I. The Power of the Court / Congressional Power to regulate the Court

Marbury v. Madison (1803): The "broad view:" the judiciary, generally, and the Supreme Court specifically, has the ultimate say in the meaning of the Constitution. Basically, Congress must "toe the line." The "narrow view:" the court's power to interpret the Constitution is incidental to the court's ordinary role in deciding cases. It is necessary to decide constitutional issues which are in front of the court because the Court should not be forced to enforce laws which violate the Constitution.

Martin v. Hunter's Lessee (1816): The Supreme Court has appellate jurisdiction over state court decisions resting on the Constitution or federal law.

Cohens v. Virginia (1821): reaffirms *Martin v. Hunter's Lessee*. The Court can have appellate jurisdiction even if there is a constitutional grant of original jurisdiction.

Ex Parte Mccardle (1869): The Constitution grants jurisdiction but Congress can regulate and make exceptions (Article 3 section 2). Congress can check and regulate the jurisdiction of the court.

Cooper v. Aaron (1958): Little Rock did not think the decision in Brown applied to them. The decision Applied *Brown v. Board of Education* to all states, even those that were not directly influenced by the opinion. Article 6 makes the Constitution the Supreme Law of the land. Marbury as interpreted here makes the federal judiciary supreme in the exposition of the law of the Constitution (Note that Marbury did not say that the power to interpret the constitution was an exclusive right of the Court)

Dickerson v. United States (Rehnquist - 2000): The QP is whether Congress can overrule a constitutional decision by the Court by enacting a statute (here they tried to overrule Miranda v. Arizona and say that all voluntary statements were admissible evidence.) Article 5 – Congress can initiate a constitutional amendment and this can be used to overturn a constitutional interpretation of the Court. Can it be done by statute? The court here says NO. Congress can overrule procedure and rules of evidence but not constitutional interpretations via statute

Scalia Dissented (& Thomas): *Scalia says the statute excludes compelled confessions, as does the constitution. Thinks that to say the court has ultimate authority, gives them the right to expand the constitution. The court should not be legislating.*

II. National Powers – Article I section 8 give Congressional Powers 10th amendment leaves all powers which are not expressly national to the states. (Federalism)

McCulloch v. Maryland (1819): **Facts**: Congress charters a national bank. There is a branch in MD. MD wants to tax the bank. The Ct held that **congress had implied powers** in that the constitutional grant of power. The constitution must give them **the power to use means to achieve permissible ends**. The court says "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution are constitutional." Relies on the necessary and proper clause. The court defers to Congress. It does not question the means or degree of necessity of the means they choose to employ in the exercise of a legitimate power. They allow some discretion.

Also, the federal government is supreme. The states do not have the right to impede Congress. MD tax laws were said to impede and effect more than the people of MD. Court strikes it down.

The meaning of "NECESSARY:" in the context of the necessary and proper clause "necessary" means employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. This is a **broad reading of the necessary and proper clause**. He said that Congress's own judgment deserved deference so long as it adopted means which tended directly to the execution of delegated powers, or were appropriate, and plainly adapted to achieving legitimate ends.

U.S. Term Limits, Inc., v. Thornton (***Stevens*** – 1995): AK voted to impose term limits which prohibit the name of an otherwise eligible candidate from appearing on the ballot if s/he has already served 3terms in House or 2 in Senate. The fear was that after that time they began to neglect the needs of the people. **HOLDING:** Court found that the term limit restricted the right of the people to vote for who they want to represent them which is at the core of a representative democracy. The qualifications for House and Senate members are in Art 1 Sec 5 and you cannot place other qualifications of a candidate.

Key Issue = interpretation of the 10th amendment: Stevens says that where the constitution is silent the states "reserve" powers that they had prior to the adoption of the Constitutions. Anything that comes from the creation of the new government cannot be a reserved right. Art 1 sec 4 allows states to make PROCEDURAL regulations, not exclude a class of candidates. States should not interfere with people's relationship with the national government. **The constitution is to be the exclusive source of congressional qualifications.** ***Thomas*** (w/ Rehnquist, O'Connor, & Scalia) *says that the states get anything that the Constitution does not specifically delegate to the national government even if they didn't have that power prior to the constitution.* ***Default rule – when Constitution is silent states get power.*** ***Kennedy:*** *McCulloch argument – states could not interfere with federal powers. The national government should be controlled by the people not the states. Therefore the states should not interfere with qualifications.*

III. The Commerce Clause – Article I Section 8: When the commerce clause has been asserted as Congress's justification for passing a law the court limits the check it puts on the law. Purpose of the Commerce Clause? End hostility among the states in trade and restrict state power to tax other states.

The standard of review: Whether Congress could RATIONALLY find that there is a basis for concluding that the regulated activity significantly or substantially affected interstate commerce

Gibbons v. Ogdon (Marshall – 1824): This case defines **Commerce**. Commerce is intercourse. Among the states means that the power is restricted to commerce that CONCERNS more than one state. This is **a very broad, plenary power**. It is restricted by the discretion of Congress and is checked by the political process (if people don't like what Congress is doing they can vote them out!)

The completely internal commerce of a state is reserved to the state itself to regulate. However under this case the court found that **Congress can regulate purely INTRAstate commerce to the extent that the local activities affect interstate commerce**. We look to the aggregate affect – how does the sale effect the whole?

United States v. **Lopez** (**Rehnquist** – 1995): **Facts:** 12th grade student convicted for knowingly possessing a concealed handgun and bullets at his high school under the Gun-Free School Zones Act passed in 1990 under the commerce clause. **Issue:** Does having guns in or near the school affect interstate commerce? **Holding:** The Act exceeded Congressional Authority under the Commerce Clause.

****This is the case where the court **states that it is not *necessary* for Congress to provide proof that they had a basis for their decision – we don't need to see their records to check whether they did their hw. Why? It's not what they DID find**, the standard is what they could have found.

Says we need to look to see if something **substantially affects** interstate commerce.

The constitution specifically withholds congressional police powers. Rehnquist does not seem to say guns in schools will not substantially affect interstate commerce. He says that this makes the commerce clause too far reaching. There are not enough limits and Congress could seemingly regulate in every area, including un-enumerated areas, and areas which have traditionally been regulated by states. Another problem is that there is not enough evidence that this affected the economy at large (commercial v. non-commercial distinction.) It is too remote from commerce therefore it is not rational.

Can still pass this law through spending powers maybe?

S.Dakota v. Dole: ok to w/hold highway funding until states raised drinking age

Kennedy / O'Connor: *federalism argument. Federalism is part of the structure of the*

Constitution. The people need to know who to hold responsible. If Fed Gov is regulating in state regulated areas, the people will vote out the wrong people if they don't like the decisions. **Thomas**: *does not like the substantial affect test. He says that if Congress could do all that the rest of section 8 seems unnecessary.*

Breyer / Stevens / Souter / Ginsburg: *wants to apply the "aggregate affect" (Wickard, S. 24.) We must give Congress leeway – it is their power and they are better suited to make the judgment than the judiciary. If the connection to commerce is practical then the law should stand.* **Stevens**: *Guns are articles of commerce and can be used to restrain commerce. Therefore, Congress should be allowed to regulate commerce in firearms and prohibit their presence in a certain location*

Three categories where Congress CAN use Commerce Clause Power (Lopez)
1. Regulating use of channels of interstate commerce
2. Regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat to interstate commerce may come from intrastate activities
3. Regulation of activities that have substantial relation to interstate commerce

United States v. Morrison (**Rehnquist** – 2000): **Facts:** we are dealing with the Violence Against Women Act – anyone who commits a crime motivated by gender and thus deprives another of the right to be free from such crimes shall be liable to the injured party (like a federal tort law!) It was passed under the commerce powers **Holding:** gender-motivated violent crimes are not economic activity. Does not make a per se rule about needing economic activity but says that in the past the only laws that have been sustained regarding intrastate regulation have been economic in nature. Also notes that like in Lopez there is no jurisdictional provision of the law to limit the cause of action in cases relating to interstate commerce.

*Here there were congressional findings relating to commerce, but they were deemed insufficient. Reasons included: fear of traveling, may prevent from engaging in interstate business and employment, may diminish national productivity, etc. Fear again of giving too much police power

Thomas: this follows Lopez; **Souter** (**Stevens, Ginsburg, Breyer**): congress has better info than the court. We should look at the aggregate effect. Also here, we actually have substantial congressional findings. This should clearly be enough.

*Note: Lopez and Morrison do not get rid of the aggregate effects test (Wickard) but rather limits it to cases of "economic" or "commercial" activity.

Gonzales v. Raich (**Stevens**, Kennedy [switched sides!], Souter, Ginsburg, Breyer – 2005): **Issue:** whether the commerce power includes the power to prohibit the local cultivation and use of marijuana in compliance with CA law. **Holding:** They cite to Wickard. Congress can regulate purely intrastate activity that is not itself "commercial," (not produced for sale), if it concludes that failure to regulate would undercut the interstate market of the commodity. This is the concern with marijuana. There is a national market that congress has the authority to control. Congress may rationally have concluded that the medicinal growth in CA would effect this national market. *Distinction from Lopez and Morrison b/c there the argument was that the regulation fell outside of Congress's authority entirely. Here, even petitioners argue that Congress had the authority, they are challenging *as applied*. Also, here we have a distinct link to ECONOMIC activity.

Scalia: *To get the authority to regulate activities that substantially affect interstate commerce you need the necessary and proper clause along with Art 1 Sec 8. Would even go as far as saying Congress can regulate purely intrastate commerce to the extent it needs to in order to make its regulation of interstate commerce effective.* **O'Connor (**Rehnquist, Thomas): *does not see this as distinguishable from Lopez. Congress can't regulate non-commercial activity b/c it might affect demand of a commercial commodity.* **Thomas:** *founder's definition of commerce was limited to buying, selling, bartering, and transport. This exercise is not "proper" though maybe "necessary."*

A. Tenth Amendment limitations on the Commerce Clause

National Laugue of Cities v. USERY (**Rehnquist** – 1976): **Facts:** Fair Labor Standards Act applied min wage max hrs to state and local government employees. **Holding:** Congress can't pass a law applying to state employees performing TRADITIONAL state governmental functions b/c this would clash with the 10th amendment. The states are supposed to be separate entities. Violates the state's authority to regulate employer-employee relations. There is a federalism concern. It is still OK for Congress to regulate private action.

Blackmun: *Thinks we adopted a balancing test – we allow Congressional regulation where the federal interest is demonstrably greater and where state compliance with the federal standards is essential.* **Brennan:** *restraint on Congress's COMMERCE power comes from the political process. He says this has been settled since Marshall (Gibbons v. Ogden)*

Garcia v. San Antonio Met Transit Authority (**Blackmun** – 1985): FLSA could be applied to a municipal transit authority. The "traditional government function" test of Usury is unworkable. He thinks that the political process should protect state sovereignty not judicially imposed limitations. Any restraint on the commerce clause should compensate for possible failings in the national political process. The court should not be defining traditional state functions.

Powell (Burger, Rehnquist, O'Connor)**:** *relies on Marbury. He says that the majority is allowing Congress to be the sole judges of their power and Marbury says that the court should check Congress's power. Members of Congress may be out of touch with traditional state function / the needs of the states.* **O'Connor:** *thinks that there are federalism concerns, and the court should not abdicate its duty to oversee the duty of the Federal Government to respect state sovereignty.*

South Carolina v. Baker (Brennan 1988): since there is no failing of the political process, the court does not have the right to check the substantive basis for congressional legislation. Problem with the law in this case? They sought to regulate state activities rather than control or influence the manner in which states regulate private parties (according to Reno v. Condon)

New York v. United States (**O'Connor** – 1992): Congress passes an Act which provides for the disposal of radioactive waste. The Act provides 3 incentives: 1)monetary – states with a disposal site can charge other states to use it 2) access – may deny access to waste generated in states that don't meet the federal deadline 3) the take title provision – a state that failed to provide for disposal by a particular date must take title to the waste and become liable for all damages suffered as a result. **Holding:** The first two incentives were ok but the court found the take title provision unconstitutional. **Rationale:** Congress can create incentives for the states to follow their guidelines, but cannot use coercion and essentially "commandeer" the states to work for the federal government. If they have the power to regulate, they can regulate themselves. Congress can regulate individuals, but may not compel the state. **The federal government may not compel the state to enact or administer a federal regulatory program, but it can encourage regulations or hold out incentives** (1 and 2 were ok things to do.) Also, the states cannot ratify an expansion of Congressional power beyond constitutional boundaries. Federalism protects individuals.

Tenth Amendment: If the Constitution gives a power to congress the 10th amendment disclaims any reservation of that power to the states. If Congress has the power, then it is not reserved to the states. If the states have a reserved power, it is not part of the powers of Congress.

