way. The fact that the women were on both sides blunted the claim of intentional sex discrimination.

2. *Wengler v. Druggist Mutual Insurance*. The issue was whether a state worker's compensation law violated EP where the law provided that death benefits would automatically be granted to the wife/widow of an employee but would be granted to the husband/ widower of the female employee only if he could show he was incapacitated or could prove actual dependence on his wife? *Held*, there is gender discrimination and both men and women are being discriminated against. The husbands cannot get benefits without a showing and also the female employees are discriminated against. Those who died because those automatically do not go to the spouse.

(c) Viva la difference! Or? Viva La Resistance!

e) **Intermediate Scrutiny**. The decision to employ mid-level scrutiny does not end the matter as it does with RB or SS. The precise way the Court applies mid-level review becomes extremely important.

i) Objective must be important

(1) Most are except

- (a) Administrative convenience (Reed, Frontiero) → not legitimate or compelling
- (b) Conservation of scarce resources (Plyer)
- (c) Offering a choice of educational environment in most circumstances (VMI)

(2) Means must be substantially related

- (a) Means/ends fit reasonably tight
 - (i) Flush out improper motivation
- (b) Actual

f) The requirement of a discriminatory purpose - The relevance of discriminatory impact.

i) **Remember the roadmap**. Step 1 - ask is there a class that is subject to government discrimination? There are two ways for a plaintiff to show government discrimination

- (1) The statute discriminates on its face
- (2) The statute is facially neutral then plaintiff must show discriminatory intent by the government and discriminatory impact by the government's policies.

(a) When a statute discriminatory on its face the reason that suffices to show discriminatory purpose is b/c we presume that it reflects discriminatory intent and that the statute has a discriminatory impact or purpose. Where the plaintiff establishes either that he is challenging a facially discriminatory statute or that he is challenging a facially neutral statute that has the requisite discriminatory government intent and purpose, then the plaintiff has made a prima facie case of discrimination against the government. Why does this matter? ***Because making a prima facie case is a requirement for getting the Court to use any form of heightened scrutiny.*** One of the reasons behind this is that without the prima facie showing than really what plaintiff is challenging would be de facto government conduct, not de jure government discrimination.

ii) Purposeful Discrimination. A classification will not be deemed "suspect" and therefore subject to strict scrutiny, unless the Court finds that there was a legislative intent to discriminate against the disfavored group. Therefore, there must be both (1) a demonstration of disproportionate impact, and (2) proof of intentional discrimination.

(1) Three ways to show purpose.

(a) The law discriminates on its face - no additional showing of a discriminatory purpose is necessary

(b) The law, albeit neutral, is administered in a discriminatory way - no additional showing of legislative motive is necessary but defenders can rebut by stating an innocent explanation.

(c) The law, albeit neutral on its face and is applied in accordance with its terms, was enacted with the purpose of discriminating, as shown by the legislative history, disparate impact or circumstantial evidence of intent. The difficulties of proving motive are greater.

(i) **Note:** If any of these three is found to exist then the discrimination is ***de jure***. Otherwise, it is ***de facto***.

iii) ***Washington v. Davis***. Rejected black applicants for police officers in the District of Columbia. Test 21 was challenged. It was a screening device for recruits. The claim this test violated the EPC of the 5th Amendment because more blacks failed the test than whites. Introduced no evidence of discriminatory intent only impact (higher % of blacks failed the test, the test had not been validated to show job performance, the number of black officers was not proportional to the number living in D.C.). The appeals court applied using the same principles of Title VII where a plaintiff can prevail by just showing discriminatory impact. All kinds of legislation that weighs more heavily on the black population and we cannot have this so they use the impact standard. Plaintiff's dealing with challenging a facially neutral statute they must make out a prima facie case of discrimination, then plaintiff has to show governmental intent to discriminate and discriminatory impact from the governmental conduct. That means that blacks are not the object of governmental discrimination. This is another reason why if plaintiff cannot make out a prima facie case, then rational basis will be used. It is no longer a quasi-suspect or suspect class. No evidence of defendant's discriminatory purpose against blacks then the governmental discrimination is not considered to be against blacks - there is no suspect class involved - the courts gonna use the rational basis test. The Court mentions that Test 21 serves a non-discriminatory purpose - assuring a certain level of skills, so the Court used the rational basis test. The Court upholds it - it is rationally related to assuring the verbal skills of the officers.

(a) **Significance of Davis.** We learned that where a statute is facially neutral in order to make out a prima facie case of discrimination against a suspect or quasi-suspect class, so as to warrant heightened scrutiny, then plaintiff must show that the statute has a

discriminatory purpose (intent) and a discriminatory impact against a suspect or quasi-suspect class. If as in *Davis*, plaintiff cannot show either discriminatory impact or discriminatory purpose against a suspect or quasi-suspect class then the Court will use the rational basis test. But what happens if plaintiff can show a discriminatory governmental purpose and discriminatory impact, (the prima facie showing) then the burden shifts to the defendant government to show it would have taken this action anyway regardless of race, gender or any of those suspect or quasi-suspect classifications. If the government meets its burden then it is essentially destroying plaintiff's prima facie case and the Court will use the rational basis test. If the government does not meet its burden then the Court will use heightened level (the appropriate level). **Remember:** If there has been no discriminatory purpose it is de facto, even if the effects were discriminatory.

(b) **Davis Hypos.** Assume plaintiff's could show that Test 21 has discriminatory effects and a discriminatory governmental purpose against blacks (prima facie case). The burden shifts to the D o C to show it would have used Test 21 regardless of race, that it had purposes other than race. If the government meets its burden it can show this test was designed just to show competent police officers then the Court will use the rational relationship test. Let's say the government cannot adequately show this, the standard the Court will use is strict scrutiny.

(2) **Inferring intent from impact.** Could be inferred from discriminatory impact taken in the context of other factors. Also can be inferred from discriminatory impact where there is no other explanation other than invidious discrimination intent to discriminate against a suspect or quasi-suspect class. The test here had an explicable purpose and there were facts that D.C. was making efforts to recruit blacks and make the department more friendly. Given these facts, the Court will not infer discriminatory intent. Interesting point of concurrence - there is no bright line.

(a) **Ways plaintiff can show discriminatory intent by government**

(i) Any proof going to government intent must indicate that the government wanted to discriminate. It is not sufficient to introduce proof merely that government took action with the knowledge that discriminatory effects might follow. This is another way of saying that the mere fact that it was foreseeable that a law would have a disparate impact on a particular group is not enough to show intent. ***The classification must have been implemented because of discrimination not in spite of it.***

(ii) Plaintiff can show discriminatory intent by showing discriminatory **impact plus contextual information** that would tend to lend support to the inference of intent.

1. **Example. *Rogers v. Lodge*:** An EP challenge to an at-large system under which 5 member board was elected. Blacks were never elected to this board. *Held*, the at-large system was maintained for a discriminatory governmental purpose based on this impact plus evidence that blacks were a sub majority of the pop and had historically been discriminated against with respect to voting.

(iii) **Impact + administration of the law** where there is no other explanation for the results other than discrimination against a suspect or quasi-suspect class

1. **Example. *Yicwo*:** a challenge to SF ordinance that required permit to run laundry. It was administered every time Chinese applied they were denied. The Chinese plaintiff's had made out a prima facie case and showed discriminatory intent because it could be inferred by the way it was administered and there was no

explanation other than discrimination against people Chinese descent

(iv) **Legislative history** - really hard most are not stupid enough to say explicitly their intent

(v) To show evidence of irregularities in the manner in the way which a law was adopted. These might show discrimination against a suspect or quasi- suspect class.

(b) **Stereotypes**

(i) **Example.** Statute forces employer's to give female employee's 2 weeks of paid vacation solely for child care. If challenged by male employee's under the EPC, this statute would be subjected to enhanced intermediate scrutiny and probably struck down. It's based on the gender stereotype that women are the child bearers. To rectify past gender discrimination and that do not involve gender stereotypes will also be subjected to enhanced intermediate scrutiny and probably be upheld.

1. **Example. Califano v. Webster.** Computing retirement benefits allowed female wage earners to exclude the three lowest earning years so the female employee would have higher ss benefits than a similarly situated male. They used intermediate scrutiny. The Court said this was an important governmental objective - women tended to be paid less and this was designed to ameliorate that. There was no gender stereotyping here. The differential was substantially related to carrying out the purpose of remedying past governmental discrimination. The Court upholds the classification. Go to 986.

iv) **If the state government adopted benign racial discrimination then the courts would use strict scrutiny.** But if the federal government engaged in benign discrimination for racial minorities then the court would use intermediate scrutiny.

(1) All racial classifications are subject to strict scrutiny --Adarand v. Peña . Federalizes Croson. Affirmative action programs by either the state or the federal government designed to benefit racial minorities will be subject to strict scrutiny. The rationales the Court used for adopting a standard of strict scrutiny for all benign classifications? The maj is troubled because ***we cannot tell benign from invidious and the concern is that governments might adopt seemingly benign programs that are in fact designed to achieve invidious discrimination and strict scrutiny will "smoke that out."*** Discrimination is discrimination. The Court wants to adopt consistency so they adopt strict scrutiny no matter who is on the receiving end.

(a) Benign discrimination creates racial paternalism - dependency by minorities on government. It does nobody any good. Another rational is that the concern is that strict scrutiny will be strict in theory and fatal in fact. 99% of statutes will be struck down.

(b) The Court says that this is not necessarily so when it is applied to benign racial classifications. Here we go with mush again. Strict scrutiny minus - in the benign racial classification context they will apply SS a little more laxly and the statute has a chance of surviving in this context. Scalia wrote he concurred with SS but he would have liked the stronger SS standard and government can never show a compelling purpose for it, never. All statutes whether benign or not should be subject to SS and should never survive. He takes this hard line because of the concept of racial entitlement. If we allow it will create a feeling that they are entitled to certain things and engenders feelings of race hatred.

Stevens wants intermediate scrutiny and there is a place for benign discrimination.

(2) The Court goes out of its way to dispel the notion that strict scrutiny is strict in theory but fatal in fact.

(3) Arguments against using strict scrutiny

(a) AA inevitably foments racial resentment and strains the effort to gain wider acceptance for the principle of moral equality of the races.

(4) Arguments for using strict scrutiny

(a) Social equality requires AA at this point in American history

(5) What will meet the strict scrutiny test?

(a) Remediating past discrimination

(i) Not interpreted to remedy past societal discrimination, and may only mean that a person with specific evidence of past discrimination of the entity in question, who proves denial of that benefit on account of race, will be granted the benefit

(b) Enhancing diversity (rejected)

(c) Providing role models (rejected)

(d) Enhancing services to minority communities (rejected)

(6) Using strict scrutiny serves to flush out improper purposes because it is often difficult to tell whether a classification is invidious or benign.

v) Classifications disadvantaging aliens. Aliens are non-citizens. The general rule is that usually governmental discrimination against *legal* aliens is subject to strict scrutiny. Legal aliens are considered a suspect class. Usually because there are some exceptions to this general approach

(1) If the classification against the legal alien was adopted by Congress or the President then the Court will use the rational relationship test to review the classification. This is because immigration matters are uniquely for the President and Congress and the Court will give them great deference.

(2) Classifications that deprive legal aliens to access to self-government or the democratic process. Such classifications will also be subject to the rational basis test.

(a) **Example.** A legal alien wants to hold office or have a government job and they are not allowed to because they are not an alien. The Court will use rational basis.

(b) **Illegal aliens.** They are NOT suspect or quasi-suspect class. The standard that the Court will use is the rational basis test.

(c) **Special treatment for children of illegal aliens brought in to the United States.** They are treated as a quasi-suspect class. The Court will use intermediate scrutiny to review laws that burden this group. The reason is that the Court takes the view that they did not illegally enter the United States.

(d) **Exceptions**

(i) **Public Function Exception** - for functions that go to the *heart of representative government*

(ii) **Greater deference to Federal Government** - it has exclusive jurisdiction over illegal aliens

vi) **Illegitimates - people born out of wedlock.**

(1) **Lalli v. Lalli.** Challenge to the constitutionality of §4-1.2 stating that illegitimate children who would inherit from their fathers to provide proof of paternity. Legitimate children do not have this burden. Appellant argues that because legitimate children do not have this burden that he is being discriminated against in violation of the Equal Protection Clause of the 14th Amendment. The Court applies Intermediate scrutiny and illegitimacy is almost always treated in this way. **Illegitimates are a quasi-suspect class.**

(a) The important objective is the orderly transfer of estates - discourage spurious claims and make service of process viable. The first prong is met.

(b) The means are substantially related to carrying out its objectives because it was a close fit between the means and the objectives. By insisting on a court order during the fathers life this will discourage fraudulent claims; the administration of the estate is facilitated and the possibility of uncertainty and delay is minimized.

(c) The dissent says this is over-inclusive - allow people who have proof to also inherit. Also, some illegitimates can inherit - those who have the court order. And the statute is upheld.

(d) Historically, where state laws have denied benefits to ALL illegitimates, the Court has applied intermediate scrutiny and the statutes have been struck down. Because the Court did this, states have enacted short statutes of limitations within which illegitimates could establish paternity. Many states think that illegitimates are a "race apart and need to be treated poorly." See, for e.g., **Clark v. Jeter.**

vii) **Rational basis will be used for other classifications discriminating against other groups.**

Occasionally, the Court has examined legislation that it finds to have been motivated by **animus or hostility** towards a **politically unpopular group**. The Court has been willing to strike down such legislation even though only "mere rationality" review is used. In doing so, the Court has used one of the following rationales (1) that the desire to harm the unpopular group cannot be a legitimate governmental objective; or (2) that to the extent some apparently legitimate state objective is cited, the means drawn are so poorly linked to achievement of that objective that not even a rational relation between means and end is present. Note that in each instance, the group discriminated against is either politically powerless or politically unpopular.

(1) **Examples:** The Court is often moved **by its gestalt to invalidate laws that doctrine suggests should be upheld.** Something more than minimum rationality is at work here. Triggers for enhanced scrutiny: something is not legitimate about the government's objective but it's willing to call it illegitimate (**Cleburne**); or the Court thinks the classification is dubious but is unwilling to call it suspect. Occasionally the Court has used rational basis with teeth for these groups

(a) Aged

(b) Poor: **Rodriguez**, infra.

(c) Mentally retarded

(i) **Example.** Texas denied a use permit to operate a home for the mentally retarded. The Court struck the statute down using rational basis "with teeth." Discrimination

against the retarded is invidious and the Court's more that rigorous application of the rational relationship test was motivated by historical and current prejudice against the retarded. *City of Cleburne v. Cleburne Living Center*. Further, if the constitutional conception of equal protection of the laws means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. *United Dept. of Agriculture v. Moreno*.

(d) **Smart People:** Smart people to take exam to get into police force and are excluded because they do too well. (See handout)

(e) **Homosexuals**

(i) *Romer v. Evans*. The Court struck down Colorado's Amendment 2 to their Constitution, which prevented the state or any of its cities from giving protections to gays and lesbians.

(ii) *Rationale*. Here the Court looks at the "real" objective when prior precedents have said that we can look at hypothetical objectives. (The gestalt) This is rational basis with fangs. *Let's get real Camille - the real objective was animus*. It knows this for certain because the statute is sooo broad, much broader than it needs to be. It withdraws legal protection to homosexual. *The fangs are even longer because over-inclusiveness should not make a difference in a rational relationship test*. This is a very muddled decision. The Court strikes down Amendment 2 under the rational basis test. Romer is the first time governmental discrimination has been struck down under the EPC where the discrimination was on the basis of sexual orientation.

(iii) *Should homosexuals be classified as a suspect or quasi- suspect class?*

1. *Immutable characteristic*
2. *Historically discriminated groups*
3. *Politically weak group*
4. *Groups suffered from being stereotyped*

(iv) Scalia Dissent.

(v) Discrimination against homosexuals will be subject to the rational basis test, but with teeth.

(f) *Discrimination against out-of-stators* when the discrimination does not impinge on a fundamental right. .

(i) *Zobel* infra: Royalties distributed depending on one's length in the state. The first two objectives (financial incentives and prudent management) were not rational and the third (recognition of past contributions) was not legitimate.

1. **Note:** These cases are the exception rather than the rule, and the usual standard is one of extreme deference.

g) ***The Equal Protection Clause and Classifications that impinge on a fundamental right.*** A classification that discriminates against a suspect class or impinges upon a fundamental constitutional right will be subject to ***strict scrutiny***.

i) Fundamental Rights - 3 steps in all cases

(1) Is a fundamental constitutional right implicated in the case?

(2) Is that fundamental right impinged by the challenged statute?

(a) If yes, go to (3)

(3) Does the challenged statute survive strict scrutiny? If a fundamental right is not impinged by the statute and the statute's classification does not discriminate against a suspect or quasi-suspect class, then look to see whether the statute survives the rational relationship test.

ii) ***Where they come from.***

(1) Fundamental constitutional rights come from the right that are explicitly set forth in the US constitution and its amendments other than the EPC.

(a) **Example.** Free Speech, protections against unreasonable search and seizure.

(2) They can also be unenumerated constitutional rights derives from or implicit in constitutional provisions.

(a) **Example.** Parents sub due process rights to raise their children.

(3) **Test.** A class that impinges on any of these rights will trigger strict scrutiny.

(4) These fund const rights that the court has found to derive from the EPC itself.

iii) She is talking about amendments 19th, 24th, etc.

iv) ***One Person - one vote → Reynolds v. Simms.*** Where the districting is not ?? to such that the weight of a voters vote is substantially diluted in comparison with another voters vote, is that an EP violation. The idea is that vote dilution would impinge on the right to vote equally. ***Held***, a state must apportion its legislative districts on the basis of population. According to population so that the districts are as equal as mathematically possible. This will avoid vote dilution and assures one person, one vote. Only this will avoid EPC problems with the exception of the Senate. The fundamental principle of representative government is one of equal representation for equal numbers of people, regardless of race, sex, economic factors or place of residence within the state.

(1) The House of Rep, state legislatures and state governments have to follow this rule. The conventional wisdom is that the Court applied strict scrutiny in assessing Alabama's apportionment scheme. An impingement of a fundamental right. The classification is the voters living in the bigger districts are being discriminated against. ***Undeniably the constitution protects the right of all qualified citizens to vote in state? It has been repeatedly recognized that all qualified persons have the right to vote. Essence of democratic society? Are these dicta or is there a fundamental constitutional right to vote as opposed to just participating equally in elections?*** This language is integral to the holding. Why be concerned with the latter unless there is a fundamental right to vote. Otherwise the court should have used rational basis. Strict scrutiny only makes sense if there is a fundamental right to vote. Others disagree, there can be a fundamental right to equal opportunity to vote, so the above was just dicta. On exam point out the disagreement.

v) ***Non-dilutional Race-based districting*** Race is used as the predominant factor in carving out voting

districts. Race-based districting has been used to achieve invidious discrimination but also as a remedy, to ameliorate race disc in the drawing of voting districts. They create majority/minority districts. This is a voting district in which a racial minority constitutes a majority of the voters in that district in order to increase the likelihood that a candidate sympathetic to the racial minorities views will be elected.

(1) **Note:** race based districting does not in itself result in dilution because you can have this that creates districts of equal populations where the majorities representation (whites) is not reduced below its proportional share.

(2) **The use of race in drawing election districts is permissible if the state can show it is necessary to achieve a compelling government interest. Two ways to show race used in drawing election lines that justify SS**

(a) **Bizarre Shape -- In Shaw v. Reno** the Court held that plaintiff establishes a prima facie case of discrimination against a racial minority by alleging that a state redistricting plan is on its face so bizarre in terms of shape or demographics that it has no rational explanation except to separate people according to race. Such redistricting plans are subject to strict scrutiny.

(i) **Open Question** (answered in Miller, *infra*) is whether a plaintiff challenging a redistricting plan in order to make a prima facie case must allege a bizarre shape or demographics? Or whether plaintiff can use other evidence showing discriminatory purpose by the government.

(b) **Purpose to discriminate -- Miller v. Johnson.** Redistricting plan challenged under EPC. Five white voters in Georgia. Certain jurisdictions had to comply with the Voting Rights Act, including Georgia, and submit their redistricting plans for approval to those administering the act. To get approval, these plans had to not have a purpose and effect of abridging or denying the right to vote on account of race. The purpose was to avoid retrogression in racial minorities voting abilities. The 11th District came into being? The nature of the resulting district was odd. The district was an "ameba doing starching exercises." Demographics and shape the district was bizarre. Almost 80% was African-American. According to the Miller majority the harm caused was stigmatization, balkanization and representational harm. (see outline).

(i) If it was ameliorative it would have based strict scrutiny and this would have been a compelling purpose. Otherwise, it is race based districting and struck down as not meeting strict scrutiny.

(ii) Shaw says P can make out a prima facie case of discriminatory race-based districting by alleging a bizarre district. The question in Miller is whether P can use other evidence to make out such a case/ The Court says yes. A prima facie case is made out because justice dept. insisted that it be race based (maj-min). The Court applies SS and finds that the 11th District does not survive because Georgia has no compelling interest in creating the 11th district because this is not ameliorative it is race based districting.

(iii) SS because of the fundamental right to vote or the other. Another theory is because this is race-based discrimination so the Court could apply SS under either theory. Race based districting is subject to SS even if it is designed to help racial minority electives. If we are trying to help why use SS? This is benign not invidious.

vi) **Qualifications of Voters. 24th prohibits as a prerequisite to vote in federal election.** What about state elections? Are poll taxes unconstitutional under the EPC? Lines drawn by voter affluence or by payment of any fee *violate* Equal Protection.

(1) **Harper v. Virginia.** Plaintiff's were residents of Virginia. Could not vote unless you pay the poll tax. Poll tax violated EPC. Wealth is not a rational way of figuring out who should be qualified to vote. The statute is not carefully confined to assuring qualified voters. Harper is considered a case where SS is applied to the poll tax because the language like it is closely scrutinizing and the statute is not carefully confined? Also, this treats voting (or an equal opportunity to vote) as a fundamental right and the poll tax impinged on that fundamental right.

(2) **Durational residency requirements as a pre-condition to vote.**

(a) Dunn v. Blumstein held invalid a statute req'g as a prereq to voting residents in the state for 1 year and in the county for 3 months before you could vote. The Court struck it down using strict scrutiny, impinged on the fund right to vote or participate equally. (**But see, Marston v. Lewis**, where the Court held valid a state req. Court used strict scrutiny as impingement but upheld the statute because the state had a compelling interest for its residency requirement of 50 days to have its voter list adequate.

vii) **The right to travel as a fundamental constitutional right** - nowhere in Constitution

(1) The right to travel interstate is really two rights

(a) The right to pass-through a state

(i) Derives from Commerce Clause or either of the P&I clauses or that it is an incident of national citizenship. We are not looking at that right

(b) The right to migrate to another state for purposes of setting up a new residence. This right flows from the EPC.

(2) **Durational Residency requirements** - where a person must live in the state for a specified period of time to receive a benefit (welfare, voting, divorce). In other words, a measure denying new residents a benefit that is available to other residents of the state until the newcomers have resided within the state for a specified period of time. Durational residency requirements discourage interstate mobility and strict scrutiny is applied. This is at issue in Shapiro v. Thompson.

(a) **Shapiro v. Thompson.**

(i) Durational Residency requirements - the right to travel can be impinged. These are a measure that denies new residents a government benefit or privileges given to older residents and the denial continues until a specified period of time has elapsed.

(ii) Denied newcomers the means of subsistence. Fiscal integrity is a legitimate state purpose but the statute did not survive nevertheless. This is not a compelling interest. State conservation of fiscal resources is not a compelling interest that would justify classifying people for the receipt of benefits. There is some strict scrutiny language here. The durational residency requirement impinges on the fundamental constitutional right to migrate interstate, and this is why the Court uses strict scrutiny. Also, there was the penalty on indigent people traveling interstate.

(iii) Where Shapiro residency requirements are not per se unconstitutional, some

residency requirements may not constitute penalties on the exercise of constitutional rights.

1. **Example.** Access to the libraries for two weeks after moving to the state is not an impingement because the right is not as important. Whether there is an impingement, i.e. a penalty or deterrent effect on the right to interstate immigration turns on the impact of the residency requirement. If the impact is a severe deprivation then there is going to be a penalty or deterrent effect hence impingement. If the impact is very small, then there probable will not be an impingement. In Shapiro, the deprivations is extremely severe.

(3) ***How mild can the deprivation be to still have impingement?***

(a) ***Dunn v. Blumfield.*** Upheld EP challenge to state law requiring as a precondition to voting 1 year and in the county for three months. The older residents do not suffer from this. The fundamental rights implicated was the right to immigrate interstate because this might make someone hesitant to immigrate interstate - penalty and maybe a deterrent. The deprivation is not of a basic necessity but if the durational residency requirement denies a fundamental constitutional right to newcomers, such as the right to vote, then that is a penalty on the right to travel interstate and there is impingement of the right to travel interstate.

(b) ***Penalty given broader scope -- Memorial Hospital v. Maricopa County.*** The Court declared unconstitutional a government rule that required a year's residency in the county as a condition to receiving non-emergency hospitalization or medical care at the county's expense. The court reviewed the prior decisions and said they stand for the proposition that a "classification which operates to penalize those persons ? who have exercised their constitutional right of interstate migration must be justified by a compelling state interest." This case is indistinguishable from Shapiro, *supra*. The state of Arizona's durational residency requirement for free medical services penalizes indigents for exercising their right to migrate to and settle in that state.

(c) ***Penalty defined.*** Not all differences in treatment between residents and non-residents are penalties, only inequalities in distribution of vital benefits and privileges

(i) ***Lower tuition rates are not sufficiently basic***

1. ***But note.*** They may constitute an illegal Irrebuttable presumption

(d) ***Sosna v. Iowa.*** Durational residency requirement that posited newcomers cannot get divorce. The court does not apply strict scrutiny - no impingement on fundamental right. The Court used rational basis test, or something close to it. Some durational residency requirements may survive an EPC and residency requirements for getting a divorce may be upheld by the Court.

(4) ***Bonafide residency requirements***

(a) **Introduction.** The requirement that you must be a MI resident to attend a school for free is called a bonafide residency requirement. This is a requirement that a person be a resident of a state in order to receive a benefit in that state. These discriminate against out-of-staters. These do not deter or penalize anyone from migrating to the enacting state. IF anything they are an inducement to come to our state. They might be vulnerable to Constitutional attack under the Commerce Clause or Privileges and Immunities Clause

under Art. IV §2.

(b) **Fixed Date Residency Requirements** - in order to get a benefit or privilege in the enacting state, you must have been a resident of that state on a particular date. This disability it imposes on those who do not meet it is permanent. They can never go back in time and be a resident at that state and qualify.

(i) *Zobel v. Williams*. The statute meant less benefits for newcomers rather than no benefits. We do not have to decide whether a strict level of scrutiny should be applied. They do not mention a right to travel but this does not impinge it actually promotes it. This is Rhinequist's dissent. This is an inducement and also a penalty, they can never earn as much from this fund. The Court used the rational relationship test. The distinction was not rationally related to any of their objectives. Struck down under the rational relationship test - "with teeth."

(ii) *Lochner revived*. Economic regulations may impinge on a fundamental right or discriminate against a suspect class and the Court should imply strict scrutiny.

(c) **Fixed Point residency requirements**. Conditions receipt of a benefit or privilege upon the recipients having been a resident of the state at a particular point in time, for example, when you got married or turned 18.

(i) *The right to migrate protects some residents of a state from being treated differently from others because of the timing of their migration -- Attorney General of New York v. Soto-Lopez*. In order to get bonus points on examinations they had to currently be a New York resident and be a resident at the time they entered the military. Soto-Lopez entered while a resident of Puerto Rico. The Court used strict scrutiny, not rational basis with teeth. There was a substantial loss of benefits here. There must be deterrence, penalty is not enough.

viii) **Other fundamental Rights Under the Equal Protection Clause**

(1) **General Questions**

(a) Does the Constitution guarantee some minimum entitlement by the poor to the basic necessities of life?

(b) Should classifications in statutes providing governmental services to the poor be subject to a heightened standard of review under the equal protection clause because they involved basic needs of impoverished human beings?

(i) *Skinner v. Oklahoma*. Marriage and procreation are fundamental to the very existence and survival of the race. It causes types inimical to the dominant group to disappear.

(c) Should classifications based on wealth be held to be constitutionally "suspect" and hence require special justification?

(2) **No fundamental right to sustenance - *Dandridge v. Williams***

(a) **Facts and Analysis**. Maryland participated in the welfare program and provided grants of a certain amount to each child but imposing an upper limit of \$250/mo. Recipients with larger families challenged this because they received less per person than those in smaller families. The limit discriminated against them because of their family size in violation of

the Equal Protection Clause. *Held*, for the state. The Supreme Court said that rational basis review was appropriate because the law related to "economics and social welfare." The Court thus accepted the state's interest in allocating scarce public benefits as sufficient to justify the law. The Court said "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."

(b) *Marshall's Sliding Scale*. The first articulation of the sliding scale

(i) *The type of classification*

(ii) *The relative importance of the benefits*

(iii) *The strength of the state's interests*

(c) *Note*. Interests not protected by EP may be protected by procedural safeguards.

(3) **No fundamental constitutional right to receive a public education - *San Antonio Independent School District v. Rodriguez***

(a) *Facts and Analysis*. A challenge to Texas' system of relying heavily on local property taxes to pay for public education. The result was that poor areas were taxed at high rates, but still had little to spend on education. Wealthy areas could tax at low rates and had a lot to spend on education. The plaintiff's argued that the disparity in funding discriminated against the poor in violation of the Equal Protection Clause. *Held*, [5-4] discrimination against the poor does not warrant heightened scrutiny. The Court also rejected the claim that the law should be discriminating against the poor as a group.

(b) Plaintiff's argues strict scrutiny should be applied for two reasons:

(i) **As poor people they were in a suspect class.**

1. *Rejected by the Court*. There was no demonstration that the system operates to the disadvantage of any class fairly definable as indigent. There is no basis for assuming the poorest people live in the poorest districts. Further, being poor has not resulted in an absolute deprivation of the benefit.