Stevens: *the constitution does not contain a provision that says Congress cannot give a command to a state to implement legislation it enacts. Therefore, the idea that it can't is unsound.*

Printz v. United States (**Scalia**, Rehnquist, O'Connor, Kennedy, Thomas – 1997): The Brady Act – requiring background checks on people looking to purchase handguns. In New York court stated that Congress cannot compel the states to enact or enforce a federal regulatory program. In this case, the court holds that Congress cannot issue directives requiring the States to address a particular problem nor can they command state officers to administer or enforce a federal regulatory program. The court was concerned with accountability – Congress can say that they fixed the problem but then the leave it to the state governments to pay for the new regulations, which means the states will need to ask the people for

money and become accountable. Worried about federal government getting too big. *Testa v. Katt (1947): State judges cannot refuse to apply federal law – this decision comes from the Supremacy Clause.* But the court here does not apply the same principle to state governments.

Stevens: *Federalist No. 27 – federal gov was to have the power to demand that local officials implement national policy programs. If we limit the fed authority to use state officials they will need to do their own work which means they will need to have a constant LOCAL presence – an even bigger federal presence in the states.* **Souter:** *Also points to Fed. No. 27, but thinks NY was rightly decided.* **Breyer:** *looks at other countries who allow the use of state implementation of federal policy b/c they believe that makes for less federal interference.*

B. 11th Amendment as a restraint on Congress

11th Amendment: The judicial power of the U.S shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of *another* state or subjects of any foreign state. State immunity clause.
The 11th amendment only applies to cases in diversity. Citizens may sue their own state.
11th amendment does not bar appellate review of suits brought against states in STATE court.

Hans v. Louisiana (1890): 11th amendment applied not only to cases within federal diversity jurisdiction but also to cases within federal question jurisdiction.

Ex Parte Young (1908): federal court could issue an injunction against state officials who sought to enforce an unconstitutional state law. Said the defendant was not really the "state" but the official himself.

Edelman v. Jordan (1974): permitted lawsuits for prospective injunctive relief against state officers, though not lawsuits for damages.

Fitzpatrick v. Bitzer (1976): Congress could abrogate 11th amendment immunity from suit and allow states to be sued retroactively for damages under its enforcement powers of section 5 powers of the 14th amendment. *This is still good law. The 14th amendment came later so it can alter the 11th amendment.

Pennsylvania v. Union Gas Co (1989): a federal environmental law permitted suits for money damages against states in federal court. The court held that Congress can do this when acting under its Commerce Clause authority. **This case is overruled by Seminole Tribe.**

Seminole Tribe of Florida v. Florida (**Rehnquist** – 1996): rejects the claim that congress, acting under its commerce power, can abrogate state immunity under the 11th amendment. It does not matter whether the state is being sued for injunctive or monetary relief. States will still have immunity in areas where federal gov has exclusive control. The 11th amendment restricts the Article III judicial power.

Stevens: *Concerned that this will bar the federal government from creating federal causes of action against states (i.e. patent infringement, copyright, bankruptcy, etc.)*

Alden v. Maine (**Kennedy** – 1999): **Facts:** State probation officers tried to sue Maine in Maine State court for not paying federally required overtime. **Issue:** Can states which would be immune from suit in federal court, be sued in their own state court system. **Holding:** Although the 11th amendment doesn't speak to this, Kennedy says that the history and structure of the Constitution **extend sovereign immunity to bar suits in state courts**. To allow these suits in state court would essentially force state courts to do the dirty work of the federal government. However, States must still abide by valid federal laws. States are not immune from suit brought by the federal government. Private individuals can still sue under 14th Amendment Section 5 legislation.

Reno v. Condon (**Rehnquist**, unanimous – 2000): Driver's Privacy Protection Act – prohibited the DMV from discoloring or making available personal information about an individual. The law in this case is a law which is generally applicable to private individuals as well as the states (as owners of databases). **Congress may regulate the states DIRECTLY but may not require or compel the states to regulate their own citizens**. If Congress wants to regulate private parties, it must do so directly.
What the court leaves open? Whether Congress could impose a restriction on the states alone? It does not say whether a restriction needs to be generally applicable in order to be constitutional.

Federal Maritime Commission v. South Carolina State Ports Authority (Thomas – 2002): extended state immunity to cases within federal administrative agencies. The FMC can investigate violations and enforce provisions itself. Private individuals can't sue the state.

IV. Individual / Fundamental Rights

Barron v. City of Baltimore (Marshall – 1833): Barron sues the city for ruining his wharf. He claims the city violated his Fifth Amendment rights (nor shall private property be taken for public use without just compensation.) The court relies on history and held that the **Bill of Rights were restraints on the FEDERAL government**. When the framers wanted to restrict the states, they did so explicitly. This was not one of those times. They were not applicable to the states. People should look to state constitutions for protection from the state.

Slaughter-House Cases (Miller – 1873): **Facts:** Louisiana adopted a law creating a monopoly for slaughterhouses for 25 years. Butchers who were not included sued claiming that it deprived them their right to exercise their trade and challenged under the 14th amendment. **Holding:** the privileges and immunities clause only protects individuals form state interference with national rights that are clear/explicit in the Constitution that belong to U.S. citizens. It is not intended to protect *state* citizen from legislative powers of the state. Only protects against states infringing on FEDERAL rights. Also, the right to trade is not a constitutionally guaranteed right. What about the privileges OR immunities clause in Art 4? This only made the states treat citizens of other states the same way it treats its own citizens. Fear is that if the privileges AND immunities clause is read too broadly, Congress can just overturn state legislation that they don't like. Don't want the federal government acting as a censor on the states. They do not overrule Barron even though some of the framers of the 14th amendment indicate that it was their intention to overrule Barron.

Bradley: *Thought the 14th applied the bill of rights to the states.*

A. Right to Travel

The right to travel is not explicitly in the constitution. It seems to come from 1) the structure of the federal system (makes no sense not to have a right to travel if you have a union of states) 2) Commerce clause 3) Privileges and immunities clause (Art 4) 4) 14th amendment privileges or immunities clause.

Crandall v. Nevada (1867): invalidated a tax on passengers leaving the state via common carriers. Fear that it would impair the right to come to the seat of the national government.

Edwards v. California (1941): invalidated a law making it a misdemeanor to bring an indigent person into California who is not already a citizen of CA. Majority relied on commerce clause. Concurrence relied on the right of persons to move freely from state to state.

Shapiro v. Thompson (**Brennan** – 1969): **Facts:** State provisions denied welfare benefits to residents who had not resided in the state for at least 1 year before applying. **Holding;** The right to travel is fundamental – thus triggering strict scrutiny. Any classification that serves to penalize or discourage the exercise of that right is unconstitutional unless the state can show that the legislation is NECESSARY to

promote a COMPELLING governmental interest. All citizens have free right to travel uninhibited by unreasonably burdensome laws. The purpose of inhibiting migration is constitutionally impermissible. Welfare was akin to the necessities of life that having to wait would burden the right to travel.

They did not make a per se rule prohibiting residency requirements. They ignore the fact that few people refused to travel b/c of these restrictions.

Dunn v. Blumstein (1972): It was ok to have a durational residency requirement for in-state tuition at state universities. However, it was not ok to have a 1 year in state residency requirement for voting.

Memorial Hospital v. Maricopa County (1974): invalidated the 1 year residency requirement before receiving free nonemergency hospitalization or medical care. State cannot deny the basic necessity of life to an indigent because it would violate the right to travel.

Sonsa v. Iowa (1975): upheld 1 year residency requirement before bringing a divorce action against a nonresident. Iowa can decide not to become a divorce mill. Also it could potentially effect things like child support etc. Domestic relations are typically state regulated.

Saenz v. Roe (**Stevens** – 1999): **Facts:** struck down a CA law which limited the amount of welfare benefits a newly arrived resident could receive to the amount they would have received in their old state. **Rationale:** Congress may not authorize the States to violate the 14th amendment. This case stands for the fact that people have a right to choose which state they will be a citizen of. However, the states may not choose their citizens – people are citizens of the state in which they reside. The state's legitimate financial interest does not justify discriminating among equally eligible citizens. **A state may draw no distinction between classes of citizens based on length of residence without compelling justification**. They articulate a per se rule of non-discrimination of bona fide residents. The states are not allowed to create different classes of citizens based on where they came from. Appropriate standard of review is strict scrutiny. (relies on right to travel, privileges/ immunities in the 14th, and citizenship cl) Three rights: 1) protects right of citizen of state A to enter and leave state B; 2) rights to be treated as a welcome visitor when temporarily present; and 3) right to be treated like other citizens when you decide to become a resident. Note: the fact that many of these people still traveled despite the regulation was not important to the court. It was the fact they were being discriminated against /penalized upon arrival.

Rehnquist: *The right to travel and the right to become a citizen are separate and distinct. He compares welfare to the tuition subsidies. Thinks it is permissible.*

V. Substantive Due Process

Calder v. Bull (1798): The debate begins

Chase – the idea that there were pre-existing fundamental rights separate from those in the constitution. The constitution was a reaffirmation of rights / a social contract to protect those rights. The 9th amendment supports him – rights not enumerated or left to the states are kept by the people (this means there must be rights other than those listed!)

Iredell – the court should not invalidate laws that are constitutionally sound, even if the court thinks that the law goes against principles of natural justice. Thinks the constitution provided the beginning of a judicial system that allows for fixed rules. Natural law is undefined and there are no rules

Munn v. Illinois (1877): The state can regulate private property when it is affected with a public interest. However, there are still limits – cannot deprive of property without due process of law.

Mugler v. Kansas (1887): legislation enacted for the promotion of public morals, health or safety would be accepted as legitimate exertion of the police powers. However, they cannot be used as a pretense. Court was willing to look at the substance / purpose of a law. If the purported exercise of police power

has no real or substantial relation to the above, or is an invasion of rights secured by fundamental law, the courts should invalidate it. **This shows a willingness to invalidate on substantive due process grounds.

Allgeyer v. Louisiana (Peckham - 1897): this case demonstrates the shift toward "substantive due process." First time the court invalidates a law on these grounds. The court said that liberty meant more than the right to be free from physical restraint [traditional liberty]. It also meant a person has the right to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways, to live and work where he will, to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be properly necessary.

A. Economic Substantive Due Process

Lochner v. New York (**Peckham** – 1905): The court is looking to see whether the restriction on the number of hours the baker can work is a **reasonable and fair exercise of the state's police powers**. Unlike Congress, the state does not have to point to anything in order to pass a law. **Holding:** The court finds that the right to contract is part of "liberty" within the meaning of the 14th. Art 1 sec 10 prevents states from impairing obligations under EXISTING contracts. This is different. They find that the state did not have a reasonable reason to restrict contracts here. It is not a field where we're worried about safety, it is not unhealthy, etc. Court concedes that health is a legitimate end of the police power. The state **cannot use its police power to equalize the bargaining power between employer and employee**.

Harlan (White, and Day): *There is a liberty of contract but it is subject to reasonable police regulations. It is not up to the court to decide whether a certain regulation is "wise." We should take the statute to mean that there was a health concern.* ***Holmes:*** *A reasonable man might think that this is a proper measure on health grounds. There are reasonable grounds for restricting the number of hours in a work day. Court has sustained similar regulations in other fields!*

Lochner is no longer good law. It has become synonymous with inappropriate judicial intervention in the legislative process.

Adair v. United States (1908): invalidated a law that prohibited employers from saying employees cannot join a union. The law interfered with the liberty to contract.

Muller v. Oregon (1908): sustained a law setting maximum hours for women working in a laundry service. There was a health concern. The physical well-being of women who mother our children is of public interest. Appropriate protective legislation

Coppage v. Kansas (1915): unequal bargaining power is a result of liberty of contract. We can't interfere with that. Court relied on Adair.

Adkins v. Children's Hospital (1923): struck down a law setting minimum wages for women. Women have the same civil rights under the 19th amendment. Therefore, they too have the freedom of contract and the state should not interfere here anymore than they should with men. **Holmes:** *Thought states should be able to take differences between men and women into account.* *Overruled by West Coast Hotel v. Parrish.

Nebbia v. New York (**Roberts** – 1933): **Facts:** NY established a milk control board with the power to fix min/max milk prices. Nebbia sold below the min. **Issue:** Can NY regulate milk prices? **Holding:** the law cannot be unreasonable, arbitrary or capricious. The means selected must have a **real and substantial relation to the object sought to be achieved**. The milk industry is affected with a public interest and therefore is subject to the exercise of police power. **State can adopt economic policy that reasonably promotes the public welfare.**

***Although this is the Lochner standard it demonstrates a decreased judicial role. There is little independent examination of the economic rationality of the law.**

West Coast Hotel Co. v. Parrish (1937): overrules Adkins. The court says that women have relatively weak bargaining power. We should be concerned with the well being of women. It may be detrimental to their health they are defenseless against the denial of a living wage. You can have reasonable regulations on the freedom to K if it is in the best interests of the community.

United States v. Carolene Products Co (1938): employs a rational-basis test. Existence of facts supporting legislative judgment is to be *presumed*. Disproving rational-basis of a congressional economic regulation is not easy.
FOOTNOTE 4: this is the first suggestion that there is a double standard and personal rights are subject to Strict Scrutiny b/c they are fundamental. If a state interferes with a provision of the Constitution (i.e. a right in the bill of rights), the 14th amendment, regulations that close off the political process, or prejudice **discrete and insular minorities,** the court should apply **Strict Scrutiny**. The less protection the political process affords, the more judicial intervention is appropriate.

Day-Brite Lighting Inc. v. Missouri (1952): **Facts:** upheld NY law that required employer to give employees 4hrs off work (paid) on election day. **Holding:** This is a public welfare law. Economic regulations are for the legislature and we should not sit as a super-legislature. Even if the means are debatable (we think there are other options) it is left to the discretion of the legislature.

Williamson v. Lee Optical (**Douglas** – 1955): The law does not need to be logically consistent with its aims in every respect. It is enough that there is an evil at hand that needs correcting and the law **MIGHT** be thought to be a rational way to correct it. The court is not very concerned with the means as long as the ends are legitimate. They "day is gone" where the court can use Due Process to strike down laws / regulations b/c they may be "unwise" or out of harmony with a particular school of thought. You can't strike it down b/c you would have chosen a different method or don't like it. **Rational-Basis Review:** What the legislature "might" have found"

B. The Right to Privacy

Meyer v. Nebraska (1923): **Facts:** state law prohibiting teaching foreign languages to young children. **Holding:** Liberty encompasses the right to contract, engage in a common occupation of life, acquire useful knowledge, marry, establish a home, and bring up children to worship God your own way, etc. Court found the law interfered with students right to learn and parents right to decide how to educate their children. **Holmes:** *If there is a rational-basis the law should pass. Also the local legislature is in a better position than the court to determine whether there is a need to have children speaking English only in schools*.

Pierce v. Society of Sisters (1925): it is not ok to force parents to send their children to public schools.

Skinner v. Oklahoma (**Douglas** – 1942): **Facts:** OK had a Habitual Criminal Sterilization Act – compulsory sterilization after 3rd conviction for a felony involving moral turpitude, but excluding some felonies. **Holding:** marriage and procreation are fundamental to the survival of the race. Felon is forever deprived of a basic liberty. Says drawing lines between similar crimes may create discrimination.

Griswold v. Connecticut (**Douglas** – 1965): **Facts:** CT passes a law saying that anyone who uses a drug, medical article, or instrument to prevent contraception can be fined or imprisoned. Any person who assists, counsels, etc. to commit the offense is equally punished. **Issue:** Does this statute violate the 14th amendment? **Holding:** We have read certain rights into the constitution. A **right to privacy** can be found in the PNUMBRAS of the 1st (right of associationish), 3rd (right to be free from housing soldiers), 4th (secure in their persons, houses, papers, and effects against unreasonable searches and seizures), 5th (right against self-discrimination.) Douglas says we create a zone of privacy that we may not force someone to surrender Boyd v. United States (1866); 4th and 5th protection against all gov invasions of the sanctity of a man's home and the privacies of life. We will not allow an invasion of privacy in the marital

relationship. The law operates directly on the marital relationship and the relationship with the doctor's role in that relationship. Fears it will give police power to intrude into marital bedrooms and look for signs of contraceptives. This did not happen here. Where there is an infringement on personal liberty, the state may only intervene where there is a compelling interest – Strict Scrutiny. *Note Douglas has a plurality. Douglas hated Lochner.

Goldberg (Warren, Brennan): *liberty is not confined to the specific terms of the bill of rights. Liberty has a right of marital privacy. Says the 9th amendment indicates there is more liberty than what is written. It seems ridiculous to say that a right like the right to privacy in marriage which is deep rooted in society and fundamental doesn't exist b/c it is not explicitly mentioned.* **Harlan:** *liberty is not a series of isolated points pricked out in explicit terms. IT includes a freedom from all substantial arbitrary impositions and purposeless restraints. Says we should see whether the law violates values implicit in the concept of ordered liberty. The intimacy of marital relationship is essential and the state should protect it. Once the marriage is acknowledged the intimate relationship should be protected. Does say that he is not saying the state cannot forbid adultery, or say who may marry.* **White**: *statutes regulating sensitive areas of liberty require strict scrutiny. Does not see how the ban on contraceptives by married people reinforces the ban on illicit sexual relationships. They could have just limited the statute to illicit relations.*

Black, Stewart: *There are certain constitutional provisions that protect privacy. The government has a right to invade privacy unless there is a specific provision which prohibits it.* **Stewart:** *We should not be judging whether the law is "wise." There is no general right to privacy in the Constitution.*

Eisenstadt v. Baird (**Brennan** – 1972): **Facts:** Baird distributed contraceptive to an unmarried person after a talk at BU Law ☺. **Holding:** Brennan expands the rationale in Griswald. The right to privacy is not necessarily rooted in marriage but is a right of individuals (marriage is a union of two individuals.) **If right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters fundamentally affecting a person as decision to bear a child**. Brennan relied on Equal protection not due process. People, married or single, should enjoy equal rights to decide how and when to reproduce without intrusion from the state.

> **Carey v. Populations Services, International** (1977): Plurality opinion struck down a NY law which prohibited the sale or distribution of contraceptives to minors under age 16. **Brennan:** unpersuaded that the interest in stopping minors from sexual activity was significant and doubted that prohibiting access to contraceptives would deter conduct. **White:** state didn't show the law would deter. **Stevens:** irrationality of the means employed. State should not be allowed to expose minors to greater risks. **Powell:** Doesn't like that it prohibits parents from distributing contraceptives to their children.
> *This case was post-Roe

Roe v. Wade (**Blackmun** – 1973): **Facts:** Texas law made it illegal to get an abortion except w/ medical advice for the purpose of saving the mother's life. **Issue:** Is there a constitutionally protected right to get an abortion? **Holding:** The right of privacy (Ct. here says it's found in the 14th amendment) is broad enough to encompass the woman's right to choose. The word "person" in the 14th does not include fetus. *the court declines to decide when life begins. Prior to viability, the interests of the mother are greater than the interests in potential life (concerns about physical, psychological, and economic harm to the mother). They seem to be using Strict Scrutiny. A trimester system:

1. Stage prior to the end of the first trimester, abortion must be left to doctor
2. In this period the state may regulate the procedure in ways that a related to maternal health.
3. After viability – state may promote its interest in potential life and regulate, or even proscribe abortion EXCEPT WHERE IT IS MEDICALLY NECESSARY FOR THE PRESEVEATION OF THE LIFE OR HEALTH OF THE MOTHER.

The Central Holding of Roe: Abortion is a fundamental right protected by the Due Process Clause.

Stewart: *Right recognized in Eisenstadt includes the right of a woman to decide whether or not to terminate her pregnancy.* **White:** *This is an extravagant exercise of judicial review. There is nothing in the Constitution that supports the result. The court is making a new constitutional right.* **Rehnquist:** *We*

have a rational relation to a valid state objective. He thinks this is Lochner. Does not see a right to privacy here. Does agree that "liberty" is more than the bill of rights, but it not absolutely guaranteed.
*Critics say that Carolene Products FTN 4 does not justify strict scrutiny in this case. Women may have less political representation than men; however, the law is between women's rights and the fetus's rights. Fetus's have no political power or representation. They are the discrete and insular minority and the law can protect them.

Doe v. Bolton (1973): invalidated a Georgia law that required abortions to be performed in an accredited hospital, approval of hospital staff committee, and two doctors in addition to the attending doctor. The attending physician's judgment should be sufficient.

Planned Parenthood of Central Missouri v. Danforth (1976): court struck down a law requiring the husband's written consent for an abortion during the first 12 weeks of pregnancy. The state cannot delegate the authority to prevent abortion during the first trimester. The woman is more directly impacted by the pregnancy. Also said that an unmarried woman under 18 does not need to have the consent of a parent to get an abortion (but says they don't mean to say every minor regardless of age or maturing can give consent.)

Bellotti I (1976): the parental consent requirement is unconstitutional to the extent that it unduly burdent the right to an abortion – clarified more in 1979.

Maher v. Roe (**Powell** – 1977): **Facts:** CT regulation allowed Medicaid benefits for childbirth but not for medically unnecessary abortions. **Holding:** The right to get an abortion is not unduly burdened. The indigent woman still has the same right to seek an abortion as she did if she was not receiving any state aid. The state can choose to encourage childbirth. Refusing to pay alone does not create an unreasonable obstacle. The state can choose how to best allocate public funds. The state can make an option more attractive as long as it does not add obstacles that were not there before.

Brennan: *thought the funding coerced indigent women to bear children they would not otherwise choose to have, and this impaired the right of privacy.*

Bellotti II (1979): Could not allow a blanket parental veto. However, ruled that parents could be involved in the minor's decision to terminate as long as there is also an alternative judicial bypass procedure so that the parent's involvement could not ultimately be an absolute, arbitrary veto.

Harris v. McRae (**Stewart** – 1980): **Facts:** Hyde Amendment – barred payments for medically necessary abortions (except for victims of rape or incest where mother's life was threatened.) **Holding:** it does not follow that the freedom to choose means that you have an entitlement to financial resources to avail yourself of the full range of protected options. The state cannot create obstacles but it can choose not to fix obstacles it did not create. This leaves the woman in the same position as she would have been in if she got no benefits at all.

Brennan: *discriminatory disbursement of benefits can discourage exercise of fundamental liberty in the same way an outright denial does.*

Akron I (1983): struck down a law requiring abortions after 1st trimester to be performed in a hospital rather than outpatient facilities (less expensive.) The court said that it placed a significant obstacle in the path of women seeking an abortion. Also said requiring doctors to disclose all information about development of fetus, date of viability, etc was unconstitutional b/c it was not designed to achieve informed consent, but rather to try and persuade her not to have the abortion.

This decision also struck down the mandatory 24-hour waiting period b/c it increased the cost of getting an abortion since it required two separate visits to the facility.

Planned Parenthood Assn. of Kansas City v. Ashcroft (1983): if parents are involved state must provide an alternative procedure where a minor may demonstrate that she is mature enough to make the abortion decision herself, or that despite her maturity the abortion is in her best interest.

Webster v. Reproductive Health Services (**Rehnquist** - 1989): upheld Missouri law which prohibited state employees for performing abortions and performing abortions in public facilities even when the patient paid herself. Left women with the same options they would have had if the state did not provide public hospitals at all. R did note that it may be different if ALL health care was provided in state facilities.

Rust v. Sullivan (**Rehnquist** - 1991): The government does not need to subsidize an activity just because it is constitutionally protected. It may choose to fund childbirth over abortion – money does not need to be evenly allocated. It is ok for the government to choose not to fund abortion counseling. This leaves women with the same options they would have had if the government had not provided family planning services at all!

Planned Parenthood of Southeastern Pa. v. CASEY (**O'Connor**, Kennedy, Souter – 1992):
Undue Burden Test: an undue burden exists if the regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus.
1) O'Connor clearly says that the central holdings of Roe are still good law. State cannot proscribe abortion prior to viability. The test for validity of state law has changed. **An undue burdened exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.** 2) They reject the rigid trimester structure of Roe. Affirm that states may take measures to insure informed choice, as long as the measures do not impose an undue burden. States have a *legitimate interest* in BOTH the life and health of the mother and the life and health of the fetus from the OUTSET of pregnancy (change from Roe, which said state's interest in life of the fetus is only compelling post viability.) *3*) States may enact regulations to further the health and safety of the mother seeking abortion so long as those regulations do not impose an undue burden. 4) THE STATE MAY NOT PROHIBIT WOMAN FROM MAKING THE ULTIMATE DECISION TO TERMINATE BEFORE VIABILITY. 5) Post viability – state may regulate and proscribe abortion except where medically necessary for health / life of the mother.

The Specific Provisions: **Akron I is overruled**. We will now **allow** legislation which requires doctors to give women all **information** about the fetus etc. The **24 hour waiting period is NOT an undue burden**. The **spousal notification requirement IS an undue burden**. **Minors may be required to have parental consent provided there is an adequate judicial bypass procedure.** It is **ok** to require facilities to produce **records** with information regarding **woman's age, age of fetus, dr, type of procedure**, etc. provided no identifying information is made public.

The Definition of LIBERTY: "at the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and the mystery of human life."

Stevens (dissenting in part): *thinks the 24 hour waiting requirement is meant to persuade and is not constitutional. He says that the state can have a preference but cannot persuade. Agrees that we should not overrule* Roe. **Blackmun** (dissenting in part): *the reproductive choice is entitled to full protection afforded before* Webster. *He thinks we should be using* strict scrutiny *when analyzing abortion restrictions. All provisions should have been held invalid.* **Rehnquist** (White, Scalia, Thomas): *Believe that* Roe *was wrongly decided and should be overruled. Woman is not isolated in her pregnancy and there is no fundamental right to abortion.* Roe *says it is a fundamental right and we should have strict scrutiny. Majority rejects both those things.* **Scalia**: *would apply rational-basis and uphold all PA provisions. The constitution says nothing about this. The court should not be making value judgments. It should be left to the states.*

O'Connor on stare decisis: we need a better basis for overruling cases than the fact that we don't like them. If the underlying facts and principles are still the same, then the case should stand. We don't want the court overruling opinions over time the judges change. T his would create too much instability.