(ii) **The policy infringed their fundamental right to obtain an education**

1. *Rejected by the Court*. Education is important to society and affected individuals, and the provision of public education is surely an important function of government, but education is not "*explicitly or implicitly guaranteed by the Constitution.*" The court suggested in dicta that a complete denial of public education to some portion of the population might present a stronger case for "judicial assistance."

a. **Note**: The Court could have used the undue burden test of *Casey, supra*. In *Casey*, the Court seemed to be saying that an undue burden exists only if there is a showing that the regulation will keep someone from getting an abortion. The Court hints that it would strike down legislation if there was a showing that poor people are prohibited from having access to abortions as the *purpose or effect* is to place a *substantial obstacle* in the path of a woman.

(iii) *Significance of Rodriguez*. In order for a right to be deemed fundamental for purposes of the Equal Protection Clause, it must be explicitly or implicitly guaranteed

by the Constitution. An interest is not fundamental simply because it is important to the affected individual, or is an important service performed by the state, or is socially significant. There is no fundamental right, yet, to receive a quantum of education at the elementary and secondary school levels from the government. It was reformatory - to ameliorate past inequities. Also, it's used across the country and the justices are not experts in education and local financing, etc. This is hollow, remember Brown and Swann, *supra*. Marshall Dissent would require an extremely tight fit.

(4) Denial of a free public education to children of illegal aliens is unconstitutional- *Plyer v. Doe*.

(a) *Facts and Analysis.* The Texas legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not legally admitted into the U.S. It also denied them enrollment to these children. Appellants argue that due to their illegal status these children are not persons under the EPC and therefore do not have protection. The law denied equal protection, in part, based on the importance of education. The Court applied a unique version of minimal scrutiny. The Court required the classification by rationally related to a substantial state interest and effectively shifted the burden of proof to Texas. When there are concerns that are absolute and enduring this level of scrutiny should be applied. These concerns in *Plyer* were:

(i) *The illegal status of these children was involuntary, and*

(ii) *The importance of education in the life of a child*

1. Criticism. The Court said that a legitimate classifying device that adversely effected a non-fundamental right must be subject to "heightened" scrutiny. In comparison, in Reynolds v. Simms, *supra*, Bitensky stated that, "strict scrutiny only makes sense if there is a fundamental right to vote," and the same can be said here - that heightened scrutiny only makes sense if the Court is saying that there is a fundamental right to education.

2. Intermediate Scrutiny. Concern motivating justices is the fear of creating an underclass.

(iii) *There was no identifiable Congressional policy*

(iv) *Upshot*

1. *No fundamental positive right to any quantum of public elementary and secondary school education YET.*

a. The possibility of that right's existence has not been totally foreclosed by the court's decisions. What happens if a state discriminatorily deprives a class of children of all such education. We think the court will use intermediate scrutiny. Barring that ***full denial*** of education other discrimination in education against classes of children will be subject to the rational relationship test unless the children belong to a suspect or quasi- suspect class.

h) Procedural Due Process

i) The requirement that the government act with "procedural due process" derives, like the requirement of substantive due process, from the due process clauses of the 5th and 14th amendments, providing that no person should be deprived of "*life, liberty or property without due process of law.*"

(1) **Note:** if none of these interests are implicated the government may act as arbitrarily or unfairly as it wishes.

(a) **Example.** Sally interviews for a job but Bob, a moron, gets the job. Since Sally has no property or liberty interest in the job opening there is no protected interest in which any procedural due process right hangs.

ii) Two limits on government

(1) Procedural - requires that government must follow certain procedures before depriving a person of life, liberty or property. In order to ensure fair decision-making processes. The due process requirements normally required are *notice* and *hearing*.

(2) Substantive - requires that the government has a good reason for depriving a person of life, liberty or property.

(a) **Example.** Assume there is a state law forbidding all state employees from using contraceptives and provides that violators will be discharged. Jane is discharged for violating the statute. She may challenge the statute as violating her substantive due process right to use contraceptives or she may argue that the state's no contraceptives law was applied to her unfairly because the state discharged her i.e. deprived her of an employment opportunity without notice or hearing.

(i) **Note:** Jane would be stone-cold stupid not to bring both claims at once.

iii) Triggering the right. The answer is two-fold.

(1) The right is triggered if government threatens those interests considered to fit the definition of life, liberty or property, AND

(2) The right will be triggered only if governmental intrusion on life, liberty or property is great enough.

iv) What property and liberty are protected by procedural due process?

(1) **Pre-1970.** Used to be the def of lib or prop depend on whether a person sought procedural protections vis-à-vis a right (an entitlement derived from law), or a privilege (a benefit gratuitously bestowed by government) distinction. The Court traditionally took the view that items flowing from benefits of the public sector, including government employment and monetary benefits, such as welfare, were privileges, not rights. Even under this traditional approach, however, these privileges could not be withdrawn for reasons violative of other constitutional provisions.

(a) **Example.** A policeman loses his job for engaging in political activities. His relationship to his job is a privilege, but the government cannot fire him for exercising his right to free speech.

(2) **Unconstitutional Conditions Doctrine.** The distinction began to erode as the Court developed this doctrine. Neither rights nor privileges may be denied for reasons that violate the constitution.

(a) The policeman's job under this doctrine cannot be conditioned on his relinquishing his

first amendment rights to speak - to politic.

(b) ***Goldberg v. Kelly***. Welfare recipients receive property and government must provide procedural protection before denying benefits. Treated as a property right and a benefit under the DPC. This led to a new problem. The concern was that if all of this is property rights then maybe government will be so hog-tied by providing procedural protections that this will deter government from giving benefits in the first place. Court moves away from this in the next case. See also, ***Bell v. Burson***, holding that a license cannot be revoked following an accident without a hearing to determine fault.

(3) ***What are property and liberty interests? - Narrowing of the entitlements theory***

(a) **Definitions.**

(i) **Property.** All real and personal property. This is the easy answer.

(ii) **Liberty.** A threat to fundamental constitutional rights be they enumerated or not. Restraints on physical freedom, meaning any significant though temporary physical restraint of a person. Also, freedom of choice or action in some significant area of human activity but not involving fundamental constitutional rights (things like restraints on obtaining a professional license).

(b) ***The tenure cases as illustrative of the cutting back approach as to what constitutes a liberty or property interest.***

(i) ***Board of Regents v. Roth***. Articulates when a property interest will be found. See Outline, two factors. If the gov has created a RE that the benefit will continue then the benefit is considered property. It is either one of these criteria but the Court rarely uses the reliance criteria. The source can be statutes, regulations and custom or practice. In the government employment context a common way to create a property interest in that employment would be by making termination only for cause. "A for cause clause."

(ii) The court uses the reasonable expectation prong and this is the one that the court usually uses. If the government creates a benefit and a reasonable expectation that the benefit will continue only then will denial of the benefit be considered denial of a property right that triggers procedural due process rights. The court uses the other criteria rarely but has never abandoned it either. How could the University have drafted the contract of untenured that would have triggered Roth's procedural due process rights. If it said that you could only be let go "for-cause" clause such that non-tenured professors can only be refused reappointment for-cause, then Roth would have had a property interest in reemployment because his employment would continue unless he did something bad, and he would be entitled to a hearing and notice as a constitutional requirement. This is going back to the right-privileges distinction, but not totally. He has to have more than a government benefit, there has to be almost an entitlement. This is a partial retrenchment from the abandonment of the rights-privileges distinction because there has to be reasonable expectation that the benefit has to continue, and looks more like an entitlement, a right.

(iii) ***Companion Case - Perry v. Sindermann***. Without notice of reason of hearing under successive one year contracts. It wishes the faculty to feel like they had tenure and wanted them happy, etc. Do to custom and practice this teacher did have a property interest triggering procedural due process protections. A liberty or property interest

that triggers procedural due process can also be created by custom or practice that a benefit is only to be withdrawn by some kind of cause.

(4) **Problem.** State law creates a benefit with a RE that it will continue. You have a property right under PDP clause. Should the procedures that are due when terminating that benefit be found in state and federal law or rather in the federal constitution. In *Arnette v. Kennedy*, a non probationary civil service ee claimed he should have had a full hearing before being dismissed. Fed law proscribed the grounds for removal and the procedures for removal. Fed law said a fed ee could be removed only for-cause (prop right) but the procedures created by federal law did not include an adversary hearing. In a plurality opinion, the court stated that the procedures that are due should not be found in the federal statute, rather should come from the federal constitution i.e. the due process clause. Some justices favored the "bitter with the sweet approach," the sweet being that a benefit is created the bitter is that federal law should be the source of the procedures that upon termination of the benefit satisfy the due process clause. Two years later, *Bishop v. Wood*, held for the Bitter with the Sweet approach. Ten years later the Court again addressed the problem in *Cleveland Board of Education v. Loudermill*.

(a) **Facts.** An Ohio statute had procedures that had to be followed upon termination. The Court rejected the bitter with the sweet approach. The Court said that when a property right is denied, you determine what procedures are due with respect to that deprivation by looking to the procedures mandated by the due process clause of the Constitution. Otherwise, what is a prop right and how protected it is under the DPC would be dictated by state law. The procedures are pre-discharge notice, and a hearing. As a general rule, this is what due process requires. In this instance a full administrative hearing after discharge and judicial review was okay. Rehnquist dissents because he still wants bit. If a property or liberty interest is subject to deprivation so as to trigger the procedural due process clause, then the timing and nature of the procedures that are due constitutionally are decided with reference to the federal due process clause. Generally speaking, the process that is due is notice and a hearing. If the deprivation is of government employment it should be pre-discharge notice and hearing. How can we avoid this whole thing? Just do not create a reasonable expectation of a continued benefit.

v) What is liberty?

(1) The court has said if the prisoner was deprived of something important then the prisoner would have a liberty interest. The Court tried to tighten this up saying that a prisoner's liberty interest could be found if government created a reasonable expectation that certain prison conditions would be continued and government was now changing those conditions.

(a) ***Sandin v. Conner.*** A two-prong standard for determining whether a prisoner has a liberty interest under the procedural due process clause:

(i) ***Must be mandatory language in statutes or regulations creating a reasonable expectation that conditions of confinement will continue unchanged; and***

(ii) ***The deprivation of an aspect of those conditions must be atypical and significant hardship in comparison to normal prison conditions.***

Here there was no liberty interest. It's not that different to segregate prisoners than normal prison conditions. There is a reasonable expectation you will not be put in disciplinary segregation but it was not so different than normal. Therefore, there was no constitutional

due process protections were triggered because no liberty interest was triggered. Ginsburg dissents and feels Conner has a liberty interest. She feels is stigmatizes prisoners and is deprived of privileges for a period of time. Breyer like the old standard: If an interest is important to a prisoner then it should be a liberty interest.

vi) What constitutes a Deprivation?

(1) *When prison officials negligently injure a prisoner the state need not provide any post-deprivation remedy. Same if the impairment is de minimus.*

(a) *Example.* A prisoner suffered physical injuries when he slipped and fell on a stairway due to the presence of a pillow negligently left on the stairway by a sheriff's deputy. The state's sovereign immunity doctrine barred any claim for damages. Tough luck said the Court, due process was not violated in this case. In order for there to be a governmental deprivation under the clause the government must act intentionally, not just negligently. They look at original intent: to negate oppression and the clause is not meant to reign in government officials who are not reasonable. The due process constraints are intended for people with real mens rea. *Daniels v. Williams.*

vii) *Procedural Due Process and Irrebuttable Presumptions.* When are procedural due process concerns implicated by irrebuttable presumptions used in the distributions of government benefits.

(1) Blandis & LaFleur: Found constitutionally defective:

(a) If the presumption is not necessarily or universally true; and

(b) If there are reasonably alternative means for making determinations about the entitlement to benefits was possible.

(2) *Weinberger v. Salfi:* Spouse had to show that marriage was longer than 9 months to get Social Security benefits. Purpose was to prevent sham marriages and fraudulent claims on the system. Presumption is that any marriage under 9 months is a sham marriage. The statute is implicit in doing this. The presumption is Irrebuttable because it may not be overcome. The standard after this case is that the Irrebuttable presumption will be safe from PDP attack if the legislature could reasonably conclude that the legislative classification is appropriate to its legitimate purpose and if the legislature could reasonably conclude that the difficulty of individual determinations justifies the classifications over-inclusiveness. This is the modern approach to Irrebuttable presumptions in PDP problems.

(a) Unless the legal class would under EP be subject to heightened scrutiny, then an irrebuttable presumption within this classification only then will that irrebuttable presumption be defective under PDP requirements.

(b) If its going to be this hard to show an irrebuttable presumption is subject to PDP protections, then why bother? The remedy if you do succeed is that you can rebut albeit the legal classification IS NOT struck down. The court says that if you use this class then you must give P's the chance to rebut.

(c) How useful is this doctrine? Not very. Salfi made this not a very productive to bring PDP claims. You can still bring the challenge. If the classification is subject to Strict scrutiny then it may be worthwhile to bring the claim.

viii) Modern Doctrine : The State Action Doctrine

(1) **Introduction.** There is this doctrine with respect to the 14th Amendment. If govt. is somehow sufficiently

implicated in private activity, then the private actor will be considered a state actor and can be restricted under the 14th Amendment.

(a) **Note:** when we refer to the govt. that encompasses not just govt. as an entity but state officials and employees. Also, remember we studied the incorporation doctrine where most of the B of R are incorporated to apply to the states and restrict state govt. as well as the federal govt. Private actors who have the state sufficiently implicated in the private conduct may be restrained not only from violating DP but also from violating those rights in the B of R that are incorporated.

(b) **Keep two things in mind:**

- (i) Explicit state action is not required and
- (ii) When race is at issue the state action is more likely to be found

(2) **The issue is:** Whether the government is so entangled in a private activity that the public act becomes a private one. There are several theories:

(a) **Coercion** ⇔

(i) **Judicial enforcement of private agreements -- *Shelley v. Kramer*:**

(b) **Symbiotic Entanglement** ⇔ When the state becomes so entangled or involved in the affairs of a private actor that it is difficult to separate their respective identities the private actor will be transformed into a state actor. It is necessary to establish either

- (i) **An extraordinary degree of interdependence**
- (ii) **Intervention by the state in the specific decision challenged OR**
- (iii) **Necessarily joint action by private and public actors**

(iv) **MERE REGULATION OR PUBLIC FUNDS TO THE PRIVATE ACTOR ARE NOT ENOUGH TO CREATE STATE ACTION. AN UNUSUALLY HIGH DEGREE OF INTERDEPENDENCE AND COMINGLING OF PRIVATE AND PUBLIC FUNCTIONS IS NECESSARY**

(v) ***Burton v. Willmington Parking Authority*:** Patron denied service at coffee shop based on race. He brought an EP claim. Even though the coffee shop was privately owned, the coffee shop had a connection to the government because it was located in a government building, leased from the government. The court said that the relationship of location and a mutually beneficial relationship makes the shop a "state actor" due to "entanglement". Entanglement can occur from judicial enforcement of private conduct or from a mutually beneficial relationship or joint participation between the state and the private actor.

(vi) ***Moose Lodge v. Irvis*** - Appellee was black denied service on the basis of race. Moose was a private club and had a liquor license and a policy of not serving blacks. Liquor licensing did not turn Moose into a state actor because mere licensing of a private activity is not **significant involvement** in the private activities of the licensee. The involvement by government by the private actor must be significant involvement. Even if there is mutuality there won't be state action absent significant involvement by the state with the private actor. The Court did find state action in Pennsylvania's

regulation requiring club licenses to adhere to their own charters and bylaws. Since those documents mandated racial discrimination Irvis was entitled to an injunction preventing enforcement of that regulation.