Stenberg v. Carhart (**Breyer** – 2000): struck down a Nebraska law prohibiting D&X abortions. The law did not have a health provision. Where there is medical authority saying that banning a particular abortion procedure could endanger woman's health, Casey requires a the statute to include a **health exception**. The wording of the statute may prohibit other kinds of abortions as well. It imposes criminal sanctions on those performing the procedures. There is an undue burden on a woman seeking abortion.

Stevens: *does not see how a state has any legitimate interest in requiring a doctor to follow any procedure other than the one he reason ably believes will best protect the woman.* **Ginsburg:** *thought the law was an attempt to chip away* Roe. **O'Connor:** *thought it may be an ok provision if it had a life and health exception and limited the provision to D&X.* **Kennedy**, Rehnquist: *It was Nebraska's job to determine whether there was a difference between the abortion procedures, not the courts.* Casey *is not implicated in this case*. **Thomas**, Rehnquist, Scalia: *We have never protected a woman's right to prefer one procedure over another.*

Ayotte v. Planned Parenthood of Northern New England (**O'Connor** – 2006): the court here was UNANIMOUS. We don't have an all or nothing rule. Courts can issue declaratory judgments / injunctions prohibiting a statute's unconstitutional application. You can invalidate parts or applications without invalidating the whole law.
*This is O'Connor's last opinion on the court.
As Applied Challenge: you are not saying that the statute is invalid under all circumstances, but rather that he way it is applied in a particular case in invalid. If you win on a FACIAL CHALLENGE, then it means the law is always unconstitutional and the whole law is invalidated.

Gonzales v. Carhart (**Kennedy**, Roberts, Scalia, Thomas, Alito – 2007): **Issue:** Whether the act imposes a substantial obstacle to later-term but pre-viability abortions. **Holding:** Even without a health exception, the law can stand. **Rationale:** A health provision is not an issue here b/c there are other, safe alternative procedures for abortion during this stage of pregnancy. The court finds that the fetus would be inches away from completing the birth process when it is terminated. They allow the state to preserve the integrity of the medical profession. Concerns about blurriness of the doctor's role in the birth process. They fear that this is too close to actually delivering the baby so they draw the line. It would be unconstitutional if the act subjected women to significant health risks. There is a factual question as to whether the Act creates health risks. However, an act is not FACIALLY invalid when there is uncertainty over whether the procedure is ever necessary to preserve a woman's health.

Thomas, Scalia: *Says that this is consistence with past rulings, but reminds us that these rulings have no basis in the Constitution.* **Ginsburg**, Stevens, Souter, Breyer: *Does not take Casey and Stenberg seriously. It oks fed intervention to ban a procedure found necessary and proper in certain cases by the American College of Obsetricians and Gynocologists. This is the first time since* Roe *that the court does not require a health provision. Though we don't know for sure if there is a medical reason for requiring this procedure, health provisions are there to protect exceptional cases – maybe there is one so rare we haven't seen it yet.*

C. Marriage

Loving v. Virginia (1967) *Note this is also an Equal Protection Case: struck down a ban on interracial marriage mostly on Equal Protection Grounds but also saying that it deprived people of liberty without due process of law. **Freedom to Marry** has been recognized as a vital personal right (Skinner.) To deny this fundamental freedom b/c of a racial classification is subversive of equality under the 14th amendment and denies liberty w/o due process of law.

Zablocki v. Redhail (1978): **Facts:** requires someone w/ a non-custodial child they are required to support to get court approval before marrying. **Holding:** The right to marry is fundamental. Marshall cites Loving and Griswold to show that right to marry is part of right to privacy. State claims they are safeguarding the welfare of children – providing an incentive for parents to pay. However, the court says

that there are less intrusive means to get to this end. *We review with STRICT SCRUTINY b/c we have a fundamental right.

Turner v. Safley (**O'Connor** – 1987): struck down a prison regulation restricting inmate's right to marry. The right to marry is fundamental even in a prison setting (even though prison setting allows for restrictions.) Most inmates are eventually released. Other reasons – people marry to gain property and social security rights and to legitimize children. We should allow marriage in the prison setting b/c of this

D. Family

Belle Terre v. Boraas aka **Frat Boy Case** (**Douglas**– 1974): **Facts:** family-oriented zoning restriction excluding most unrelated groups from a village. **Holding:** The restriction was ok. Douglas called it an economic and social law therefore only requiring judicial deference. **Marshall:** *we need strict scrutiny. Decisions on who to live with are deeply personal. It relates to the intimate relationships within a home, and the right to choose who you live with is based in liberty.*

Moore v. City of East Cleveland (**Powell** – 1977): **Facts:** zoning ordinance limiting occupancy of a dwelling to members of a single family – meaning a nuclear family, a couple and their dependent children. Mrs. Moore lived with her two grandsons who were not brothers. **Holding:** the ordinance is invalid. We use strict scrutiny in this case. The city interests in preventing overcrowding, and minimizing traffic were legitimate, but there is only a tenuous relationship between these goals and the ordinance. **Rationale:** History and tradition – uncles, aunts, cousins, and especially grandparents sharing a household have old roots.

Stevens: *Makes a property argument. This is an unjustifiable restriction on Moore's right to use her property as she sees fit.* Under this rationale, an unrelated neighbor could also have taken in the boys and it would have been permissible. **Brennan:** *extended families are especially part of black tradition and we cannot impute white values on them.* **White:** *we are broadening substantive due process. It is debatable what are "traditions," and debatable that living with multiple sets of grandchildren is tradition.* **Stewart**, Rehnquist: *we should not equate this with rights to marry, bear, and raise children.* **Burger:** *procedural grounds for dissent.*

Michael H. v. Gerald D. (**Scalia**, Rehnquist, O'Connor, Kennedy – 1989): **Facts:** Michael H. claimed to be the biological father of Carolene D. and Gerald D.'s child and sought visitation. CA law established the presumption that any child born to the life is legitimately a child of the marriage. **Holding:** The court upheld the CA law. **Rationale:** Michael H's constitutional rights were not violated. **Due process requires a fundamental liberty interest that is traditionally protected by society**. Footnote: Tradition weighs in favor of the marital family. **There is NOT ONE case that supports Michael H's claim**.

O'Connor, Kennedy: *Join all of the opinion except for the footnote. We don't always look to the most specific level of generality available (in this case the "natural father.")* **Brennan**, Blackmun, Marshall: *dislikes that the plurality requires approval from history before protecting something in the name of liberty. Society / value changes over time.*

Troxel v. Granville (**O'Connor**, Rehnquist, Ginsburg, Breyer – 2000): **Holding:** a court decision to give visitation rights to grandparents over the objection of the surviving parent (fit, custodial mother) violated the mother's due process rights. **Rationale:** due process clause of the 14th amendment protects a fundamental right of parents to make decisions concerning the care, custody, and control of their children. (See also Meyer and Pierce v. Society of Sisters.) The court can't make child rearing decisions in place of a fit parent b/c it thinks something else is better. **Leaves open the scope of the parents' right to control their children's visitation / does not say how much deference to give to parents** – but noted the trial judge didn't give any deference to the mother's decision.

Stevens: *we have never held that the parent's right is so rigid that it protects every arbitrary parental decision. We should also think about the child's interests. Due process allows the court to*

consider impact on a child of arbitrary parental decisions. **Scalia:** *Does not think we should be deciding. He doesn't think the Constitution give him the right to deny legal effect to laws that infringe on what in his opinion is an unenumerated right.*
*O'Connor took this as an applied challenge.

E. Sexuality Cases

Bowers v. Hardwick (**White** – 1986): **Issue:** Whether the constitution confers a fundamental right upon homosexuals to engage in sodomy and therefore, we must invalidate laws that make sodomy illegal. **Holding:** under recent precedent, this right has not been fundamental under due process *Recognized:* child rearing/education (Pierce, Meyer), procreation (Skinner), marriage (Loving), contraception (Eisenstadt, Griswold), abortion (Roe). Sodomy has no connection to family, marriage, or procreation. **Apply rationality review** – they don't want to begin looking for new fundamental rights. REJECT THE CLAIM THAT MORALITY WAS INSUFFICIENT TO PROVIDE A RATIONAL BASIS.

Burger: *sodomy is traditionally illegal b/c of Judeo-Christian moral and ethical standards.* **Powell:** *found the law facially valid, though the thought the 20-year prison sentence may give us 8th amendment concern.* After his retirement Powell changed his mind and thought that he made a mistake voting with the majority. He is not concerned about this though b/c this is never prosecuted. **Blackmun**, Brennan, Marshall, Stevens: *Thinks we have a violation of the right to privacy – sexual intimacy is a sensitive, key relationship of human existence. Thinks the majority refuses to accept that there is a fundamental interest in controlling the nature of one's intimate relationships.* **Stevens:** *the law prohibited sodomy in married couples and other heterosexual relationships as well. If we are only prosecuting gay men then we need HEIGHTENED SCRUTINY – selective application must be supported by a neutral and legitimate interest – more substantial than a dislike for a disfavored group!!*

Lawrence v. Texas (**Kennedy**, Stevens, Souter, Ginsburg, Breyer – 2003): Liberty – autonomy of self that includes freedom of thought, belief, expression and certain intimate conduct. **Fact:** Texas law criminalizing homosexual conduct. **Rationale:** Court uses **Liberty** under the **Due Process Clause** of the **14th Amendment.** We recognize a right to privacy (Griswold) which was expanded beyond the marital relationship in Eisenstadt. The statute seeks to control a personal relationship that is within the liberty of persons to choose without being punished as criminals (this does not mean the law needs to legally recognize these relationships.) We acknowledge that adults have the right to choose to enter into an intimate relationship – we extend this right to homosexuals. **The MPC:** Did not provide penalties for consensual sexual relations conducted in private 1) would sacrifice respect for the law to penalize something that many people engage in 2) regulated private conduct that was not harmful to others – what good is that? 3) laws were arbitrarily enforced – fear of blackmail. **Relies on Casey** – allows protection to personal decisions relating to marriage, family relationships and intimate and personal choices – central to personal dignity and autonomy. Homosexuals may seek this same autonomy. **Romer v. Evans**: invalidated a class-based law directed at homosexuals on equal protection grounds. **Stevens view in Bowers should have been controlling and they adopt it in this case (i.e. morality is not a sufficient reason for upholding a law prohibiting certain conduct.** They say they OVERRULE Bowers.

O'Connor: *does not join in overruling Bowers. She would ban the law on Equal Protection grounds. A bare desire to harm a politically unpopular group is not a legitimate state interest. The law makes homosexuals unequal (heterosexual sodomy is still ok under the TX law.) Morality is not sufficient to satisfy review under Equal Protection. Is not afraid of changing the law to be equal b/c people wouldn't stand for ban on heterosexual sodomy. ** Worried about turning homosexuals into 2nd class citizens b/c they are stigmatized as criminals.* **Scalia**, Rehnquist, Thomas: *Stare Decisis: our past cases say we apply strict scrutiny when rights which are deeply rooted in history and tradition are violated. There is no deeply rooted right to engage in homosexual conduct.* **Thomas**: *claims to not like the TX law but he cannot see a right to privacy in the Constitution. Therefore, he can't help as a member of the court. It is not the court's job if it does not go against the Constitution.*

Gay Marriage: Lawrence does not say whether state governments must recognize same sex couples. Moral disapproval of homosexuality is not a legitimate state interest after Lawrence. **Goodridge v. Department of Public Health** (MA 2003): prohibitions against same sex marriage violate the MA constitution. Struck down the provision on due process and equal protection grounds – a person who enters into an intimate same sex relationship is arbitrarily being deprived of membership in a rewarding and cherished institution. The state claimed procreation, optimal child-rearing situations as their goals. However, the court found no rational relationship between these goals and the ban on gay marriage (many heterosexual couples do not reproduce / are incapable of reproducing). No one is seeking to undermine the institution of marriage – they want to embrace the customs.

Gay Parenting: Bottoms v. Bottoms (1995): court removed child from custody of biological mother and gave him to grandmother in part b/c mother was gay. Being in a lesbian household may have burdened the child b/c of social condemnation. Lofton v. Secretary Dept of Children and Family Services (11th Cir. 2004): said Lawrence said nothing about homosexual right to adopt. Court upheld a law banning gay adoption (even though this couple was already serving as foster parents.) They said that Florida may have had a legitimate interest in putting the children in homes that would provide them with optimal developmental conditions, and the state could decide what those were.

F. Right to Die

CRUZAN v. Director, Missouri Dept. of Health (**Rehnquist** – 1990): **Facts:** Cruzan had been in a vegetative state since 1983. There was basically no chance she would regain cognitive functioning. Her parents wanted to remove the artificial feeding tube. She had no living will. The Missouri Supreme Court ruled that before the parents could pull the plug, they must prove by **clear and convincing evidence** that it is what Cruzan herself would want to happen. **Issue:** Does the Constitution forbid the establishment of this procedural requirement by the state. **Holding:** requiring clear and convincing evidence is constitutional. **Rationale:** Rehnquist **assumes that the Constitution would protect a competent person's right to refuse medical treatment.** A state is entitled to safeguard against the possibility that the family will not be acting to protect the patient. The state can assert an interest in the preservation of human life. The clear and convincing evidence standard will allow the state to try and have fewer errors in making decisions. This is important b/c death is not reversible.

O'Connor: *agrees that there is a liberty interest in refusing unwanted medical treatment including the refusal of lifesaving food and water. That interest is not violated by the clear and convincing evidence standard.* **Scalia:** *Thinks that the federal courts do not have business deciding these cases. We have always let the State regulate suicide including refusing medical treatment as a way to die. We should have left it with the state.* **Brennan**, Marshall, Blackmun**:** *no state interest can outweigh the rights of a person in Cruzan's position. There is a liberty interest (not absolute) to be free from unwanted medical treatment. State has no legitimate interest in someone's life which is separate from the person being able to live that life.*

What Cruzan left open: whether there was a liberty right or interest sufficient to invalidate a law with the effect of barring altogether the assistance of a physician in accelerating one's death, and what level of scrutiny should apply there. Answered by Glucksberg:

Washington v. Glucksberg (**Rehnquist** – 1997): **Facts:** Washington law made it a felony to aid another person's suicide attempt. However, they say that withholding life-sustaining treatment at a patient's discretion is not ok. **Issue:** Does the liberty protected by the due process clause include a right to commit suicide which itself includes a right to assistance? **Holding;** The ban on assisting suicide is constitutional. **Rationale:** History supports a ban on assisted suicide. R distinguished Cruzan and Casey b/c Cruzan said that forced medication is a battery and Casey admits that not all intimate decisions are

protected. The ban is rationally related to state interests in 1) preserving life; 2) preventing suicide; 3) protecting integrity of the medical profession – causing death is incompatible with being a healer; 4) protecting vulnerable group (studies show people would not choose to die if the pain / depression was fixed); 5) limiting voluntary euthanasia

O'Connor: *agrees that there is no general right to commit suicide. She says that the parties and amici briefs agree that someone who is terminally ill and experiencing pain has no legal barrier to obtain medication from doctors to alleviate their suffering, even to a point of causing unconsciousness and hastening death. Concedes that an "as applied" attack may win, but it is not facially invalid.* **Stevens:** *recognizes that the state's interests in banning dr-assisted suicide will not have the same weight in all cases. The State's interests do not apply to an individual who is competent. It would be inconsistent with the healing role for doctors not to prescribe pain medication which will make death tolerable. S thinks that a more particularized challenge may succeed.* **Breyer:** *The laws are ok because the law does not infringe the right to die with dignity since it does not force a dying person to undergo pain. A doctor could prescribe drugs in that situation.* **Souter:** *the state has shown they are not making an arbitrary / purposeless distinction. Says the legislature is more competent to make this decision.*

Vacco v. Quill (1997): **Holding:** It was ok for NY to ban assisted suicide by permitting patients to refuse lifesaving medical treatment. **Rationale:** They reject an equal protection claim – equal protection makes us treat like cases alike but allows us to treat different cases differently. The distinction? When someone dies from pulling the plug or refusing treatment it is ultimately the underlying disease that kills them. When a patient ingests a lethal medication, he is killed by the medication. What about **painkillers?** The underlying purpose of prescribing those is to ease the pain, not kill the patient. For a doctor to be guilty of assisted suicide he must primarily intend that the patient be made dead.

Stevens: *the holding does not foreclose the possibility of as applied challenges (Rehnquist agrees with this in a footnote.).* O'Connor, Souter, Ginsburg, and Breyer also concurred.

Note: Only Scalia, Kennedy, and Thomas joined in the opinion without qualification.

G. Procedural Due Process – Property

Goldberg v. Kelly (**Brennan** – 1970): **Holding:** due process required a welfare recipient get a hearing before the termination of benefits. **Rationale:** benefits are given by statutory entitlement if you qualify. Termination can deprive a person of means to live by – they may very well be eligible and until we don't want to take benefits away from an eligible person without a hearing.

Board of Regents v. ROTH (**Stewart** – 1972): **Issue:** whether he had a constitutional right to a hearing before they deny rehiring him. **Holding:** No, he did not have a property interest. **Rationale:** He had a one year contract. His interest is over when the contract is over. He received everything he was entitled to. You can't have a **property** interest in something you don't have. What about his reputation? Does this take away his **liberty**? They say no – his good name had not really been disturbed. If the state defames you though, you may have a right to a trial. Further, his right to liberty is not deprived because he is still free to seek another job – no one is stopping him from doing anything, they just don't want him to work there.

Perry v. Snidermann (**Stewart** – 1972): **facts:** The college had a *de facto* tenure program, and he was not rehired. He claimed he had tenure under the program and was entitled to a hearing. **Holding:** A person has a property interest for due process purposes if there are rules or mutually explicit understanding that support his claim of entitlement to a benefit. In this case, because he could potentially have tenure b/c of the policy / mutual understanding, he can have a hearing before he is deprived of that benefit.

Arnett v. Kennedy (1974): **Facts:** could only be dismissed for "cause," but the dismissal procedure did not provide for a hearing. **Holding:** the employer can have conditions on the employment interest. The

law had removal procedures, and the procedures did not provide for a hearing. It did create the expectation of continued employment, but you must take this interest with the understanding that you would not be provided with a hearing. *This was later rejected by Loudermill.

Bishop v. Wood (1976): **Facts:** Bishop was a policeman fired without a hearing. **Holding:** we should be looking at state law. Relied on the lower court's holding that Bishop was employed at the will and pleasure of the city.

Cleveland Board of Education v. Loudermill (**White** – 1986) rejects Arnett. He says we look to state law to see whether a property interest exists, but state procedures contained in the law creating the property right are not the source of constitutionally required procedures for termination. When the due process clause applies, the question of what due process is, is not found in state law.

The above line of cases shows that the due process clause does protect against deprivation of all government benefits, but only of "entitlements" created by state law. If the state law gives you an interest, then they need to use due process to take it away.

Town of Castle Rock v. Gonzales (**Scalia**, O'Connor, Rehnquist, Kennedy, Souter, Thomas, Breyer – 2005): **Facts:** she claims a property interest in having the police enforce a restraining order against her husband. As a result of the non-enforcement, he abducted and killed their three children. **Holding:** there is no protected entitlement if officials may grant or deny the benefit at its discretion. Past property cases, like Roth, have required a showing of an ascertainable monetary value – this does not have one. The interest arises out of a service that has always been provided at the official discretion. Colorado law did not make enforcement mandatory. Police didn't enforce something that they said they might not enforce.

Stevens, Ginsburg**:** *If she had entered into a contract with a private security agent, she would have had a property interest. He thinks the restraining order was like a contract – Colorado undertook the obligation (they did not have to issue the restraining order), and once they did that she justifiably relied on their undertaking of her protection.*

H. Procedural Due Process – Liberty

Paul v. Davis (**Rehnquist** – 1976): **facts:** local police deemed P and active shoplifter and distributed flyers about him. He sues under 1983. **Holding:** Reputation alone is not a constitutionally protected interest. He may be able to win a defamation claim, but this is separate from a constitutional claim. Problem is that if we let this go forward every time a public official commits a tort, P would have a federal claim. This was not that purpose of 1983.

Question: What procedural guarantees attaché when there is a deprivation of a protected liberty or property interest?

Mathews v. Eldridge (1976): due process is flexible. To determine if procedures are ok we look at government v. private interests. 1) private interest that will be affected; 2) the risk of an erroneous deprivation of such interest through the procedures used an probable value of additional or substitute procedural safeguards, 3) the government's interest – also can look at the additional burden on the government that an alternative procedure would entail.

VI. Equal Protection – Economic Cases / Rational Review

When a regulation does not involve a racial classification or another type of classification that warrants heightened scrutiny, the court has applied minimal rationality review to determine whether there is a rational relationship to a legitimate government end.

Railway Express Agency v. New York (**Douglas** – 1949): **Facts:** NY law does not allow advertising on vehicles unless they are putting their own business notice on their own business delivery vehicles. Co sells ad space on trucks unconnected with the business. State court found a safety issue – distraction to drivers. **Issue:** Does the under-inclusive regulation violate equal protection? **Holding:** They find a rational basis – the local authorities may have concluded that those who advertise themselves on their trucks do not present the same traffic problem in view of the nature or extent of the advertising they use. We can't say that this is not allowable. **It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.** They can attack problems on a case by case basis

Williamson v. Lee Optical (2nd appearance on outline! – 1955); **Legislatures can take reform one step at a time**. Evils in the same field may be of different dimensions and we can deal with them differently and at different times.

U.S. Department of Agriculture v. MORENO (**Brennan** – 1973): the court struck down a provision of the federal food stamp program limiting assistance to "households," which were defined as groups of RELATED people. Brennan found that exclusion of "unrelated persons" to be irrelevant to the stated purposes (raising levels of nutrition and increasing consumption of food to strengthen the agricultural economy.) **For the constitutional conception of equal protection of the laws to mean 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.**

New Orleans v. Dukes (1976): **Facts:** 1972 New Orleans provision sought prohibition against pushcart food vendors in the French Quarter. The provision gave an exception to venders who had continually operated the same business for eight years prior to January 1, 1972. **Holding:** The grandfather clause was a purely economic regulation. The city had an interest in preserving the appearance and custom valued by the residents and tourists. The classification may rationally further this purpose.

New York City Transit Authority v. Beazer (**Stevens** – 1979): **Holding:** upheld the exclusion of methadone users from Transit Authority employment. Note: methadone is the prescribed treatment for heroin addiction. **Rationale:** Stevens says that as long as they are on methadone there is still a degree of uncertainty. Two rational basis for the law: 1) safety – there is still a degree of uncertainty. These are not yet ex-drug addicts. Methadone is still a controlled substance. 2) Deterrence – maybe this policy will deter people from using heroin to begin with (even if it can't work as a specific deterrent it can still be a useful general deterrent.)

White: *Thought the real reason for the provision was animus. The TA said that they were afraid of an adverse public reaction. Animus should not provide a rational basis* (see Moreno.) *Found this case hard to reconcile with* Moreno.

What was left open? Whether a policy of excluding ALL former users of controlled substances would be constitutional.

U.S. Railroad Retirement Board v. Fritz (**Rehnquist** – 1980): **Issue:** the constitutionality of the distinction Congress drew between those employees who could continue to receive dual benefits and those who were denied them. **Holding:** Congress could have taken away all benefits. Therefore it was permissible for them to draw lines between groups for the purpose of phasing out benefits. **Rationale:** There are plausible reasons for the lines Congress drew (i.e. could properly conclude that persons who had actually acquired statutory entitlement while still employed had greater equitable claim etc. It does not matter if these were the real reasons – we don't demand that congress give us their reasons. As long as there are conceivable reasons, the lines drawn are ok. **A legislative classification can be based on rational speculation and unsupported by evidence or empirical data** (Thomas in FCC v. Beach.) Congress is trying to preserve the benefit system and this means could rationally achieve that end.

Stevens: *the congressional purpose to eliminate dual benefits is unquestionably legitimate. The timing of the employee's railroad service is a reasonable basis for the classification. Does not agree that every classification must further and objective that is the legislature's actual purpose. IF we can find a*

legitimate purpose we can reasonably presume that was a motivation. **Brennan:** *says that just looking at the words of the statute just says what the classification is – this is not judicial review. The challenged classification should only be sustained if it rationally relates to achieving an actual legitimate governmental purpose. He says we should look at 1) the objective of the statute and 2) whether the challenged classification achieves that objective.*

Allegheny Pittsburgh Coal v. Webster County (1989): invalidated a tax system which treated people differently. Properties which were recently transferred were taxed on the basis of the recent purchase price. Properties not recently transferred were assessed on the basis of previous assessments. It created a large disparity in taxes between similar / neighboring properties. The court found that this even went against the West Virginian Constitution, which provided that property shall be taxed at a rate uniform throughout the state according to the estimated market value. They had no rational reason for evaluating the market values differently.

Nordlinger v. Hahn (**Blackmun** – 1992): **Facts:** CA prop 13 – imposed an acquisition-value property taxation system, benefiting longer-term property owner at the expense of newer property owners. **Holding**: Allegheny is distinguished. **Court's review requires that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant gov decision maker**. Note that this case was decided BEFORE Saenez v. Roe(*A state may draw no distinction between classes of citizens based on length of residence without compelling justification*.) Proposition does what it sought to do – benefit long term property owners over new ones. *This may not be good law b/c of Saenez (right to travel / citizenship clause)

Thomas: *This is not different from Allegheny.* Allegheny *should be overruled.* **Stevens:** *thought this was not ok. He said similarly situated neighbors should equally share in the benefits of local government. The state was drawing arbitrary inequalities, and it does not rationally further a legitmate state interest.*

Village of Willowbrook v. OLECH (2000): **Facts:** the village required Olech to give a 33-foot easement as a condition for connecting her house to the municipal water supply. The village had only required a 15-foot easement of other property owners. **Holding:** treating her differently was enough to sustain a claim on equal protection grounds. **Rationale:** the purpose of equal protection if to secure every person against intentional and arbitrary discrimination. **It doesn't matter that she is a class of 1**, she is still being treated differently. The court found that there was no rational reason for treating Olech differently (it was "irrational and wholly arbitrary") and this entitled her to relief.