(vii) **Reitman v. Mulkey**: California legislatures enacted two laws banning racial discrimination in housing and an amendment to CA.'s constitution was passed forbidding interference with the right of people to sell property, etc. § 26 establishes a right to discriminate in the transfer of property. Precluded any future legislation. Private discrimination in housing pursuant to § 26 is state action violative of the 14th Amendment. The state was **affirmatively authorizing** private acts of discrimination and this represented significant involvement. This actually creates a right to discriminate. Private activity that violated 14th Amendment rights can transform the private actor into a state actor, but mere governmental neutrality by itself is not such authorization or encouragement. Repeal of the statutes prohibiting racial discrimination would not be state action sufficient to trigger the 14th A EPC since there is no affirmative obligation on the part of states to enact such laws. The repeal + constitutional enactment amounted to state authorization of private racial discrimination in housing.

1. These are determined on a case-by-case basis - require factual determinations, questions of degree.

(c) **Public Function**: private persons exercising governmental powers should be regarded as state actors. The doctrine is limited to those instances where private actors are exercising powers "traditionally exclusively reserved" to governments.

ix) *Post Civil War Amendments and Private Conduct*

(1) The 13th and 14th and 15th Amend. are limits on governmental conduct. "No state shall deny EP?", etc. These are textual limits on governmental conduct. Do they have any relevance to private deprivation of rights? In the US is it that only gov cannot implicate constitutional deprivations, but individuals are free to trump on individual rights.

(a) **Civil Rights Cases**: What is Congress' power, if any, in enforcing the rights described in the 13th 14th and 15th amendments? The 13th, 14th and 15th amend. Are not silent on this matter. They say that Congress has the power to enforce each amendment through legislation. That raises related questions (private/public distinction) → Can Congress proscribe private conduct in enforcing the rights laid down in these amendments? Civil rights cases are a consolidation of 5 cases. The cases grew out of the exclusion of blacks from theaters, RR's and hotels. Cases were brought pursuant to the statute -- the Civil Rights Statute of 1875.

x) Whether the legislation is Constitutional? No. The federal courts continue to adhere to this position today, but modern state action doctrine mitigates the harshness of this position. If a person's rights are trampled upon by another American they should look to state law -- tort, criminal law, etc. Congress' enforcement powers under § 5? Congress has no power to reach private conduct. The modern view? We will get into that later, now Congress does have some power to reach private conduct under § 5. The Court says that the 13th Amendment does restrain private actors as well as government: slavery or involuntary servitude. Can Congress under § 2 of the 13th Amend legislate so as to prohibit private racial discrimination? No these are not badges of servitude. That view has been completely overturned by modern law. The Const. of the

Civil Rights Act -- the Act is struck down as an attempt to reach private actors and Congress cannot do that.

xi) Federal Power to Regulate Private Conduct under the 13th Amendment.

(1) § 1 prohibits slavery or involuntary servitude. It is the only constitutional right that applies to both government and private conduct. § 2 of the 13 A says Congress shall have the power - an acknowledgement by the drafters that legislation would be needed to enforce the amendment. To pass those laws for abolishing the badges and incidents of slavery. The Court also took the position that § 2 does not permit Congress to reach private conduct.

(2) ***Jones v. Alfred Mayer.*** § 1982 action that says: All citizens of the US shall have the same right as enjoyed by white citizens to sell, etc. property. Prohibits discrimination by either the government or private entities. Thought it had the power to reach gov and private racial discrimination pursuant to § 2 of the 13th Amendment. Did Congress have the power under § 2 to enact § 1982 proscribing racial discrimination in the transfer of property by either the government or private actors.

(a) Under § 2 of 13th Congress does have the power to legislate against either private or governmental impositions of slavery or badges and incidents of it. The Court said this result flows from § 1 that applies to both private and governmental conduct. Congress has the power to rationally determine what the badges and incidents of slavery reachable by its legislation. It is a rational basis test. § 1982 was a rational determination that racial discrimination in the disposition of property was a badge or incident of slavery because holding and disposing of property is a basic freedom therefore it is rational to conclude that racial restrictions on this civil freedom should be proscribed as a badge or incident of slavery.

(b) The Modern Standard: Under § 2 Congress can reach private as well as gov conduct; Congress must use a rationality standard in deciding that an activity is a badge or incident of slavery and therefore can be prohibited by Congressional legislation.

(c) Under § 5 of the 14th Amendment: C has power to enforce the 13th Amendment. Types of law that C might conceivably enact pursuant to the A we come up with three categories of law

(i) A remedial law that achieves the remedy through parallel enforcement. This is a Congressional law that enforces a 14th Amendment right already recognized by the federal judiciary and that law requires proof of state action plus all the elements of the judicially created prima facie case. This is called remedial because we are talking about legislation that is remedying an already established 14th Amendment right and there has to be state action. It is parallel to what would happen if this was sued upon under § 1 of the 14th Amendment.

(ii) Again, this would be a remedial law but this time involving non-parallel enforcement. There are two types

1. C enacts a law to enforce a 14th AM right already recognized by the federal judiciary but C omits any requirement of state action or omits one of the elements of a prima facie case. The remedy will work even if there's no SA or P cannot establish what would be elements of a judicial case. Cannot make any law it

wishes, C is held to a rational basis standard, it must be a rational method for remedying the invasion of the 14th A right.

2. A Congressional law to enforce a alleged constitutional right that would carry out a judicially recognized 14th A right. The word right the first time equals a right that may not yet be recognized, but that is essential or needed. Arguably necessary to carrying out that 14th A right. It must reach another non-recognized right which is why it's non-parallel. (Boerne Case)

(iii) A Congressional law that creates new substantive 14th A rights. This is sometimes designated as interpretive laws. Creating not yet recognized rights.

1. In *Employment Division v. Smith*, the Court held that where a state enacts a ban that is generally applicable, the state may automatically enforce that ban - without any balancing of the government's interest against the individual's - even where the ban has the effect of substantially interfering with an individual's exercise of his religion. Therefore, laws of general applicability (i.e., laws that apply to everybody) and that burden religiously motivated conduct are per se **constitutional** under the Free Exercise Clause. This also means that only laws that purposefully burden religious conduct are unconstitutional under the Free Exercise Clause. (The ban at issue in Smith prevented Native Americans from making their traditional religious use of peyote).

2. **Congress' response:** Religious people were outraged and RFRA overturned Smith. It did this because RFRA says that if a law of general applicability substantially burdens religiously motivated conduct then that law will be subject to SS. This means it will probably be struck down. If the Smith case was after RFRA the state would have to show a compelling reason and that the law was narrowly tailored. Tough standard to meet.

3. δ 5 of 14th is how this was enacted to enforce Free Exercise of Religion which is incorporated by the 14th Am Due Process Clause. Did C have this power?

a. New Substantive rights by enacting RFFA? Yes. The right to be free of substantial burdens imposed by laws of general applicability on religiously motivated conduct unless the law can survive SS.

b. Congress does not have the power under δ 5 to enact the interpretive laws - laws that create new substantive rights. The power under δ 5 is totally remedial.

i. Textual analysis - the words of δ 5 congrss can only enforce rights not create new ones.

ii. Also, this would give C the power to alter the Constitution and it would become no more permanent then legislation. The Court says this cannot be, the Constitution is paramount.

c. Was it enacting RFRA for remedial purposes and if so whether the law involved para- or non-para- lell enforcement? It is designed to ferret out neutral laws of general applicability that underneath it al are purposefully seeking to express religious expression. This would involve non-parallel enforcement. It is the second type of category 2: a law that is enforcing a non-recognized right, a

purported right, in order to remedy a recognized 14th Amendment right. The purported right is that crazy involved right - the right to be free to have your religious conduct unburdened by laws of general applicability, unless the law survives SS. It is being used to enforce the recognized right to religious exercise. Congress actually *expanded the scope* of the Free Exercise Clause.

d. In order for a category 2 sub- δ 2 type of law to be a constitutional exercise of C's remedial power under δ 5 the law must be *proportional* to its alleged remedial objectives. The effect would be all kinds of laws of general applicability would be struck down - overly broad. The purported purpose was ferreting out the laws that purposefully suppress expression. The leg record is devoid of any evidence that laws of GA are being used to interfere with religious conduct. There is no history of this.

e. *Significance of Boerne.*

- i. Congressional leg under δ 5 of the 14th A may only be remedial or preventive it cannot be interpretive.
- ii. Non-parallel Congressional remedies that fit category 2 sub- δ 2 must be proportionate to the violation of 14th A rights that C is trying to remedy.
- iii. If the remedy is not proportional, then the law is probable an unacceptable interpretive law.
- iv. Fri. a.m. up to page 1261; p.m. up to 1334 delete sup 164-176.

7) Free Speech

a) *Introduction.* Can include the gambit of Expression. Expressive conduct, dancing or pantomime. Conduct that is intended to convey a message and that is reasonably understood to communicate that message.

b) *Roadmap.*

i) Not all expression is protected by the FSC. For FSC analysis, there are three basic categories of expression.

- (1) First, unprotected speech. This consists of incitement to illegal conduct or violence, obscenity, libel, fighting words, and child pornography. Things like bribery, perjury or treason are also considered unprotected speech.
- (2) The second category is less protected expression. This includes commercial speech and speech that is sexually explicit but not obscene.
- (3) The third category is protected expression. That is all other expression. In this category, political speech is considered the most highly valued speech.

ii) Having said all this, under certain circumstances, even unprotected expression may receive free speech clause protection. Another thing is that legislation restricting expression is broken down into two categories.

- (1) First, content-based regulations. Those are regs that regulate the substance of a speaker's message.
 - (a) To elaborate, there are two ways that a reg can be content-based.

(i) First, subject matter regs. It is a restriction aimed at a particular subject.

1. Ex. Of a content-based sm reg: A reg that says no speech about abortion in this jurisdiction.

(ii) A view-point regulation, which is aimed at a particular viewpoint. Ex: No speech advocating pro-choice.

(2) The second category is content-neutral regulations. They regulate expression regardless of the substance of the speaker's message.

(a) BTW - an ex of a content-neutral regulation: No talking in the library. Has nothing to do with the content of the speaker's message.

iii) As in other areas of con law, the court uses different levels of scrutiny to assess the constitutionality of laws restricting expression. This depends upon the intersection of three different factors:

(1) the category of expression,

(2) the type of restriction imposed on the expression,

(3) the place where the expression occurs.

iv) General Rules.

(1) Content-based regulations of protected expression in all venues, are subject to strict scrutiny. The same one we've met before.

(a) The exception is if it falls within a class of speech that has lesser social value, such as offensive or indecent speech or child pornography.

(2) Content-based regulations of unprotected expression in all venues are subject to the test of constitutionality assigned by the court for each particular category of unprotected expression.

(a) This exception is set forth in *RAV, infra*. (Ask Bitensky)

v) **Regulation of pure conduct:** The Supreme Court has articulated a two-part test for determining whether conduct possesses a sufficient "**communicative element**" to trigger the First Amendment

(1) There was an intent to convey a particularized message; and

(2) The likelihood was great that the message would be understood by those who viewed it.

vi) **The Cases.** The first set of cases concern unprotected expressions: speech that incited illegal conduct, violence or insurrection. There is a basic problem with this kind of expression, if we let this freely occur, it could lead to criminal acts, but if the government is given a free hand to proscribe this kind of expression on the grounds that is dangerous then this could lead the government to take on the role of a censor of our most highly valued political speech. Where do you draw the line? This problem arises in a dramatic way around the time of the Bolshevik revolution. There was opposition to WWI and a leftist movement. Congress adopted the Espionage Act of 1917.

(1) For most of this century prior to *Brandenburg*, the dividing line between legal advocacy and illegal incitement of criminal acts was drawn by use of the "clear and present danger" test. Under this test, speech could be punished as an attempt to commit an illegal act if the speech created a "clear and present danger" that the illegal act would come about, even if it never did. The test was articulated in Schenk, below.

(2) **Schenk v. US.** Whether this kind of speech poses a clear and present danger to a government objective.

- (a) **Note:** this is not the modern standard.
- (b) **Three elements:** Speech can be const proscribed if it has a
 - (i) tendency of causing
 - (ii) Imminent
 - (iii) and significant harm

1. the focus is on determining whether the speech will cause on uproar.

(c) This standard also tells us what restrictions will be constitutional. Restrictions that has a tendency to cause imminent and significant harm. These restrictions are content-based. The standard identifies the speech category that is unprotected and the type of law proscribing the speech that would be constitutional under the FSC.

c) **Abrams v. US.** D's were convicted of violating the Espionage Act, which prohibited the curtailment of war production with intent to hinder the United States' prosecution of the war. D's had published leaflets, which attacked US' production of arms that might be used against Russia (US did not declare war against Russia). Neither leaflet was pro-German. The key factual issue before the Court was defendant's intent to interfere with the war effort against **Germany**.

i) **Holding.** Primary purpose is irrelevant, D's must be held accountable for the consequences of actions they knew likely would produce.

ii) **Holmes in Dissent:** It must be immediate. He wants a tight causal relationship with producing insightful insurrection. If this element is not given weight, the C & P standard will sweep with it a lot of political dissent. This cannot be distinguished from Schenk, and he just has a change of heart.

(1) Holmes articulated a new test that permeates 1st A cases: great protection for speech because what the 1st A protects is a "**marketplace of ideas.**" He's saying he wants to narrow the standard by focusing on immediacy so that more political speech can enter the marketplace of ideas. If this is dangerous, other ideas will combat the bad dangerous ideas. Further, in that way the truth will act.

(2) Judge Hand felt the standard was not adequate and he suggests that const law should be such that a person should not be permitted to violate the law.

(a) In his view, as a constitutional matter, mere criticism of the government should always be protected. He focused more at the content of the speech and less at forecast. The advantages to his approach is that it might be a clearer standard and may be more protective of expression. There are disadvantages: truly dangerous speakers who are going to cause harm might not be prosecuted. A debate began and raged for years. **Holmes v. Hand.** The modern formulation is in the next case.

iii) **Brandenburg v. Ohio.** KKK leader was convicted of violating state law that made it unlawful to advocate the duty, necessity or propriety of crime, etc., as a means of accomplishing industrial or political reform. The Court adopts the directed to inciting/likely to incite standard. Directed to inciting imminent and unlawful action and that is likely to produce such action is unprotected speech.

(1) **New Test:** For speech to be unprotected in this category

- (a) the speaker must intend incitement; (Hand)
- (b) in context his words must be likely to produce imminent, illegal action; (Holmes)
 - (i) his words objectively must encourage imminent, illegal action.

(2) **Significance.** This tells what is unprotected and what kinds of laws will bear judicial review. Elements of both Holmes and Hand. There is forecast and it focuses on content. This was advocacy of abstract doctrine - protected speech. Not likely to incite anyone to unlawful action. This was before the OKLA city bombing.

(3) **Severity of Harm.** This test does not explicitly take into account the severity of the harm which is threatened.

(a) **Example.** A speaker who advocates use of nuclear weapons for terrorist purposes, but only after a 1-year moratorium, could not be punished because this is not imminent

(b) **Example.** One who incited his listeners to jaywalk immediately could be punished.

d) **Overbreadth, Vagueness and Prior Restraint**

i) These are procedural doctrines barring government from regulating expression too unclearly (vague), too broadly (overbreadth) or too soon.

ii) **Vagueness and Overbreadth**

(1) The problem is that laws suffering from these defects is that there is a procedural defect in its drafting. On overbroad law sweeps in too much speech, it prohibits too much, i.e. speech that is protected. A vague law is unclear about what speech it proscribes.