Breyer: *The ill will of the city toward Olech should have been considered. It shows illegitimate animus or ill will. This for him is what transforms an ordinary zoning ordinance (which may be ok) into a constitutional violation.*

VII. Equal Protection – Race Cases

Equal Protection Standards of Review:
Race discrimination – strict scrutiny
Gender discrimination – intermediate scrutiny
All other classifications (socioeconomic, age, disability, sexual orientation – not inherently suspect) **– rationality review.**

Strauder v. West Virginia (1880): **Facts:** black defendant convicted of murder by an all white jury. W.VA law provided that "all white males who are 21+ and citizens of W.VA shall be liable to serve as jurors." **Holding:** The law was unconstitutional. **Rationale:** the law violates equal protection. The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, is practically a brand upon them, affixed by the

law, as assertion of their inferiority. Equal protection = no discrimination based on color. Could set qualifications based on gender, landownership, education – but not race.

Yick Wo v. Hopkins (1886): **facts:** could not operate a laundry without he consent of the board of supervisors. Board granted permits to all but one of the non-Chinese applicants, but did not grant any permits to over 200 Chinese applicants. **Holding:** found discrimination in the *administration* of the law. **Rationale:** they distributed permits on an unequal basis to the extent that it violated equal protection. **Even if the law is fair and equal on its face, if it applied and administered by public authority w/ and evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, there is a constitutional violation.**

Plessy v. Ferguson (1896): court sustained a Louisiana law that required "equal but separate accommodations" for white and colored passengers. Majority held that 14th could not have intended to abolish distinction based upon color or to enforce social as distinguished from political equality. They say that Laws requiring separation does not necessarily imply the inferiority of either race.

Harlan: *it is obvious that the law was intended to keep blacks out, not to keep whites out of black areas. The law interferes with personal freedom. There is no superior ruling class in the constitution – it is colorblind. He is sure this will be overruled with time.*

Gaines v. Canada (1938): Gaines was denied admission to University of Missouri Law School b/c he was black. The majority held that the State was obligated to furnish Gaines within its boarders facilities for legal education substantially equal to those which the state offered to whites. Since there were no other schools in Missouri, he was entitled to be admitted.

Korematsu v. United States (**Black** – 1944): This is the only racial classification which has survived strict scrutiny (although it is unconvincing that they actually applied strict scrutiny as we know it today.) **Facts:** WWII – military order excluded all Japanese (even US citizens) from certain west coast areas. The identified public necessity was that there was a possibility of disloyalty and it was impossible to separate the loyal from disloyal. **Rationale:** There is deference to the military. The court could not say the actions were unjustified. The military claimed there was not enough time to separate the who was disloyal (even though there was no indication of any disloyalty)
Court avoided the most difficult issue: imprisonment of Japanese Americans based on race without ANY hearing at all (due process concern!) Also – important to note that DeWhit was very racist (thought the fact that there was no disloyalty was telling that there would be) and there WERE hearing for the Italians and Germans on the east coast.

Murphy: *says he applies a reasonableness standard and it still doesn't pass. He is not convinced that the deprivation of individual rights was reasonably related to an imminent public danger. There was time for a different process.* **Jackson:** *afraid of the long term effects of the decision. Court rulings last longer than military decision.*

Sweatt v. Painter (1950): required the admission of blacks to University of Texas Law School even though the state had recently establish a law school for Blacks. They found no substantial equality in the educational opportunities – number of faculty, variety of courses, size of student body, scope of library, law review, etc. The University of Texas Law School was superior. The big point was the reputation and connections.

Brown v. Board of Education (**Warren** – 1954): **Question Presented:** does segregation of children in public schools solely on the basis of race, even though the physical facilities are other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? **Holding:** We believe it does. **Rationale:** Sweatt – ct relied on objective measurement / intangible considerations (McLaurin). They say to separate children from others of similar age and qualifications b/c of race generates a feeling of inferiority as to their status in the community – may affect hearts and minds in a way that cannot be undone. **In the field of public education the doctrine of separate but equal has**

no place. Separate educational facilities are inherently unequal.
If anything the holding is limited to education. The court focuses on the IMPACT of the discrimination, not just the focus. The court does not say that education is a fundamental right. However, they say that where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
De facto v. de jure discrimination: there may still be problems with de facto discrimination. However the effects of discrimination are worse when they have the sanction of law.

Bowling v. Sharpe (1954): **Holding:** racial segregation in D.C. public schools violated the due process clause of the 5th amendment – the 5th amendment contains and implied equal protection clause. *could not use 14th amendment equal protection b/c that applies to the STATES. Classifications based solely upon race must be scrutinized with particular care. Liberty under the law extends to the full range of conduct which the individuals is free to pursue and cannot be restricted but for a proper governmental interest. **Segregation in public education is not reasonably related to any proper governmental objective… and thus it imposes on Negro children of the District of Columbia a burden that constitutes an arbitrary deprivation of their liberty in violation of due process.** It is not reasonable to think that the constitution would impose a lesser duty on the federal government.

Later there is a no segregation ban extended to all public facilities.

Gomillion v. Lightfoot (1960); Alabama law redefining the city boundaries of Tuskegee was held to be a device to disenfranchise blacks in violation of the 15th. The odd shape removed all but four or five of its 400 black voters and removed no white voters or residents. It seemed obvious that the law was concerned with segregating white and colored voters.

McLaughlin v. Florida (1964): struck down a criminal adultery and fornication statute prohibiting cohabitation by interracial, unmarried couples. We apply strict scrutiny b/c it's a racial classification. They found discrimination – no reason why conduct of non-interracial couples was fine but interracial = crim.

Griffin v. Country School Board of Prince Edward Country (1964): post Brown public schools which would have been required to integrate closed and private schools for white kids were opened with grants of public funds. Black's majority found there was only one reason why this happened. If there are nonracial grounds to support closing public schools and opening private ones, they must be constitutional. Opposition to desegregation is not constitutional.

Loving v. Virginia (**Warren** – 1967): **Facts:** whether the proscription of interracial marriage violates the 14th amendment. **Holding:** This is a racial classification (based on the race of the people trying to get married) and therefore we subject it to strict scrutiny. The fact that it applies "equally" to both races is not good enough to say there is no racial classification. **To survive strict scrutiny the state must show the statute to be necessary to accomplish a permissible state objective independent of the racial discrimination** (b/c the 14th amendment sought to eliminate racial discrimination.) They find that the laws were meant to maintain white supremacy – there is no legitimate reason that justifies this classification.

Palmer v. Thompson (1971): Mississippi did not act unconstitutionally when it closed its public swimming pools after they had been ordered to desegregate. Majority held **no affirmative duty** to operate swimming pools. They refused to call it unconstitutional b/c the state may have desired to avoid desegregation. Motivation was hard to prove – too hard to invalidate on motivation alone. There seem to be economic factors as well. *Distinguished Gomillion b/c that case looked at the discriminatory *effects*.

PALMORE v. Sidoti (**unanimous** – 1984): **Facts:** mother was awarded custody of her 3yr old daughter in her divorce. She remarried a black man. The state then awarded custody to father in the

"best interest" of the child. They thought the child would face social stigma if she grew up in a mixed race household. **Holding:** The custody holding was based solely on race – clear mother could have kept child if she married a white. We apply strict scrutiny b/c this is a racial classification. Recognize that the best interests of the child are a substantial state interest. Ct Acknowledges that the child may be subject to pressures and stresses b/c of the mixed race household. HOEWEVER – we should not give effect to private racial prejudice. If we remove the child from the home b/c of the race of the step father we give effect to the biases of other. The law cannot directly or indirectly give effect to prejudices.

Johnson v. California (**O'Connor**, Kennedy, Souter, Ginsburg, Breyer 2005): This case involves the CA prison system. They would segregate inmates for up to 60 days every time the inmate was transferred. The state claimed the reason for this was to prevent violence caused by racial gangs. **Holding:** We must subject the provision to strict scrutiny. There is a compelling interest in prison safety. However, we must see whether the means used are narrowly tailored to meet those ends. They REMAND this case for the determination of whether the provisions could satisfy strict scrutiny.

Stevens: *Says we don't need to remand. We have enough facts to know these provisions are unconstitutional.* **Thomas, Scalia**: *strict scrutiny should not apply. The constitution demands less in the prison walls. We usually defer to reasonable judgments of officials experienced in running the prisons. They are better suited to know what is needed in the prisons.*

A. Purposeful Discrimination

Washington v. Davis (**White** – 1976): **Facts:** a test to get on the police force. More blacks were failing than whites. **Holding: Law is not unconstitutional solely b/c it has a racially disproportionate impact – need a racially discriminatory purpose**. If we have a prima facie case of discrimination the burden then shifts to the government to show that permissible racially neutral selection criteria and procedures produced the result (Here: everyone had to take it, test is neutral on its face, legitimate interest in having a verbally competent police force, composition of academy classes had been changing, actively trying to recruit more black officers.) Fear of invalidating too many programs. Disparate impact alone does not trigger strict scrutiny – b/c the statute is neutral on its face we use Rational Basis.

Stevens: *The actor is presumed to have intended the natural consequences of his actions. Agrees that a constitutional issue is not raised every time disproportionate impact is shown – but if the impact is as dramatic as in* Yick Wo or Gomillion, *then we have a real problem. He takes a narrower approach than the court 1) neutral and legitimate purpose of requiring all applicants to meet a uniform min standard of literacy 2) the federal system in D.C uses the same test.*

Purpose of Equal Protection: to prevent official conduct that discriminates on the basis of race.

Arlington Heights v. Metropolitan Housing Corp (**Powell** – 1977): reaffirmed that disparate impact will not be enough. **Facts:** challenge to refusal to grant a request to rezone property from a single-family to a multiple-family classification. Developer wanted to build townhouse for moderate income tenants. **Holding;** It is enough to show that discriminatory purpose has been a motivating factor – it does not need to be the dominant or primary one. If racial discrimination is a motivating factor then the burden shifts to the village to show they would have acted the same way without the discriminatory motivation. If it can prove they would have acted the same, the law is not invalid.

Rogers v. Lodge (**White** – 1982): **Issue:** Whether the at-large system of election in Burke County, GA violates the 14th Amendment rights of black citizens. **Holding:** if multimember districts are conceived or maintained as purposeful devices to further racial discrimination by minimizing voting strength, then they are unconstitutional. Circumstantial evidence is enough to prove this. We look at the totality of relevant facts. There is no smoking gun in this case, but we don't need it. They uphold the finding that the at-large system was maintained to dilute the black vote.

Powell: *relies on* Mobile v Bolden *where an at-large system was upheld.* Mobile *held that this kind of evidence was not enough. He wants to see the smoking gun.* **Stevens**: *doesn't think subjective*

intent can determine constitutionality. No evidence that blacks were not allowed to vote and vote for who they want.

Hunter v. Underwood (**Rehnquist** – 1985): Struck down a facially neutral law as reflecting a racially discriminatory purpose. Ct relied on starkly disparate impact and on circumstantial historical evidence. Court noted that the law (disenfranchising persons convicted of crimes involving moral turpitude) had disfranchised 10x as many blacks as whites. He noted that when this law was adopted the zeal for white supremacy ran rampant. R says that even if they were also trying to disenfranchise poor whites, it would not get rid of the purpose to discriminate against blacks. 1901 convention selected crimes that were more commonly committed by blacks.

McCleskey v. Kemp (**Powell** – 1987): **Facts:** McClesky was convicted of armed robbery and murder. To consider death penalty there must be at least one aggravating factor – jury found 2 (armed robbery and killing peace officer in the line of duty.) McClesky offered no mitigating factors. **Issue:** does the Baldus study, which shows that people who kill whites are more likely to be sentenced to death than people who kill blacks enough to show that McClesky's death sentence was racially motivated and unconstitutional? **Holding:** The Baldus study (even if we assume validity) is not enough to support inference that the decision-maker acted with a discriminatory purpose. **Rationale: 1)** McClesky would need to show that the decision-makers in *his* case acted with discriminatory purpose, but offered no evidence specific to his case. **2)** the study indicated the race of the VICTIM mattered, not the race of the defendant. *They do not apply strict scrutiny b/c the statute is facially neutral.. Also, history is not relevant in an applied challenge.

Brennan: *It is the nature of juries to be unpredictable. The state can't rebut the Baldus study b/c we can't ask jurors their rationale. An explanation for the sentence is in the record – he did something we allow the death penalty for doing.* **White**: *discretionary judgment is required in sentencing cases, and therefore we need exceptionally clear proof before we can say discretion has been abused. It is not enough to show the policy was maintained IN SPITE of discriminatory impact. He would need to show that it was maintained BECAUSE OF the discriminatory impact. We know it was not created w/ discriminatory purpose – the Baldus study was not around. Can't use history to prove BECAUSE OF factor unless it is contemporaneous (*cite to Feeney) **Stewart, Powel, Stevens:** *Even BALDUS does not try to say that his statistic prove race enters into any sentencing decision or that it effected McClesky. They find that the Baldus study does not indicate that the risk of racial bias affecting the death sentencing process is not constitutionally significant. The Legislature can change the law after looking at the study if they want to. They are better situated to make the judgment call.* **Blackmun:** *D showed 1) he is a member of a recognizable, distinct class, singled out for different treatment –he's black. 2) He showed a substantial degree of differential treatment – the Baldus study. 3) He established that the procedure is susceptible to abuse – there is not check on the reason of the prosecutor to go after the death penalty, The court's fear that this will give rise to too many other claims is not good enough.* **Brennan:** *Thinks the death penalty violates the 8th amendment and efforts to eliminate arbitrariness are doomed. Furthermore, we should consider past discrimination in the criminal system, though they are not dispositive. He thinks that the system is too arbitrary and allows for bias.*

B. Affirmative Action Cases

Regents of University of CA v. BAKKE (**Powell** – 1978): **Facts:** the special admissions program at UC-Davis medical school. The program "set-aside" 16 seats for minority students. **We apply strict scrutiny because we have a racial classification** – Powell says strict scrutiny is appropriate even when the racial classification is said to be benign (preference can still reaffirm stereotypes – minorities can't do well without help.) **CA justifications:** 1) reduce historical deficits; 2) increase # of physicians in underserved areas, 3) educational benefits from an ethnically diverse student body 4) counter the effects of societal discrimination. **Holding:** He says that preferring members of ANY one group is facially invalid – this is discrimination. Racial balancing is per se unconstitutional. This is a quota system – we don't allow them. "Social discrimination" is different than actual discrimination. In the absence of judicial,

legislative, or administrative findings of constitutional or statutory violations, we have not approved a classification that aids persons of a "victimized group" at the expense of another innocent individual. No evidence that these minorities will work in underserved areas. **A diverse student body is a constitutionally permissible goal.** It is not narrowly tailored b/c it only looks at ONE aspect of diversity. Compares this method with the Harvard method – economic, racial, and ethnic grounds. Race may be considered a "plus" factor, but should not grant automatic admission / cannot insulate the individual from comparison with all other candidates.

Brennan (and dissenting in part): *agrees that there is a racial classification and therefore strict scrutiny applies. Says that the Harvard program keeps quiet what the Davis program shares publically, which may make it seem more acceptable, but its not that different. The purpose to remedy past societal discrimination is important enough to justify race conscious admissions. It does not stigmatize and preferred applicants are undoubtedly qualified.* **Marshall:** *does not think that the clause used to try and prevent discrimination would stand in the way of trying to remedy discrimination.* **Blackmun**: *To get beyond racism we must first take race into account. He does not think that you can have a successful racially neutral affirmative action program.* **Stevens:** *If Bakke was rejected b/c the program was illegal and he was rejected b/c of his race, we should affirm the judgment. However, the issue of whether race can ever be used is not at issue in this case and therefore that discussion is inappropriate. (*Title VI however, "race cannot be the basis of excluding anyone from participation in a federally funded program – Stevens says the meaning is clear.)

Fullivove v. Klutznick (**Burger** – 1980): upheld to a program which mandated that 10% of federal funds for public works must be used to procure services from businesses controlled by Negroes, Spanish-speaking, Orientals, Eskimos, and Aluets. Burger rejected the idea that Congress needs to act in a colorblind in a remedial context. **Powell:** claimed to apply Bakke. Here the provision is a remedy = compelling interest. Congress is competent to make past disscrimnation finding. **Stewart:** *equal protection absolutely prohibits invidious discrimination by the government. Racial discrimination is by definition invidious.* **Stevens:** *not narrowly tailored. He said the congressional procedures were lax.*

WYGANT v. Jackson Board of Education (**Powell** – 1986): **Facts:** seniority was given preference, but at no time would there be a greater % of minority teachers laid off than the % currently employed. **Holding:** held unconstitutional minority preference in teacher lay-offs. **Rationale:** applied **strict scrutiny**. The goal of providing "role models" was not compelling. (Why? It has no stopping point – there can be discriminatory hiring and firing. *Another problem: it can be used to limit minority hiring – maybe they would only hire in proportion to the minority population; or segregated schools if black students are better off with black teachers!) Even if remedying past discrimination is a legitimate goal, this provision is not narrowly tailored.

White: *it is not ok to fire white teachers to make room for black teachers who have not shown that they were victims of discrimination.* **O'Connor:** *agreed in rejection of the role model theory. She, however, would not require a finding of past discrimination before allowing for an affirmative action program. She says there is a difference between the role model theory and an interest in having a diverse faculty (but doesn't say whether she would uphold the 2nd either.)* **Marshall**, Brennan, Blackmun**:** *thinks that a public employer should be able to preserve the benefits of a legitimate / constitutional affirmative-action hiring program even when forced to reduce its workforce.* **Stevens:** *defended the role-model theory – school board may* ***reasonably conclude*** *that an integrated faculty will provide benefits to the student body that an all white faculty could not. He thought the benefits of education should allow the provision to stand.*

What this leaves open? Whether having a diverse faculty is a compelling state interest – but we do know that if the role model theory is used to justify it, it would be stricken down.

Richmond v. Croson (**O'Connor** – 1989): **Facts:** program required contractors to subcontract at least 30% of $ amount to minority contractors (business must be 51%+ owned by a minority.) City noted that Richmond was 50% black, but only .67% of construction contract was awarded to minorities. **Holding:** they distinguish this case from Fullilove, b/c we had a CONGRESSIONAL action in Fullilove. However, the 14th amendment applies to the STATES so we check state action with strict scrutiny. Congress has a

constitutional right to remedy past discrimination (14th A. Sec. 5) O'Connor concedes a history of discrimination, but that cannot justify a quota in the awarding of pubic contracts. Richmond did not identify discrimination in their construction industry. **States can take remedial action to remedy identified discrimination** – nothing was identified in this case. Also, says it was not narrowly tailored b/c of the inclusion of random racial groups like Aluets (may not even exist in Richmond!)

Stevens: *Richmond's analysis employs the type of discrimination we try to avoid. He disagrees that the gov can never use a racial classification except remedially.* **Kennedy:** *favors prop that racial preference must pass strict scrutiny. Did not see the Richmond provision as a remedy but as a preference, which is constitutionally impermissible.* **Scalia:** *thinks that the* ***states can only use race when they are eliminating their own maintenance of a system of unlawful racial classification****. States cannot use race to ameliorate effects of past discrimination. Agrees that strict scrutiny applies to all racial classifications. We can remedy discriminatory effects against specific individuals (this is textually consistent b/c the 14th A. talks about individuals.)* **Marshall:** *we should not apply strict scrutiny to remedial measures. We know that there is a history of discrimination against blacks and we should be allow to remedy that. This is different than invidious racial discrimination (which should get strict scrutiny.)* **Blackmun:** *this decision is a regression – Richmond is part of the confederacy and when they try to remedy discrimination it gets shot down? This doesn't make much sense.*

Metro Broadcasting, Inc. v. FCC (**Brennan** – 1990): upheld 2 minority preference policies by the FCC 1) enhancement of minority ownership in competitive proceedings for new broadcast licenses; 2) allowed for transfer of some radio and tv stations to minority-controlled firms. **Rationale:** They only applied *intermediate scrutiny* – congress gets more deference. Congressional race classifications are subjected to a different standard than such classifications by state and local governments. **O'Connor:** strict scrutiny should apply across the board. She gets the majority in ADARAND.

ADARAND Constructors, Inc. v. Pena (**O'Connor** – 1995): **Facts:** Federal gov gave general contractors more money if they hired subs who were socially and economically disadvantages individuals. Adarand gave the lowest bid, but Gonzalez was hired. Adarand would have been hired if the federal government did not give this incentive. **Issue:** What level of scrutiny should be subject the federal government to when they make race based classifications? **Holding; all racial classifications imposed by whatever federal state, or local governmental actor must be analyzed with strict scrutiny.** Classifications will only be upheld if they are narrowly tailored to further a compelling governmental interest. (Fullilove is overruled to the extent that it applied a lower standard of review.)
Three propositions w/ respect to gov racial classifications: 1) SKEPTICISM: any preference based on race or ethnicity must necessarily receive strict scrutiny (Wygant); 2) CONSISTNECY: the standard of review under the equal protection clause is not dependent on the race of those who are burdened or benefited by a classification – even if whites are burdened we still use strict scrutiny (Croson); 3) CONGUENNCE – the due process clause of the 5th amendment was said to have an implied equal protection element (Bowling v. Sharpe) and equal protection analysis should be the same under the 5th A as it is under the 14th.

Scalia: *nothing in the constitution allows for reverse discrimination – discrimination to make up for past discrimination. The individual who was harmed can be made whole, but we should not use discrimination to do it.* **Thomas:** *agrees that strict scrutiny should apply to all racial classifications. The government cannot make up equal, but it can and must recognize us as equal before the law. The fact that there were good intentions behind the program shouldn't make it ok to discriminate. These programs stamp a badge of inferiority and may cause dependencies. Therefore "benign" discrimination can be just as bad.* **Stevens:** *thinks there is a difference between benign racial classification (like a welcome mat) and invidious discrimination (a no trespassing sign.) We should not ignore the difference between them.* **Ginsburg**, Breyer: *We owe a large deference to Congress. Strict Scrutiny is fatal in fact..*
***This case leases over the scope of congress's power and the extent to which the court should defer to Congress's power.**

Grutter v. Bollinger (**O'Connor** – 2003): **Facts:** UofMichigan Law School – gives weight to diversity in order to get a "critical mass." Race is only one diversity factor that is considered. **Issue:** Whether the use of race in the law school admissions process is unlawful. **Holding:** they endorse the ruling in Bakke that

student body diversity is a compelling state interest that can justify the use of race in university admissions. We will apply strict scrutiny to see if the policy is narrowly tailored, and it is. **Rationale:** We defer to the law school to see that diversity is essential to the academic mission (*first time this has happened.) **If they employed racial balancing or percentages it would be unconstitutional**. All diversity factors, not just race are looked at (traveled abroad, fluent in many languages, family hardship) are "plus" factors. It is not ultimately determinative. **To be narrowly tailored you don't need to exhaust every conceivable race-neutral alternative. Narrow tailoring does require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks. The program must not unduly burden individuals who are not members of the favored racial and ethnic groups.** In this case they find that alternatives would have required the school to sacrifice either academic quality, diversity, or both. Since all diversity factors are considered no one is unduly burdened. **we expect that 25 years from today the use of racial preferences will not be necessary to further the interest approved of today.

Ginsburg: *the reality is that minorities still have unequal educational opportunities. This helps.* **Scalia** (dissenting in part): *the rulings are confusing and will require us to have more litigation to see whether there is individual analysis or separate admissions tracks or a quota system.* ***The constitution proscribes government discrimination based on race and state-provided education is no exception.*** **Thomas** (dissenting in part): *the constitution does not give deference to educational facilities. The Equal Protection clause prohibits classifications made on the basis of race. Other law schools have diversity without discrimination.* **Rehnquist:** *Michigan's means aren't narrowly tailored. We should look at the numbers! The % of admitted minorities and too closely related to the % of minorities that applied. They are engaging in race based planning which is not constitutional.*

Gratz v. Bollinger (**Rehnquist** – 2003): **Facts:** the undergraduate admissions program automatically awarded 20 points out of the 100 needed to guarantee admission to racial minority applicants. **Holding:** There is not enough individualization for this to stand strict scrutiny. **Rationale:** You can get points for other things, but the 20 points for race is disproportionate to points awarded for other "diversity" factors. The 20 points in effect meant that every minimally required minority got in.

O'Connor: *Notes that other "diversity" factors get much fewer points v. the law school which has more individualized review and potentially weighs all diversity equally.* **Thomas:** *this correctly applies other precedent. He would say that all racially discrimination in higher education admissions is* ***categorically prohibited***. **Souter:** *this case is closer to* Grutter *than* Bakke. *You can get 20 points for other things like athletic ability, socioeconomic disadvantages, attendance at a predominantly minority high school or at the provost's discretion. Afraid that only people who hide what they are actually doing will survive strict scrutiny. Michigan is being honest and is using individual analysis.* **Ginsburg:** *where race is considered for the purpose of achieving equality no automatic proscription is needed. Every admitted applicant is qualified to attend. There are no racially reserved seats in the class. It doesn't burden non-minorities (they can get points other ways.)*

Bakke remains good law insofar as achieving diversity in higher education remains a compelling state interest sufficient to justify at least some race preferences in higher education.

PARENTS INVOLVED v. Seattle School District (**Roberts** – 2007): **Facts:** the school districts allow students to rank the high schools they want to attend. In tiebreaker situations, they use race to determine which schools the children will attend. **Holding:** these plans are unconstitutional. **Rationale:** we subject the plans to strict scrutiny. Unlike Gratz race is not once of many factor. It is THE ONLY FACTOR that gets considered. The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits coincides with the racial demographics they make from their plan. Also, only a few students are placed based on race – it may not really affect the racial outcomes of the schools so why bother doing it that way at all? Also fails "narrowly tailored" because they failed to show that they CONSIDERED other methods other than explicit racial classifications. (see Grutter.) Grutter alone doesn't control b/c we were talking about needs of higher education – this is a public high school. Only "war" and "diversity in *higher* education" have passed strict scrutiny.