(a) **Overbreadth Analysis**

(i) **Test.** A statute is overbroad if, in addition to proscribing activities which may be constitutionally forbidden, it also sweeps within its coverage speech or conduct which is protected by the guarantees of free speech and free association.

(ii) **Invalid on face.** Results in the invalidation of a law on its face, rather than as applied to a particular speaker. When a law is invalidated on its face that's it for that law, it's in the garbage. If invalidated as applied, the application that is invalidated now shapes that law.. It can never again be applied in the manner that has been prohibited. Ordinarily, garden variety litigation, a litigant will claim that a statute is unconstitutional in the litigation as a applied to him.

(iii) **Exception to Standing.** When a litigant challenges a law on this basis, he is not claiming that it is unconstitutional as to his own expression. Rather, the claim is that the law is unconstitutional as to other's expression. They can be challenged by someone not hurt by the law and it's struck down in its entirety.

(iv) **Rationale.**

1. the chilling effect; An overbroad statute "hangs over people's heads like the *sword of Damocles*." The focus is not on the actor but those who may forgo protected activity rather than violate the statute; and

2. Selective Enforcement: law enforcement personnel can exercise their discretion to prohibit constitutionally protected speech. Great example Emanuel's page 444.

(b) **Vague.**

(i) **Test.** A law is vague if the conduct forbidden by it is so unclearly defined that people of common intelligence cannot ascertain what speech is proscribed and what is not.

(ii) **Rationale.** FSC vagueness typically produces facial invalidations. This is because of their chilling effect, and you may overkill in restricting your speech. Also, selective enforcement.

(c) **Relationship.** They both are related and its common for a law to be overbroad law and vague.

(i) Forbidding the display of nude body on motion picture screen. Not vague but is overbroad. It might reach protected speech. David is as naked as the day he was sculpted.

(ii) A law that forbids all unprotected speech. It's not overbroad but it's vague.

(d) **Coates v. Cincinnati.** A city ordinance criminalized assembly, defined as 3 or more persons assembled in a manner annoying to passers-by. The law was both overbroad and vague. It will reach three people wrapping it up after dinner and someone gets annoyed. The challenged law had both vagueness and overbreadth issues. The skimpy state of the record was a concern of the Court's. The ordinance was facially overbroad and vague, the exact facts precipitating the offense was irrelevant.

(i) **Dissent.** Dissent says this is not overbroad. Disgust. May have thought it perverse. These are the sort of concerns that have lead to limitations on the overbreadth doctrine.

1. **The overbreadth must be substantial before facial invalidation is appropriate.** The litigant must be able to show that the law proscribes significantly more speech than is permissible under the free speech clause.

2. **An overbreadth challenge will be entertained only if the challenged statute is incapable of a narrowing construction.** If the plaintiff's own speech is wrongfully proscribed by the statute then he can't assert overbreadth. He's got to do it as applied.

(2) **Prior Restraint.** An administrative directive or judicial order that prevents speech from occurring. A challenge to a regulation on the basis that it is a prior restraint may be on its face or as applied. Either one. These are **especially disfavored** under the FSC. This is because it was thought that with just the "**stroke of a pen**" could impose punishment. Also, the thought is that censors will favor censorship. Speech suppressed in advance never reaches the "**marketplace of ideas**" whereas speech later punished did have a momentary airing in that marketplace. Finally, the **collateral bar rule**. This is where an unconstitutional court order cannot be challenged if it is disobeyed. If you have a court order that is a prior restraint, you are left with not being able to challenge it if you exercised your 1st A rights and disobeyed it. If there is a restraint on speech and you violate it and are punished, you can still challenge that law if you disobeyed it.

(a) **Near v. Minnesota.** This was a prior restraint because the injunction was not a punishment for prior publications, it was to apply to future action. Prior restraints will be upheld only in exceptional circumstances.

(i) **Note:** just short of per se unconstitutionality. The troopship exception. In the time of war it would be acceptable to issue an injunction prohibiting days in which you would land on the beach in Normandy. Very extreme circumstances.

(b) **Times v. United States.** Even a military emergence is not a compelling government

interest that will justify the imposition of a prior restraint.

(3) **Libel.** Another unprotected category is libel. The tort of defamation imposes liability for injuring another person's reputation. Defamation was considered completely unprotected under the 1st Amendment and could be regulated without restraint.

(a) ***Beauharnais v. Illinois.*** Libel considered completely unprotected under the old view. Also holds that group libel is unprotected expression and it is the strongest precedent among S Ct. cases in support of the constitutionality of the regulation or banning racist speech. It is considered of questionable vitality as support for the fact racist speech can be banned. It has never been overruled.

(b) ***NY Times v. Sullivan.*** The extent to which the FSC limits governments power to award money damages in a libel action brought by a public official against critics of his official conduct. The Court said that a public official cannot recover money damages for defamation relating to his official conduct unless he can show that the defamer acted with actual malice. Actual malice is defined as knowledge of falsity or reckless disregard for truth or falsity.

(i) **Note:** The Court again has defined another category of unprotected expression. This is defamation of a public official regarding his official conduct where that defamation is the product of actual malice. That's the unprotected category. The standard tells us what laws will be constitutional under the FSC. They will be laws that proscribe defamation against a public official in connection with his public duties and that impose damages for that defamation where there is a showing of actual malice. In this case, the evidence failed to show actual malice by the NY Times.

(ii) **Why actual malice?** Giving public officials some breathing room so that they could report on public activity of officials without worrying that they are committing defamation. Negligent misstatements can be articulated without liability.

(iii) ***One requirement for a public official who is a defamation plaintiff to successfully avoid a free speech clause defense. Plaintiff must prove actual malice and falsity by clear and convincing evidence.***

1. Opinions are not false and considered protected under the FSC, unless the opinion suggests defamatory facts.

(iv) **Dissent.** Black wants an absolute protection. He would say all speech should be protected even if its defamatory. Otherwise, public debate will be stifled. They are absolutists.

(v) **The NY Times Rule was extended to public figures (Sullivan applied to public officials).** For example, Michael Jordan. These are non-public persons (NOT OFFICIALS) who are involved in the resolution of important public questions, or who by reason of their fame, shape events of concern to society.

1. **Who are public figures is addressed in Gertz.**

(c) ***Gertz v. Robert Welch.*** With respect to private individuals, and for constitutional purposes, states may define the appropriate standard of liability. States may not as a constitutional matter impose liability without fault. More invasion of free speech when it comes to defamation of private individuals. Public official can rebut and have put

themselves into the kitchen and must take the heat. Private individuals are less to blame if they attract comment. Two more caveats: As a constitutional matter, laws of defamation protecting private individuals damages can only be assessed for injury actually incurred. This is unless plaintiff can show actual malice. If so, then she can get punitive damages w/out running afoul of the constitution.

(i) ***Dun & Bradstreet***. Where P is a private entity the Gertz requirement that actual malice be shown only applies in suits brought by private plaintiff's and involving issues of public concern. No issue of public concern then as a constitutional matter proof of actual malice is not required to get punitive damages. A possible later rule would make things turn on whether the D was a media entity but that rule was never applied.

e) ***Obscenity***. The most protected to preserve morals and social order.

i) ***Paris Adult Theatre v. Slaton***. The state could reasonably conclude that the film should be suppressed. Lays out the rationales for giving obscenity non-protected status. Quality of life, preserving public safety. The first amendment should be absolute. Each definition has been problematic and unworkable.

ii) ***The modern standard for defining obscenity***. Brochures described graphic sexual depictions of sexual activities. The test for obscenity: obscene material has three attributes: What is obscene for 1st A purposes? Expression meeting these three criteria. Also, what laws proscribing this category of expression will be upheld as being constitutional.

(1) Whether the average person applying contemporary community standards would find that the work taken as a whole ***appeals to the prurient (lascivious desire) interest?*** and

(2) Whether the work depicts in a ***patently offensive*** way sexual conduct specifically defined by state law; and

(3) Whether the work taken as a whole ***lacks serious literary, artistic, political or scientific*** value? They are talking hard core.

(a) ***Note***: elements one and two are based on ***community standards***. Criteria three is a ***national standard***. This is to take account of local sensibilities and national standards of what is truly scientific, political, etc. The national standards would help counterbalance local standards. If nationally, everybody thinks this is great artistic merit, it won't be obscene.

(b) ***Is this test problematic?*** The test allows judges to run berserk with this standard (a lot of discretion). Isn't this "I know it when I see it." Does it impose one conception of morals (Victorian) over another? This would be problematic because it favors one viewpoint over another.

(c) ***Example***. Woman goes on stage and urinates as performance art. This is not obscene because it does not meet number one even though it may be both patently offensive and of low speech value.

f) ***Pornography***. Generally, sexually explicit speech that is not as a legal matter considered obscene. Just because speech is not obscene does not mean it is protected under the 1st A. Considered less protected. It is difficult to pinpoint a standard for determining when regulations are constitutional and when they are not. The Ct. engages in ad hoc balancing to determine if the regulation of pornography passes muster under the FSC - the need for free expression and the speech value of the pornography. Restrictions on porn will usually be upheld under the Free Exercise Clause as long as those restrictions don't have the effect of totally banning

the dissemination of pornography. The reg can say put it in X neighborhood but not this one.

i) Exception

(1) Child Porn - totally completely unprotected. This kind of expression has no value.

ii) Viewpoint suppression of certain pornography merits strict scrutiny

iii) Can Porn be outlawed consistent with the FSC on the theory that it causes a harm rather than it expresses a viewpoint? The harm is that porn sexualizes the submission of women and the domination over them.

iv) American Booksellers Association v. Hudnut. An Indianapolis ordinance treated pornography as a practice that discriminates against women, and that is to be redressed by the same administrative and judicial means as other discrimination.

(1) Facts

(a) Pornography was defined to include graphic sexually explicit subordination that includes the presentation of: women as sexual objects who enjoy pain or humiliation or experience pleasure in rape or being penetrated by animals, etc.

(b) This kind of expression is banned regardless of any of the merits of the work.

(c) Plaintiff's were congeries of distributors and readers of books magazines and films.

(2) Holding

(a) The Court of Appeals struck down the ordinance on the grounds that it was not content-neutral. Speech that subordinates women is forbidden no matter how great the literary or political value of the work taken as a whole. Speech that portrays women in positions of equality is lawful, no matter how graphic the content. ***This is thought control.*** Rather, it establishes an approved view of women, how they may react to sexual encounters, etc.

(b) Defender's of the ordinance argued: That the way women are portrayed in pornography effects society's view of them and increases discrimination against them. The ultimate in objectification. Also, this is low value speech. This conditions a sexual response towards women and constitutes injury.

(c) The Court acknowledged the truth in this but disregarded it as relevant because this was merely the power of pornography as speech. All these unhappy effects depend on mental intermediation.

(d) Tests Applied

(i) First this was ***content-based*** because it regulated the substance of the speaker's message (speech that degrades women). Then, this is a ***viewpoint regulation*** because the ordinance did not prohibit all porn, only that that perpetuated the subordination of women

(ii) The court used ***strict scrutiny*** and struck the ordinance down. Were there any compelling interests? Avoiding stereotypical thinking of women that results from the conflation of sex and gender. The means/end prong is what fails because the ordinance is not narrowly tailored to serve a compelling government interest. A tiny portion of a great work could be prohibited.

v) **Control of Fighting Words and Offensive Speech**

(1) **Introduction.** One of the unprotected categories of speech consists of so-called "**fighting words**," that is, words which are likely to make the person to whom they are addressed **commit an act of violence**. They are unprotected because they are not normally part of any dialogue or exposition of ideas.

(2) **Old Approach** - The origination of the fighting words doctrine was in **Caplinsky v. New Hampshire**. **Plaintiff** was a Jehovah's witness who called the city marshall a "goddamn racketeer" and a "damned fascist" and then got into a fight. He was convicted under a statute that provided no person shall address any offensive or annoying word to any other lawfully in a public place. The NH S Ct. interpreted the words to mean words likely to cause an average addressee to fight. The S Ct. agreed and upheld the conviction. Fighting words, said the Court, are unprotected: those that inflict injury by their utterance or incite immediate breach of the peace. They are not essential to an exchange of ideas Nd have such slight social value that any benefit is outweighed by the social interest in morality. Words are fighting words if

(a) **The words are likely to cause violent reaction by an audience against the speaker**
OR

(b) **The words are likely to cause immediate emotional harm (their very utterance causes harm)**

(3) **Limitations on the Doctrine.** The Court realized that giving a broad scope to fighting words doctrine would swallow the 1st A

(4) **Introduction.** Generally, the Court has said that statements may not be punished merely because they are profane and are therefore offensive to listeners. These cases must be distinguished from that speech which is obscene.

(a) **How vital is the Fighting Words Doctrine? - Profane offensive language is First Amendment Speech -- Cohen v. California.**

(i) **Facts.** Cohen wore a jacket in a courthouse corridor that said "Fuck the Draft." D was convicted of violating a statute that prohib ited "maliciously and willfully disturbing the peace or quite of a neighborhood through offensive conduct.

(ii) **Ca. Court of Appeals affirmed the conviction:** offensive conduct was conduct likely to incite others to acts of violence and this was foreseeable by wearing this jacket.

(iii) **Holding/Rationale.** In this instance, using the word "Fuck" was not directed to the person of the hearer. The words not likely to cause a violent reaction. What must be shown? The words must be directed at a particular person and be likely to cause a reaction by an audience against the speaker. Here, the jacket was not obscene. An expression is obscene only if is is some significant way erotic. Reading the jacket would not produce "psychic stimulation."

(iv) **CA argument.** California claimed that Cohen's message had been thrust onto the unsuspecting audience and the state had the power to protect such "captive audiences" from offensive language. The Court rejected this that even if a person's sensibilities were offended they could shut their eyes. Also, even though women and children were present, no one was in fact offended.

(v) **The second prong of Chaminsky was dropped** - these words in and of themselves don't cause harm. No words are fighting words. One mans harm is another

man's lyric.

vi) **Hostile Audience Doctrine.** Both involve speech that provoke listeners to react violently against speakers. But the difference is that

(1) Fighting words are treated as unprotected because of the form that their message takes as well as because of the fact that they must be addressed to particular issues. In contrast hostile audience cases arise when an audience is provoked by either the form of the message or its substance and the speech is not addressed to particular individuals.

(2) Can the government constitutionally punish a speaker for non-fighting words expression that provokes a hostile audience reaction against the speaker? The answer is complicated because there is precedent saying "yes" and it's never been overturned. The modern approach, however, is not to allow the government to punish the speaker. The Court shows a preference for government control of the audience if that is feasible.

vii) Hate Speech

(1) **Introduction.** Groups interested in eliminating hate speech against minorities have argued an exception should be made for "**hate speech.**" These anti-hate statutes run afoul of content-neutrality, and thus violate the 1st A.

(2) **R.A.V. v. City of Minnesota.** D and several other teenagers burned a cross inside the fenced yard of a black family at night. D was prosecuted under the St. Paul "Bias-Motivated Crime Ordinance:" whoever places a symbol ? one knows or has reason to this would arouse alarm or resentment on the basis of race, color, religion or gender shall be guilty of a misdemeanor.

(a) **Defendant claimed** the ordinance violated his 1st A rights b/c (1) it was substantially overbroad; and (2) it was impermissibly content-based.

(b) **City of Minnesota claimed that this was not protected speech.**

(3) **Minn St Court reversed** the lower Court's dismissal on the grounds that the statute was not overbroad, the modifying phrase limited the statute to fighting words.

(4) **The S Ct Court agreed the ordinance was unconstitutional on its face irrespective of whether or not the speech is proscribable as fighting words, because it is content-based, but split 5-4 on the rationale.**

(5) **Issue.** Whether speech that is in the unprotected category of fighting speech can be regulated if it is content-based? **Yes.**

(6) **Scalia.** The law was **content-based** because it **prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses.**

(a) **The Minnesota Court:** concluded it was only applicable to fighting words, not to bias speech that would not threaten an immediate breach of the peace. Scalia accepted this construction.

(b) Remember that the Court has held that fighting words are an unprotected category but Scalia says that **even when the government is regulating an "unprotected" category, it may not do so in a content-based way.** Unprotected speech cannot be proscribed if the reason is to make the speech a vehicle for content discrimination unrelated to their proscribable content. **Scalia says that Sometimes these categories of unprotected speech are expressive.**

(i) **Examples.** The government may proscribe libel but not make the further content

discrimination of proscribing only libel critical of the government. A city council may not enact an ordinance prohibiting only those legally obscene works that contain criticism of the government.

I. Note. Under this argument, the state cannot proscribe the expressive act of homosexual sodomy without also proscribing heterosexual sodomy, as *Bowers v. Hardwick* and his Romer dissent suggests.

(c) ***Exception to the rule that even unprotected categories enjoy complete freedom from content-based regulation:***

(i) "when the basis for the content regulation consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists," and the content discrimination is allowed.

1. **Illustration.** A state may choose to prohibit only that obscenity that is most patently offensive in its prurience but not obscenity that includes offensive political messages.

2. **Note.** One can argue that the ordinance was based on a judgment that fighting words based on race, religion and gender are most likely to cause the harms that the fighting words doctrine was meant to prevent.

(ii) ***When a content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.***

1. **Note.** The ordinance is written specifically in terms of secondary effects, it proscribes speech that would "anger, alarm or cause resentment."

(iii) ***As long as there is no indication that suppression of ideas is afoot.***

(d) ***Ordinance is Unconstitutional.*** Regardless of the fact that fighting words are generally unprotected.

(i) The ordinance was ***content-based***, because it applied only to fighting words that insult or provoke violence on the basis of race, etc - abusive language was permitted unless addressed to one of these people.

1. **Note.** Apparently, the state can only regulate morality if it has to do with homosexual conduct.

(ii) The ordinance was also ***viewpoint based***. If there was a confrontation, one side could use fighting words, while the other could not.

(iii) ***Proponents argued it falls within the first and second exceptions and if not that it meets the rigors of strict scrutiny.***

1. The ordinance falls under the exception for content discrimination based on the very reasons why the particular class of speech is proscribable.

a. It does not fall under exception 1 because St. Paul has not singled out an especially offensive mode of expression

2. The ordinance falls under the incidental exception because the ordinance was not intended to impact on free speech, rather to protect historically marginalized

groups who are victimized by hate speech.

a. It does not fall under 2 - Scalia felt it was clear that the ordinance is not directed only to the secondary effects within the meaning of Renton.

3. ***That the statute could survive strict scrutiny b/c it was necessary to achieve a compelling government interest.*** Scalia says the state had a compelling interest in safeguarding the rights of traditionally disfavored groups, but the ordinance was not necessary to achieve this state interest because there were content neutral alternatives. (Ex., enact an ordinance prohibiting all fighting words).

(iv) ***Note.*** EP guarantees that people who are ***not similarly situated*** will ***not be treated similarly***. Without the ordinance it is possible to claim that plaintiff's would have an EP challenge that the city's refusal to stop this type of hateful activity violates their 14th A rights. The analogy is drawn from the wealth/poverty classifications where narrowly defined fundamental rights are impaired. This case runs afoul of the 14th A., in a way constituting a double bind, because it sends out a message that blacks, and women are can be treated less equally under the EPC.

(v) ***Note.*** Even assuming that we reject these types of messages, they linger with us. But that may only be part of the problem, when members of these groups internalize this type of speech this helps to solidify an inherently unequal atmosphere.

(e) ***Concurrence [White, etc.]*** believed that where a category is unprotected the states are not prevented from regulating it on the basis of content. The content is by definition worthless and this is inconsistent.

(i) ***Even if the principle of content-neutrality*** should be applicable to unprotected speech, the rule merely required strict scrutiny, not a total ban. The ordinance could survive strict scrutiny here. The state's interests were compelling. The majority's view amounts to a complete prohibition on content-based restrictions - it would always be possible to achieve content-neutrality by banning a wider category of speech. He would use the rational basis test.

1. ***The exception also swallowed the majority's rule.*** The reasons why fighting words are outside the Amendment have special force when applied to these minority groups.

(ii) This case should be decided on overbreadth grounds. The words reached not only words intending to incite an immediate breach of the peace, but also words and expressive conduct that only cause hurt feelings or resentment. Since the ordinance reached protected and unprotected speech it is overbroad.

(f) ***Stevens Concurrence.*** The ordinance is overbroad and the allure of absolutist principles has skewed the analysis of both the majority and concurrence. Objects to the conclusion that the ordinance is unconstitutional content-based regulation of speech. Not all regulation of content based speech is per se unconstitutional as seen by prior precedent. Fighting words are given greater protection than commercial speech. Can use the same premise to determine that the ordinance is constitutional. Doesn't like White's categorical approach. Should consider the content and context of the speech. Applying this the ordinance is not overbroad b/c it only regulates fighting words.

(7) ***Arguments against regulation of hate speech.***

- (a) *Free speech as good in its own right - the absolutist view*
- (b) *Likely to be selectively enforced against minorities*
- (c) *Chilling effect*
- (d) *Slippery Slope: we will end up banning more and more speech*
- (e) *Drive speech underground*

(8) *Wisconsin v. Mitchell.*

viii) *Regulation of Commercial Speech.*

(1) *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council.* A right to receive this kind of advertising. This case is famous for the principle that where speech is protected by the FSC and where there is a willing speaker then the listener also has a first amendment right to receive the communication. There basic defense is that this is commercial speech which is unprotected under the FSC. Commercial Speech is defined as a proposal of a commercial transaction. Consumers have a keen interest in the free flow of information. Decisions about allocation of resources about where to put money is important and these speech is needed to make these decisions. If the commercial speech is unlawful, untruthful, etc. it is unprotected and can be regulated. It is dicta here but later becomes the rule. There is less degree of protection because there is less of a chilling effect because commercial speech is integrally related to making money. (Doesn't this rationale apply to religious speech). The Court has no standard for assessing this lower value of speech and just holds it's unconstitutional.

- (a) *Significance.* Begins an attempt to define commercial speech and tells us that commercial speech is a protected form of speech. The exceptions is for untruthful, unlawful and misleading commercial speech, which remains unprotected.
- (b) *Rehnquist Dissents.* This will allow for more leeway to sell bad things. Elevating commercial speech to a protected category he said you are making the hawking of wares and this denigrates the FSC. He is concerned that if we protect commercial speech we are undercutting the FSC, yet in RAV hate speech doesn't denigrate the FSC.

(2) *Central Hudson v. Public Service.* There was a complete ban on types of advertising but informational advertising was not banned. The G&E company claimed that the commission order violated FSC because commercial speech is protected speech and strict scrutiny should be applied. The formulation fro Vi Pharmacy: it is a proposal of a commercial transaction, but added to this definition expression relating solely to the economic interest to the speaker and its audience. The concurrence says this is a stupid formulation. If an economist is interested in economics ??? Lots of stuff would be commercial speech but its not. The case book would be commercial speech. The Court settled to a definition subsequent to this case: ***commercial speech is a proposal to a commercial transaction***, but everyone is still unsatisfied with this definition, not much guideline as how to separate non-commercial speech from commercial speech. The test for regulations of protected commercial speech → If passes this test it is telling people to ***engage in a commercial transaction***.

- (a) *Is the speech commercial speech and not unlawful or misleading?* If the answer is yes, you go to step 2. If the answer is no, the speech is unprotected and you must find the appropriate category where it belongs.
- (b) *Does the government have a substantial interest?* If yes, go to step 3. If no, strike the statute down.
- (c) *Does the statute directly advance the governmental interest?* If yes, go to step 4, if no

strike the sucker down.

(d) *Is the statute more extensive than is necessary to serve the governmental interest?* If yes, strike down the statute. If no, uphold the statute.

(3) Blackmun does not like this 4-part test: It allows too much regulation. It deprives the public of needed information. He would like strict scrutiny. This is a return to Lochner. This is like striking down economic regulations.

ix) Where expressive activity takes place on property owned by the government, the level of FSC protection may turn on how that property is classified. There are

(1) Three classifications of government values

(a) *A traditional public forum*: government property that has traditionally been used to exchange ideas. **Example**: parks and streets.

(b) *A designated public forum*: government property that is not a traditional public forum, but that government has intentionally devoted to expression. **Example**: the Wharton Center.

(i) Government may limit who may speak at that forum and may close it down altogether.

(ii) *The main difference*. In traditional public forums the government may not regulate merely to protect tranquility but designated public forms may be regulated to preserve the tranquility that is that forum's basic purpose.

(c) *Non-public forums*: government property that is not a traditional or designated public forum. **Example**: court-room or Dept. of Motor Vehicles. A place not devoted to the free exchange of ideas.

(i) *Examples*

1. Airport terminals
2. Jails
3. Military Bases
4. Courthouse
5. Post Office
6. School used after hours
7. Government Workplace

(2) In the traditional public forum and in the designated public forum, content-based restrictions are permissible only if the restrictions meet the standards of review that we have already studied. That is: if you have a content-based regulation of protected speech, the reg will be subject to strict scrutiny. Unless you are dealing with commercial speech, in which case you have the four part test, or unless dealing with porn, which there is the ad hoc balancing approach. If in these for a you have a content-based regulation of unprotected speech then that regulation has to survive the test of constitutionality assigned to the particular unprotected category, except RAV. That is, content-based regs operating within an unprotected category are subject to strict scrutiny. THIS MAKES NO SENSE.

(a) In these for a, the test for content-neutral restrictions are subject to the following test.

Note: they must be *content*-neutral. They are permissible only if

- (i) They are *narrowly* tailored to serve a *significant* government interest and
- (ii) These regs must leave open *ample alternative channels* for the communication of the information.

1. This test is often referred to as a sort of intermediate scrutiny.

(3) Non-Public forum use the same framework except the regulations need only be reasonably related to some legitimate government objective.

(4) Content-neutral regulations are regulations of expression not in any way based on the content of the speaker's message. They detail the circumstances under which expression may occur. We typically say they govern the time, place or manner of expression. Sometimes it is tricky to ascertain if it's content-neutral or based.

(a) What if the applicability of a law governing *time, place or manner* is contingent on the content of the expression

(i) **Example:** A state law bans distribution of commercial advertising bills within 1000 feet of a public school. It governs based on what type of expression. It's contingent on restricting a particular type of speech so its content-based.

(b) Where a law governs time, place or manner but accords excessive discretion to an administrator in carrying out the law, so much discretion that they can suppress a viewpoint under the guise of regulating time, place or manner.

(i) **Example:** A law gives a city commissioner to deny or permit permits in a city park based on his determination of the need to keep order. This would probably be content-based.

x) *Injunctions against expressive conduct*

(1) *Madson v. Women's Health Center.* The amended injunction was content-neutral because all it dictates is the time, place and manner in which they can speak there mind. There's not any other group demonstrating. If that were the case then it would be content-based. The restrictions only fall on this one group. The Court characterized the forum as a traditional public forum because they were just blocking the streets. In the typical case of content-neutral statute, the test of constitutionality is the intermediate level, *supra*. Because an injunction is doing the regulating and need a more rigorous standard is because it's much easier to censor with an injunction, they can easily be prior restraints and can be used for ??

(a) **When you have a content neutral injunction regulating expression then the injunction will only be upheld if it burdens no more speech than is necessary to serve a significant governmental purpose.** Special test to each challenged part of the injunction

(i) **36-foot buffer zone.** This is a place regulation. This is upheld does not burden more speech than necessary - assuring access to the clinic.

(ii) **Making a racket.** A significant government interest to protect health and wealth of patients. This is manner and time and place.

(iii) **Images observable to patients.** The images pose a threat. Burdens too much speech than necessary. This injunction it burdens too much because this problem is easily solved - pull down the shades. This is time and manner.

(iv) **Refrain from physically approaching people?** Struck down more speech than necessary.

(b) **Dissent -- Scalia.** He wants strict scrutiny. He is concerned with the difference between injunctions and regulations. They just lend themselves for abuse. Very likely to be view-point suppression especially if the judge is ticked off. Also, it is discretionary and dangerous to FS because of the Collateral Bar Rule. This articulates a good basis as to why the court does not apply the standard content-neutral review: Injunctions are dangerous to FS. This is the special Madson review when the regulation is an injunction.

(c) **Private Premises - owner v. non-owner.** Speech by the owner of private premises or someone authorized by the owner to be on the premises will be governed by the Free Speech Clause, just as if it were a traditional public forum. Applies with its full force.

(2) **"Leave open alternative channels" requirement -**

(a) **City of Laude v. Gilleo.** The City generally prohibits "signs" and defines that term broadly. All residential signs are prohibited except for identification signs and for sale signs. P places a sign in the 2nd story of her home stating, "For Peace in the Gulf." P asserts the sign must come down, on the grounds that it is merely a time, place and manner regulation whose purpose is to minimize visual clutter.

(i) **Holding.** By forbidding residents from displaying virtually any sign on their property, the city has foreclosed an important means of communication. There were no ample means of communication.

1. An entire method was foreclosed and this method is easy and inexpensive, so other channels are not substitutes.
2. You could make an argument the ordinance was content-based because it had certain exemptions, ex. For for-sale signs. Here it was the owner.

(ii) **Note.** Even if it's content-neutral the Court does not like total bans and is less likely to uphold that regulation if it totally bans a particular medium.

(3) **Secondary Speech.** The ordinance prohibits a side-effect of the speech other than the speech's impact on a listener. Example is an employment discrimination law like Title VII. Employer says to female employee: "Hey Babe, I'm gonna lower your salary because you are just a woman." Title VII prohibits this but will sweep within it the speech element of his conduct - Title VII goes after the side-effects of the speech. The side effects are employment discrimination.

(a) **City of Renton v. Playtime Theaters.** A zoning ordinance prohibited adult theater locations near residential homes. Plaintiff's were theaters who wanted to show the films. This ordinance was content-neutral because it is designating place restrictions and not regulating based on the content of the speech. It was narrowly tailored and served a significant interest. The issue was whether it left open alternative channels for communication. *Held*, for defendants. This speech is of lesser value than other types of speech. Also, since many locations were available for the showing of these films, the actual impact on protected expression would be slight. (Is the holding due to the fact that this represented a de minimus impact on protected speech or because it is merely regulating secondary effects as per RAV?)

(i) **Note.** The magnitude of the interference is a significant factor in indecency cases.

(ii) Bottom Line

1. The Court will lean towards finding a dubious statute to be content neutral rather than content-based if it affects low value speech, such as porn
2. Where low value speech is regulated by a content neutral law, the Court will take a lenient view as to whether there are alternative channels of communication left open
3. A content neutral regulation designed to curb secondary effects does not become content based because it singles out one particular type of content for regulation

(iii) In pornography cases the court normally uses an ad hoc balancing test. This is for content based regulations of porn. The Court does not use the balancing test here but uses

1. whether the ordinance is designed to serve a substantial governmental interest
2. whether the ordinance allows for reasonable alternative avenues of communication

(4) Government Subsidies to Speech. Congress is allowed to make appropriations under Spending Clause and can also make conditional appropriations: where Congress makes a grant of money predicated on fulfillment of government specified conditions. This is subject to the unconstitutional conditions doctrine.

(a) Rust v. Sullivan. Government cannot be regulated on the condition of speech.

(b) Finnelly.

xi) Symbolic Speech. First A should protect communicative conduct, but any conduct can be construed as communicative. What is communicative conduct?

(1) Definition. The actor must intend to convey a specific message and there must be a substantial likelihood that the message will be understood by the audience. Only then is the 1A triggered.

(a) US v. O'Brien. This would be considered high value because it is political. The Court treats the statute as non-content based and fashions a test for the constitutionality of regulations restricting symbolic conduct where the regulation is not directed at the **content of the expression inherent in that conduct**. It is treating the statute as not bearing on expression, even though it does. It is going after the conduct, just happens to sweep into it the expression.

(i) Does the regulation further an important or substantial governmental interest

(ii) Whether the governmental interest unrelated to the suppression of free expression.

(iii) Is the restriction on expression no greater than is essential to further the government interest

1. **Note:** This is the intermediate scrutiny test for content-neutral regulations. It makes sense, doesn't it. Conduct component of expressive conduct.

(b) Texas v. Johnson.

xii) Compelling Free Speech -- So far we have studied how far the state can go in restricting speech. Now,

we are looking at how far the state can go in compelling speech and the beliefs underlying it.

(1) **Virginia v. Barnette.** Students had to pledge allegiance and salute the flag. If you did not you could be expelled so it was compulsory. The challenge was brought under the Free Speech Clause. The court held this violated the free speech clause. The rule is the free speech clause protects against governmentally compelled belief and speech.

(2) **Wooley v. Maynard.** "Live Free or Die" A NH law made it a misdemeanor to obscure any portion of the license plate. The Maynards' covered up the motto because they objected to it on moral religious and political grounds. They were prosecuted and challenged the law under the FSC. Held, the NH law as applied to the Maynards' violated the FSC. This case tells us that the FSC also protects people against being compelled by government to use their property to convey a message. Although it is hard to tell, the court appears to use strict scrutiny. Although the Court relied on Barnette, the cases are distinguishable. If in Barnette the saluted the flag the idea would be attributed to the children. But if the Maynards' did this nobody would think that they believed in the license

(a) **After Barnette and Maynard what is in fact the scope of the doctrine against compelled belief and expression?** We are not entirely sure because the gov compels you to express beliefs all the time. (In court, on exams, IRS forms - these surely would not be held objectionable)

xiii) Freedom of Association. It is not an express constitutional right. It is an implied constitutional right derived from the right of Free Speech and Assembly. It is essential to carrying out those express rights.

(1) **Generally.** There is a right to intimate associations (husband/wife - parent/child, and the like). This is actually part of the right to privacy protected by substantive DP.

(2) The right of individuals to gather in groups in order to engage in pursuits. We are looking at the second category - that protected by the FSC. Not all groups in the second category receive meaningful protection under the FSC. That is, what level of scrutiny the court will use to assess the constitutionality of government interference with association under the FSC depends upon the groups primary purpose. That is, if individuals come together for economic pursuits or to pursue interests unrelated to a fundamental constitutional right then the court will use the rational basis test. But, if these individuals come together to engage in a type of activity expressly protected by the First A then the court will use a form of strict scrutiny. (Jaycees, infra).

(a) **Caveat.** Strict scrutiny will be used in this situation only if the governmental interference impinges on expression.

(3) There are various ways for the government to impinge on expression. Note that the list is non-exhaustive.

(a) Outlaw an organization

(b) Require disclosure of membership information

(c) Interfere with the internal organization of the group

(d) Government could deny benefits to members of the group

(4) **NAACP v. Alabama.** There is a right to associate in order to express beliefs and ideas. State Action which may have the effect of curtailing the freedom to associate is subject to strict scrutiny.

(5) **RR Trainmen v. Virginia.** Extended this right to people helping each other in asserting their rights. Strict scrutiny was used here as well.

(6) **Limits on Association activities. Does it expand to Boycotts? - NAACP v. Claiborne Hardware Co.:** non-violent boycott activities are entitled to First A protection, so that only losses proximately caused by the

few violent episodes could be recovered for. The other boycott activities, such as peaceful picketing and even the use of threats of social ostracism, are constitutionally protected. Speech does not lose its protective character simply because it may embarrass others or coerce them into action.

(7) ***Limits on Association membership Policies - US Jaycees***: The original all-male membership of the Jaycees has a constitutionally protected interest in not being required to accept women as members, but this interest was outweighed by the state's compelling interest in banning discrimination in places of public accommodation, an interest which could not be fully achieved by narrower measures.

(8) ***Glickman v Wileman Bros.*** Where government forces a business to pay for the dissemination of a message that is not political or ideological, the scheme usually won't be found to violate the freedom of association or expression. Thus, a government regulation that forces every grower of a particular agricultural product to contribute to a fund for generic advertising of that product, no infringement of a First A right occurs, in part because the growers are not being forced to endorse or to finance any political or ideological views.

(9) ***Abood v Detroit Board of Education***. Principle case recognizing the right not to associate. School Board Employees were not required to join the union, but anyone who did not join was required to pay a "service fee" equal in amount to union dues. *Held*, non-union employees had a constitutional right not to have their service fees used for support of ideological causes of which they disapproved. (But not for the costs of maintaining the system of collective bargaining).

xiv) Freedom of the Press

(1) ***Introduction***. No right to print media??? The press has a First A right to exercise editorial judgment as to what will or will not be printed. The rule on right of access is more complicated. Remember ***Near v. Minnesota***: extraordinary circumstances → The troopship exception: exposing the dates that troopships set sale, i.e. for national security interests.

(2) ***Miami Herald Publishing v. Tornillo***: Florida statute that forced newspapers to print the replies of political candidates whom the paper had attacked was held unconstitutional. Newspapers would tend to avoid subjects that would trigger the right of reply, thus dampening the vigor of press coverage of public events. Also, the statute was an unwarranted intrusion into the function of editors because they had to publish certain things. The Court uses strict scrutiny.

(3) ***The Pentagon Papers***: The press has almost absolute immunity from pre-publication restraints. The government argued that publication would prolong the war by giving the enemy information useful to it and would embarrass our diplomatic efforts. The case has three lines of rationale: the absolutists, the justices that thought a prior restraint could be appropriate but not on these facts, and those who thought the restraint should be issued. Criticism of the absolutists is that surely they would not advocate giving the Nazi's info that the British were reading the orders of Nazi High Commands? Most agreed this would damage the nation but that it was not substantially certain to. Two questions - when can a troopship exception exceed and would a statute authorizing the prior restraint have helped in terms of upholding the constitutionality of the prior restraint?

(4) ***Nebraska Press v. Stuart***. Two fundamental rights considered of equal importance: 3 prong test. In order to permissibly interfere with the press look at the gravity of the evil; clear and present danger. You could say there was a clear and present danger of an unfair trial. It fails in the long run because there are alternatives to governmental suppression of speech.

(a) ***Is the coverage such as to prevent selection of a fair jury***

(b) ***Are there other measures that would be likely to mitigate the effects of unrestrained***

pre-trial publicity? Sequestering jury, change of venue, postponing trial, etc

(i) There probably was so much publicity that change in venue will not help.

(c) ***Would a restraining order effectively operate to prevent an unfair trial? a&c=yes; b=no. This is the "very strictest of scrutiny"***

xv) Press Access to Government Information. Once the press has acquired truthful info it is virtually exempt of liability in publishing that info. Does the press have a constitutional right to access to acquire info that is under the governments control. As a general rule, neither the public nor the press have a constitutional right to access with respect to government actions. There is no freedom of information act embedded in the constitution, but media access to the criminal justice system is considered to raise a special problem: fear that secret trials could jeopardize an accused's right to a fair trial of society at large. These concerns underlie Virginia: Presses right to attend criminal trials.

(1) ***Richmond Newspapers v. Virginia.*** There is an implied fundamental constitutional right that the public and the press has to access to a criminal trial from the Free Speech, Press and perhaps Assembly.

(2) Electronic media rely on electronic media to get programming into our homes, on the theory that the frequencies are a scarce commodity held in trust for the public. The federal government, specifically Congress, developed a regulatory scheme, through which use of the frequencies must be regulated by the FCC to promote "the public interest, convenience, or necessity." The Court has also accepted this scarcity theory, and that is one of the reasons why broadcast media are treated somewhat differently than print media under the Free Press clause. (review Miami Herald case).

(a) ***Red Lion Broadcasting v FCC*** - S Ct upheld as against a Free Press Clause challenge, an FCC order imposing a right of reply requirement on broadcast media. Left the question open of - is the administrative right of access (by the FCC) - that was upheld in Red Lion - also a constitutionally-mandated right of access.

(b) ***CBS v Democratic National Committee*** (1973) Is there a constitutionally-mandated right of access to the broadcast media? Constitutional Claim - The complainants claimed that they had a constitutional right to purchase time from radio and television stations (broadcast media) to air the party's view, under the First Amendment. Congress had rejected the idea that broadcasters are "common carriers" required to provide access to everyone, but the FCC adopted the "Fairness Doctrine." A regulation that broadcasters must make sure that different viewpoints are fairly covered. Did NOT give non-broadcasters (general public) a right of access. Did require that broadcasters must assure balanced coverage.

(i) In Red Lion, the challenge had been to this fairness doctrine. The Court had ruled that Congress and FCC could impose a right of reply on the broadcast media. Plurality decision - Court held that there was no right to access/reply to broadcast media. Court held that if a right of reply was constitutionally compelled, what would happen to the freedom of editorial expression of broadcast journalists. Court did not want to be dragged into monitoring of broadcast journalists. Broadcasters can refuse to accept paid advertisements on political matters.

(c) ***Concurrence*** - Douglas - Fairness doctrine is excessive interference by the government, and would overrule it.

(d) In 1987 - FCC repealed the Fairness Doctrine* Dissent - Brennan - felt that the Fairness Doctrine and the CBS holding were insufficient to protect free press interests,

because broadcasters could interfere with the marketplace of ideas, by controlling the ads that would appear on their frequencies.

(3) **Summary of CBS and Red Lion:** Taking them together - they mean that under the First Amendment, Congress can impose access on broadcast media, but otherwise there is no right to access as a constitutional right.

(4) **More elaborate summary** - While a broadcaster may be required to provide access under a statute, in the absence of such a statute the broadcaster enjoys editorial freedom to deny access.

xvi) **The Establishment Clause**

(1) **Purpose.** The basic purpose as articulated by Thomas Jefferson is to put a "wall of separation between church and state." This is not very helpful. Establishment Clause - Congress shall make no law respecting or establishing a religion. Free Exercise Clause - Congress shall make no law abridging the free exercise of religion. Establishment clause prevents government from favoring one religion over another, or religion over non-religion. Free Exercise Clause - limits government from using authority to interfere with religious beliefs and exercise. Both clauses are aimed at limiting religious freedom. Religion - all organized systems of faith based on the belief in either a supreme being or some other transcendent authority. Court will not inquire into the nature of the beliefs in determining whether a system is a religion, no matter how bizarre those beliefs may be. May also not consider how recent a religion is. Does not exclude cults/occult. Mere philosophical beliefs are not considered religious beliefs. Court relies on various theories in interpreting how the Est Clause should be applied. May use one, two, or all. Depends on the case.

(a) **Separationism** - idea that the Est Clause should act as a wall of separation between church and state. Under this theory, only the most minimal interaction is allowed between church and state.

(b) **Non-Preferentialism** - Idea that the Est clause does not permit gov't to favor one religion over another religion, but does permit gov't to favor religion generally.

(c) **Neutrality theory** - Idea that the Est Clause prohibits gov't from favoring one religion over another, or from favoring religion over non-religion. Part of this theory is the "endorsement test" Government conduct is not acceptable under the Est Clause if a person could reasonably believe that gov't is endorsing religion in general or any religion in particular.

(2) **Five theories.**

(a) **Separationism:** religion and government do not mix well together. In *Everson*, the Court relied on the history of religious persecution and intolerance toward minority religions as support for separationist thesis.

(i) ***Everson* → Applicable to the states. Education & Religion.**

1. **Facts.** The Board of Education authorized reimbursement to parents of money expended for the bus transportation of their children. Part of this money was for the payment of transportation of some children to Catholic schools. The plaintiff was a district taxpayer. He brought an action challenging the right of the Board to reimburse parents of parochial school children as, in effect, state power to support church schools contrary to the First A.

2. **A key feature of the scheme was neutrality.** Parents of public school students were included in the reimbursement scheme. This supplied the secular benefit of

transportation to one's school and as supplying the benefit in a way that is completely neutral as between religious and secular institutions. Nothing in the EC requires the government to be hostile to religion. Neutrality can be maintained by not allowing government to be hostile.

3. *Argument.* If only transportation to public schools was reimbursed parents might send their children to the public schools instead of the Catholic schools. Nevertheless, the benefit to religion was incidental and remote rather than primary.

4. *Conflict with Free Exercise Clause.* If Catholic parents cannot get their kids to the school, then they could claim the government impeding their right of FE of religion. It seems like there is a fundamental due process right under Pierce.

5. *Governmental actions that clearly violate the establishment clause.*

- a. Setting up an official church
- b. Forcing a person to go or remain away from church or force him to profess a belief or disbelief
- c. Punishing for professing a (dis)belief
- d. Preferring one religion to another
- e. Participating in the affairs of religion and vice versa

6. *In short, separationism has been tempered by a desire to avoid hostility toward religion.*

(ii) *See also Lee v. Weisman [Souter Dissenting]:* the theme of separationism is to keep separate as much as possible church and state.

(b) *Non-preferentialism:* premised on the idea that the government may provide aid to religion and religious institutions as long as the government does not prefer one religion over another. The government is free to promote religion in general as long as it does not discriminate against different religions.

(c) *Neutrality:* the government cannot favor one religion over another

(i) *The test for religious displays:* Whether a reasonable observer seeing the display would conclude that the government was endorsing religion in general, or endorsing a particular religion? If yes, the display violates the EC. The most important factor is the context in which the religious symbol is displayed. (look for non-religious symbols nearby)

(ii) *Religious Speech and Displays on Public Property. -- County of Allegheny v. ACLU.* {plurality} The litigation concerned the constitutionality of two recurring holiday displays: a crèche and a menorah. The facts are similar to Lynch, which upheld the constitutionality of a crèche because the crèche did not have the purpose or effect of advancing or promoting religion. The concurrence provides a framework for analyzing religious symbols. The concurrence recognizes any endorsement of religion as invalid because it sends a message to nonadherents that they are outsiders, not fully members of the political community and that adherents are favored members of that community. Second, the concurrence stresses the importance of context. The test is whether the symbol, viewed in context, would be understood as endorsing religion.

The Court held the nativity scene as unconstitutional because it was tantamount to a praise of Jesus standing alone in the courthouse. On the other hand, the menorah and tree exhibit were secular messages of seasons greetings. The main distinguishing factor from Lynch is the absence of non-religious symbols near-by, such as reindeer and a Santa Clause.

1. Applying accommodation theory to 2nd prong is really like applying coercion theory
 - a. *Gov cannot coerce anyone to support or participate in religion and*
2. *Gov may not give direct benefits to religion so as to effectively establish a state religion*

(d) **Coercion.** The EC is violated if the government establishes a church or coerced people into a religious practice.

(i) **Lee v Weisman.** A middle school principle invited a rabbi to deliver a prayer, told him the prayer should be non-sectarian, and gave him a pamphlet detailing the kinds of prayers that would be appropriate at a public civic occasion. The prayers delivered by the rabbi were indeed non-denominational and consisted mainly of thanks to God. Plaintiff was a graduating student who argued that she shouldn't be required to listen to a prayer as part of the graduation ceremony. The delivery of the prayer in this context violated the Establishment Clause. The state effectively coerced students into participating in or supporting the prayers. The **school district argued** this was voluntary because plaintiff could have received her diploma without attending. The Court rejected this on the grounds that High School graduation is one of life's most significant occasions. Nor could the **state argue that plaintiff did not have to participate** because peer pressure compelled students to participate. **Also, that the prayer was non-sectarian** was irrelevant. There is no such thing as an official religion that is exempt from the Establishment Clause.

(ii) **Criticism: Accommodation theory and non-preferentialism--** Scalia has a lot of nerve in light of *Adarand*, *Croson*, *Bowers*, *Romer* and *especially RAV*, to argue that there is an important national objective of unifying participants of different backgrounds to be served by group prayer in public settings. To say this is an important unifying mechanism is nothing short of absurd.

1. **Note:** *If schools authorize or endorse religious prayers, readings or teachings in the public schools as part of the official school day then this will violate the EC. A key aspect of this holding is that the school principle invited the rabbi and gave him instructions as to the type of prayer that would be acceptable - making the entire prayer in a real sense state sponsored. If, in contrast, a member of the student body offered the prayer, without significant participation or sponsorship fro school officials, this would probably not be state sponsored and thus would not violate the EC.*

(e) **Accommodation:** the EPC should not be used to void practices that have long been accepted as part of our social customs

(3) **Three Part Test → Lemon**

(a) Governmental action violates the Establishment Clause unless

(i) **Purpose.** It must have a secular purpose

1. **Edwards v Aguillard.** The Lo. Act forbade the teaching of evolution unless that teaching was accompanied by instruction in creation science. No school was required to teach evolution or creation science but if either was taught the other must also. The majority concluded that there **could not have been a secular purpose.** The preeminent purpose was to advance a religious viewpoint that a supernatural being created humankind. Public schools can make references to religion as long as the references promote religion.

a. **Note:** one could defend this statute on the grounds that it is neutral as between religion and non-religion, and presents all viewpoints.

2. **Dissent → Scalia has gone way too far.** Racist and sexist yes - Scalia is an idiot! He argues that it is impossible to determine legislative intent, however it is important to note that under Washington v. Davis sex and race based classifications must have been created for the intent of discrimination and the reason in this context that he endorsed this standard is for the very reason he wants the Lemon Test invalidated.

3. **Note.** The purpose prong of the three-prong test is that there must be **a** secular purpose not that there may not be a religious purpose. If there is both a religious and secular purpose, the prong is not violated. Here there was no conceivable secular purpose.

a. Teachers can still teach the creation science point of view, as long as it is part of an attempt to truly enhance the effectiveness of science instruction.

b. **Can government insist that the EC means that students must learn scientific rather than religion. Secular humanism.**

(ii) **Effect.** Its primary effect must neither advance nor inhibit religion

(iii) **Entanglement.** It must not foster excessive government entanglement with religion

1. **Political Division.** The law must not create an excessive degree of political division along religious lines

2. **Financial Aid to church related schools -- Elementary and secondary schools:** How much subsidization can government give to religious schools and in what manner without running afoul of the EC? A point of contention has been Title I, which directs money to local educational agencies which are supposed to spend the money on eligible students - those within the attendance boundary of the public school in a low income area and who are at risk of academic failure. The funds are supposed to help these kids regardless of whether they are in public or private schools. In two senses, we are talking about a neutral statute as to both the eligibility of the kids and as to whether the kids are parochial or public school kids.

a. **Aguilar.** Invalidated Title I in so far as it was used to fund public school teachers who were sent to parochial schools to offer courses that were attended solely by students enrolled at those schools. The majority believed that the second prong of Lemon was violated - the primary effect was to promote

religion.

b. **Two reasons:** The reason for the result is because (1) it was impossible to have public school teachers working on the property of private religious schools without advancing religion and (2) This set up would require pervasive monitoring to make sure the teachers were not teaching religion. This would cause excessive entanglement. NYC bought a gazillion vans and turned them into little mini classrooms and the kids would get the instruction in the vans. NYC Board of Education was groaning underneath this burden and the next case arises

i. The response was portable classrooms

c. **Modification of Lemon in accordance with the non-preferentialist view -- Agostini v. Felton:** Whether public school teachers can provide non-sectarian supplemental education on site in religious schools without violating the EC? Lemon test → Entanglement test now refers to only that entanglement that has the primary effect of advancing or inhibiting religion. I.e., that is the only type of entanglement that is excessive. There is no reason to assume that he/she is going to express religious ideas or that the public will see this as a union of church and state. Especially since the remedial instruction goes to the students not the school. Title I provision of neutral supplemental remedial instruction to religious school students does not violate the EC even when the instruction is provided on religious school premises with minimal monitoring. Although the Court applies non-preferentialism → here the court is allowing government to favor religion over non-religion while indicating it would not favor one over the other.

i. **Significance:** State supplied teachers may now teach basic remedial courses on-premises at parochial schools as long as the curriculum is carefully kept secular, and this is probably true of other services like counseling.

d. **Broad themes on financial aid schemes"**

i. **Lower v. Higher education**

ii. **All students v. religious students**

iii. **Direct v. Indirect aid**

e. **In sum: the primary effect must be secular.** The breadth of the benefited class is an important index of secular effect.

(4) **Application of all theories -- Zorach v. Clauston.** In McCollum the Court held that a release program violated the First A. on the theory that the program helped religious groups obtain pupils through the use of the state's compulsory public school machinery. This case involved a NY city program that permit its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to centers for religious instruction or devotional exercises. This was similar except that the students who elected to participate were released to receive religious instruction **away from the public school's physical facility**. We have here a potpourri of almost every theory. This demonstrates how manipulable these theories are. The rule with respect to the constitutionality under the EC of released time programs that operate during the school day: programs that allow public school students to be released from

classes to receive religious training is permissible under the EC if the student's receive that training off of public school premises, but not on the premises.

(5) ***Religious groups at public colleges and the FSC -- Winston.*** Students wanted to use state facilities for religious discussion. The university's policy was to make facilities available to registered student groups for meetings, but they denied permission to such groups to use facilities for religious services. P's claim was that the policy of denying use of school facilities violated the FSC. The University's defense was that we have to have this policy or it will violate the EC.

(a) ***Religious expression of private entities does not violate the EC when the expression takes place in a traditional or designated public forum open to all speakers on equal terms.*** A reasonable observer should be an informed observer and on that basis she concurred. Stevens dissents: Separationist approach - there should be a strong presumption against leaving religious symbols on public property. This is not separation between church and state. This is a plurality view. Can the Endorsement test ever be objectively administered? Judges are mostly of the judeo-christian background. Aren't they going to bring that perspective?

xvii) Free Exercise Clause

(1) ***Church of Lukumi Babalu Aye, Inc. v. Hialeah:*** where government takes an action whose purpose is to forbid or interfere with particular conduct because the conduct is dictated by a religious belief, the government action will be strictly scrutinized and almost always struck down as violative of the FSC.

(a) ***Government action that affects religion will be subject to strict scrutiny unless the government acts is both***

(i) ***Neutral and***

(ii) ***Of general applicability***

(2) **Exemptions:** Where the state's objectives could be served by giving an exemption, then the state must do so

(a) ***Sherbert v. Verner:*** P was a Seventh Day Adventist who was fired for refusing to work on Saturdays, her religious day of rest. The state refused to give her unemployment benefits on the grounds that she refused to accept suitable work when offered. The Court held that this violated P's FEC rights. Refusal to work on Saturdays is conduct. The court applied strict scrutiny.

(i) ***Rationale.*** This forced her to chose between her religion and receiving benefits. There was a discriminatory component because Sunday observers were not put to this choice. (wouldn't this violate the EC)

(ii) ***State Interests.*** Ensuring that payments went to only those who were involuntarily unemployed. There was no showing that an exemption would not achieve this same interest. No evidence showing that if the rule prevented from working Saturdays that this would increase fraud. Even if it were, So. Carolina has never attempted to show that its statute is narrowly tailored to carrying out the government's purposes.

1. ***Note.*** If an individual is put to a tough choice of following religious belief or suffering financial hardship, is this an unconstitutional condition?

(b) After Sherbert, the Court has rarely invalidated laws under the FEC. Only in two areas has the Court struck down laws in the period between 1963 and 1990. One area is the

unemployment compensation cases. In cases where the government has denied unemployment compensation benefits to employee's who left their employment for religious reasons, the Court has applied strict scrutiny and typically struck down those laws. The other area is the Amish case.

(c) ***Wisconsin v. Yoder.***

- (i) **Respondents:** 3 parents that were members of the Amish sect and residents of Wisconsin
- (ii) **Conviction:** violating compulsory attendance law which stated that you had to go to school until age 16. **The Supreme Court of Wisconsin reversed under the First A.**
- (iii) **Amish beliefs:** The Amish did not want their children attending school after the 8th grade because school would expose them to censure of their church community and endanger their salvation. **Why?**
 - 1. It was an essential element of the Amish religion that members be informally taught to earn their living through farming and other rural activities, and that compulsory high school education was at odds with that belief.
- (iv) **Was Wisconsin law designed to target the Amish?** No, it was a law generally applicable to all students of a certain age.
- (v) However strong the state's interests they are not absolute.
- (vi) **Regulating religious beliefs or conduct?** The regulation compelled conduct that was inexorably intertwined with speech.
- (vii) **Standard of review?** Strict scrutiny
 - 1. **Wisconsin's arguments - 2**
 - a. Having all of its citizens be reasonably well educated so they could participate intelligently in political affairs and become economically self-sufficient
 - 2. **Did Wisconsin law survive SS?** No.
 - 3. **Why?** The state's interests were not advanced by the compulsory attendance law. A mere two years is not going to do a lot to further the state's interests, especially given the fact they were going to be living on a farm.
 - 4. **The state supports its interests by recognizing that some will leave the farm.** There is no evidence of this or that they would become societal burdens.
 - 5. **Holding. For parents → The First and the Fourteenth As prevent the state from compelling respondents to cause their children to attend formal high school to age 16. The state remains free to promulgate reasonable standards to ensure a proper agrarian vocational experience.** The Court conceded that Amish children who failed to attend school would not receive the same level of intellectual learning but the Amish's interest in not going to school outweighed the state's interest because these kids were going to remain in the Amish community throughout their lives and they were being properly trained for that.

(viii) **Dissent.** The Court was wrong to decide the case without considering whether the children wanted to attend over the objections of their parents. He thought the children's desires should be preeminent.

(ix) Is the Court favoring the Amish? I am not sure because there is a substantive due process right to direct the upbringing of your children under Meyer and Pierce. And, if there is no positive right to an education then at least this is somewhat consistent. On the other hand the Court did stress the societal importance of religion, so if these children were going to be in society then perhaps we would have a different holding.

(x) ***Generally applicable laws that burden religious conduct and some other constitutional right (the right to privacy or free speech) remain subject to strict scrutiny***

1. Aren't the Amish harming their children?

(d) ***Employment Division v. Smith.*** Oregon criminal prohibition of the knowing or intentional possession of a controlled substance. They were denied unemployment benefits for violating the law. They challenged the statute as applied to them. A generally applicable criminal law is automatically enforceable regardless of the degree of burden it causes on an individual's religious beliefs. There is no standard of review. The FE clause is inapplicable here because too many exemptions would follow. Maybe he is doing this because of legislative influences.

(i) The Court in *Smith* stated that its decision to abrogate the strict [*1468] scrutiny test is in "**accord with the vast majority**" of precedent. n218 This statement is erroneous. The only fact in accord with cases that applied the strict scrutiny test to uphold a law is that the respondents in *Smith* were unsuccessful in their action. n219 It is the legal principle that emerges from a case, however, not the result, that gives a decision precedential value in subsequent cases. n220 The principle that emerged from the cases applying the *Sherbert* test was that the **free exercise** of religion is a highly valued constitutional right that cannot be infringed absent a compelling justification by the state. n221 By abandoning *Sherbert*, the Court in *Smith* clearly departed from "the vast majority of precedent." n222

(ii) These kinds of laws are per se constitutional under FE examination EXCEPT

1. Hybrid cases (P challenge a law of general applicability that burdens religiously motivated conduct and challenges on FE basis and there is some other violation then use SS. The P has to bring up the claim.

2. Unemployment compensation cases → SS

(iii) **Note:** Smith does not deal with the situation of a law that is not a law of general applicability. That is, *Smith* does not deal with the situation of a law that purposefully regulates, i.e. targets religiously motivated conduct. That issue is dealt with in Hialeah, supra. If the claimant can establish that government has acted intentionally to suppress then the government action will be subject to SS.

xviii) Final Exam: 35-40 multiple choice 20 T/F 2 essays.

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So as we celebrate the importance of the *Roe v. Wade* decision, we also need to move beyond it. We need a new vocabulary for abortion rights. We need to rethink some of the premises underlying reproductive rights, and we are here today to talk about some of the new ways we can reframe abortion rights to provide access to abortion for all women, which is as just as important as the abstract right of choice itself. These rights are best viewed as a dialectic - where new contradictions are exposed. As a consequence of the abortion decision, for example, we need to create new definitions. Pregnancy and sex do not necessarily go hand in hand these days. An abstract notion of choice that does not get people very far if they do not have the resources to effectuate their choice.

By framing the issue as one of privacy rather than consent the court reinforces the traditional public/private dichotomy - implicit in this is the idea of what is a proper role for women - wife, nurturer, mother - not in the economic sphere. The state does provide funds to protect people's bodily integrity and liberty, and yet the state is not providing those funds to pregnant women; that is unconstitutional. It is the comparison of the way the state provides funds to some people but not other people whose bodily integrity and liberty is being similarly threatened. as things stand now, poor women have absolutely no constitutional right to funding, under the current interpretation of the Constitution. And, so we have got this really major divide among women. Those who can afford to have their reproductive decisions fulfilled, and those who can't. And those who can't, effectively do not have the right. The Due Process Clause is a negative right that protects people from interference from the government, not a positive right that guarantees peoples assistance from the government. For this reason, in order to secure abortion funding, most pro-choice advocates feel we must switch from the Due Process to the Equal Protection Clause,