Thomas: *race imbalance is not segregation (i.e. deliberate operation of a school system to*

separate public solely on the basis of race.) These schools are not in danger of re-segregating . **Kennedy:** *refuses to endorse the conclusion that the Constitution is ok with de facto segregation. He agrees however that in this case we did not need to use racial classifications.* **Breyer**, Stevens, Souter, Ginsburg: *de facto re-segregation is on the rise. There is a difference between using race to integrate and using race to* segregate.

C. Race Preferences in Electoral Districting

United Jewish Organizations (UJO) v. Carey (1977): **Facts:** Hasidic Jews sue after they are divided into 2 voting districts in order to create one black majority district. **Holding:** their challenge is rejected. **Rationale:** The city was complying with the voting rights act. The plan did not create a social stigma with respect to whites or any other group. They could take race into account when redistricting. There is no cognizable discrimination against whites. We will have problems if we start carving people up into smaller subsets. **Burger:** *why they may not have a right to remain unified, they have the right not to be carved up to create a voting bloc composed of some other ethnic or racial group.*

Shaw v. Reno (SHAW I) (**O'Connor** – 1993): **facts:** NC got at 12th seat in the house. The US Attorney General objected to their new districting plan under the Voting Rights Act. They made a new plan which created 2 black majority districts. Appellants argue that the irregular shape of the boundary lines constitute an unconstitutional racial gerrymander (division of districts to give a political majority) and it can only be viewed as an effort to segregate the races for voting w/o a compelling justification. **Issue;** Do they have a claim? Is the redistricting unconstitutional? **Holding:** They do have a claim under equal protection and race based districting by state legislature demands strict scrutiny. **Rationale:** Race is always a factor in re-districting. However, **Appearance Matters**. A plan highly irregular on its face may rationally not be understood as anything other than effort to segregate voters. Also, it undermines a representative democracy – elected officials are more likely to believe that their primary obligation is to represent only the members of that group rather than their whole constituency. If the redistricting is for the purpose of race then the separation lacks sufficient justification.

White: *this case is just like UJO (ct said the redistricting into minority-majority districts was ok – complying with the voting rights act was a compelling interest.) The majority side steps UJO by focusing on the weird shape of the district. However, if we've already conceded that race is ok to look at then who cares what the district looks like?* **Stevens:** *When an assumption that people in a particular minority group will vote in a particular way is used to* benefit *that group, no constitutional violation occurs.* **Souter:** *the states should be making these decisions.*
This case leaves open whether the Voting Rights Act is a sufficiently compelling governmental interest. They don't analyze the act here.

Miller v. Johnson (**Kennedy** – 1995): Shaw said that the state can separate people into voting districts on the basis of race. Shape is relevant because it may be persuasive circumstantial evidence to show that the district was drawn b/c of race. A showing that the district is oddly shaped is not a requirement to allege racial discrimination in districting. They can use other evidence. P **burden is to show that race was the predominant factor motivating the legislature's decision to place a significant number of oters within or without a particular district.** Note: compare this standard with Arlington Heights (race needs to be A motivating factor – not predominating factor for burden to shift)

Shaw v. Reno (Shaw II) (**Rehnquist** – 1996): on remand from Shaw I the district court found that the redistricting was primarily based on race, but it survived strict scrutiny. **Holding:** strict scrutiny is appropriate, but there is no compelling interest. The Voting Rights Act does not require race-based redistricting and neither was the shape therefore it cannot be said to go towards a compelling interest. *Still does not decide if trying to comply with the VRA would have been compelling (doesn't matter b/c these things aren't part of the act.)

Bush v. Vera (**O'Connor** – 1996): strict scrutiny does not apply to redistricting just because race is taken into account, no to all cases of intentional majority-minority districts. P must prove **other legitimate**

districting principles were subordinated to race – the predominate factor (Miller.) Here she found that race based redistricting would not necessary to ameliorate the effects of past discrimination, and therefore would not survive strict scrutiny. **O'Connor:** *noting that the VRA was not at issue in this case FINALLY said she would find compliance with the VRA a compelling interest sufficient to withstand strict scrutiny.* **Thomas:** *would apply strict scrutiny in any case intentionally creating a majority-minority district.* **Stevens:** *the legislature is better suited. Also, that the standard was unworkable and unpredictable and we should allow some faith in the political process.*

VIII. Other Equal Protection Cases

A. Sex Discrimination

Minor v. Hapersett (1874): women were not permitted to vote. They may be "persons" and "citizens," but were not entitled to participate in a political or professional real reserved for men. *19th Amendment allows women to vote. Equal Right Amendment was proposed, but never passed.

Goesaert v. Cleary (1948): Michigan law provided no woman could obtain a bartender's license unless she was the wife or daughter of the male owner. The constitution does not preclude the states from drawing lines between the sexes. Constitution does not require legislation to reflect sociological insight or shifting social standards any more than it needs to change with science. Protective legislation is ok.

Reed v. Reed (1971): **Facts:** State preference for men over women in the appointment of administrators of estates. **Holding:** the court refused to call sex a suspect class and purported to apply rational basis. Reducing the amount of work for probate courts was a legitimate interest. However, giving a mandatory preference for men over women is the kind of arbitrary legislative choice forbidden by equal protection.
*This seems to be more than rational basis – couldn't it be rational that men have more experience? There seems to be something more going on here.

FRONTIERO v. Richardson (**Brennan** – 1973) struck down a military provision on equal protection that allowed male members automatically claim their wives as dependents, but women serving had to prove that their husbands were dependent. **Rationale:** Brennan would have found gender to be a suspect class but he only had a plurality (long history of sex discrimination and there is still discrimination, women are underrepresented in the political process, gender is an immutable characteristic. Counterargument is that women are not a discrete and insular minority.) The government might reasonably have concluded (b/c women are more often dependent on their husbands than men are on their wives) that it would be cheaper and easier to make this presumption. However, they do not show that it is saving them any money. **Any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, violates equal protection** (cite to Reed.) **Powell, Burger, Blackmun**: *concur in the judgment but say that there is no need to characterize sex as a suspect classification. We should rely on* Reed. *We should also wait and see about the Equal Rights Amendment b/c if it is adopted it will solve the question about whether gender is a suspect class.* **Rehnquist:** *women have access to the political process – if they have access they can protect themselves.*

Frontiero criteria for finding a suspect classification: history of discrimination; high visibility of group; political powerlessness; likelihood that classification reflects deep-seated prejudice, immutability of trait; if characterization bears a relation to the ability to contribute to society.

Craig v. Boren (**Brennan** – 1976): **Facts:** Oklahoma statute – cannot sell 3.2% beer to men under 21 and women under 18. **Issue:** does the gender distinction deprive men 18-21 of equal protection? **Rationale: Classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives**. We know that administrative ease and convenience are not sufficiently important objectives. OK claims that traffic safety is the reason – more men in this age group drink and drive then women do. **The means aren't substantially related**. Why?

Men are not allowed to buy it, but they are still allowed to drink it. This may not stop the drinking and driving problem. Also, the statistics indicate a tenuous relation (.18% women, 2% of men).

Rehnquist: *he would apply regular rational basis scrutiny and it would pass. There is no indication that men in this group are disadvantaged, subject to systematic discriminatory treatment, or otherwise in need of special solicitude from the courts. Today is the first day we are using heightened scrutiny to invalidate discrimination against males. The state could have thought the real rate was higher than the arrest rate the stats showed.*

Mississippi University for Women v. HOGAN (**O'Connor** – 1982): **Facts:** men were excluded from MUW (nursing school), founded in 1884 to provide for the education of white girls. Hogan denied admission, told he could audit, but would need to go to a coeducational nursing school in Mississippi to get a nursing degree. **Holding:** Hogan should have been admitted. MUW could not discriminate based on gender. **Rationale:** relied on the Craig v. Boren standard and rejected the justification that it was a "benign" and "compensatory" system. **The fact that it discriminated against males did not reduce the standard of review and the party seeking to uphold it would need to show that there was an exceedingly persuasive justification for the classification** (it would need to serve an important governmental objective and be substantially related.) **"Compensatory justification is only ok if members of the gender benefitting by the classification actually suffers a disadvantage related to the classification.** Here, women were earning 94% of nursing degrees – policy of excluding males perpetuates the stereotype. ALSO the fact that they let men audit the classes undermines the claim that women are adversely affected by the presence of men.
Note O'Connor's rationale: this is not a case about all single gender schools. It is very limited.

JEB v. Alabama (**Blackmun** – 1994): **gender based preemptory challenges are unconstitutional** (extended Batson which said that race could not be the reason behind a preemptory challenge.) We cannot allow people to rely on gender stereotypes when picking a jury. This just allows for acting on discriminatory beliefs.**O'Connor's view** (we didn't read it): If men and women are similarly situated, then we need to treat them the same. IF they are not similarly situated, then we don't have to treat them the same. She believes that gender matters – gender can result in different life experience and this will be relevant to his/her views on things such as rape, child abuse, etc.

Rehnquist: *sexes differ in experiences, and it is not stereotyping to say they may produce different outlooks in the jury room. This is not the same as imposing a value on race.* **Scalia:** *who cares if we don't have statistics about gender differences? Here all groups were struck for preemptory so no one group is denied equal protection.*
If you can show a stereotype for one person is true (i.e. woman says that all men are sex abusers during selection) then you can dismiss for cause or use a preemptory.

VMI (**Ginsburg** – 1996): **Facts:** VMI is an all male military school using the adversative model of education – physical rigor, mental stress, absolute equality of treatment, absence of privacy, minute regulation of behavior. The men live in barracks. Female student want to go to VMI, but can't. She claims equal protection has been violated. VA made a military school for women VWIL – different method of education. **Issue:** is VMI even with VWIL violating equal protection? If yes, what is the proper remedy? **Holding:** state must show **exceedingly persuasive justification** – substantially related to the achievement of an important governmental objective. VA justifications 1) single sex education provides important educational benefits and contributes to diversity in education; 2) VMI approach would need to be modified if admitted women. Responses: 1) did not show VMI was established and maintained in order to diversify education. No evidence they were trying to further this goal. 2) they would not need to change their teaching method. They would just need separate housing facilities and physical training programs. No reason why women who want the VMI training shouldn't be able to get it if they can meet the physical requirements. Remedy? They don't specify – we can only guess that they need a VMI like program for women? Does not dispute state could support diversity in education (see footnote.)

Rehnquist: *The problem isn't having separate schools, it's not having a comparable opportunity for women. We should be looking at VMI post-Hogan, when they were put on notice that there may be a problem with their admissions policy. The school itself is too old to judge from the beginning of its*

history. **Scalia:** *gov funded military schools is deep rooted in the traditions of the country, and we only send men into combat. If the people don't like these traditions they can* ***change them through the political process****. Thinks "exceedingly persuasive" is too close to strict scrutiny. Immediate scrutiny has never required least-restrictive means. Women are not "discrete and insular" we should use rational basis.*

B. Discrimination in sex-related differences?

Geduldig v. AIELLO (**Stewart** – 1974): CA disability insurance did not cover disability that accompanies normal pregnancy and childbirth. **Holding: this is not considered a gender classification**. Men AND women benefit from this program – women who do not get pregnant enjoy lower premiums. It removes one physical condition from the list. Just because only women can be pregnant, doesn't mean every classification concerning pregnancy is against women – unless you can show it is a pretext to discriminate against women. **Deferential standard of review. Brennan:** *there is discrimination. Men are fully covered for all disabilities suffered. Women are not..*

Michael M. v. Superior Court (**Rehnquist** – 1981)**:** upheld the CA statutory rape law, which punished the male, not the female even when the girl was also underage. **Holding:** legislature may provide for the problems of women. They accept "preventing teenage pregnancy" as a valid state interest. Pregnancy is a natural deterrent for women – law made deterrence for men to equalize. Remember, we are not asking whether the line is drawn as precisely as it could have been, but whether the line chosen is within constitutional limits. Under a gender-neutral law, women would not report b/c they would also be in trouble. The state has reason to believe it wouldn't work. Do not apply intermediate scrutiny b/c men and women are not similarly situated in this case (women – physical, emotional harm of pregnancy.) If we want a gender neutral C, this case is wrongly decided.

Rostker v. Goldberg (**Rehnquist** – 1981): rejected the claim that it violated equal protection for the president to require men to register with the Military (Selective Service Act MSSA) and not women. **Rationale:** Congress is given great deference with military affairs. Even under Craig raising and supporting armies is an "important governmental interest." The purpose of registration was to be able to draft combat troops. Women are not eligible for combat – this is not an arbitrary decision for administrative ease. Men and women are not similarly situated here.

a. Discrimination against fathers of non-marital children

Caban v. Mohammed (1979): invalidated law which allowed mother but not the father of an illegitimate child the right to block the child's adoption by withholding consent. There is no state showing that not allowing the father to block adoption is substantially related to the proclaimed interest in promoting adoption of illegitimate children. An unwed father may have a comparable relationship with his child to the unwed mother.

Ngjhen v. I.N.S. (2001): upheld law treating children born out-of-wedlock w/ one citizen-parent and one non-citizen-parent differently depending on whether the mother or the father was the citizen. If it's the mother, they are automatically citizens. If it's the father, must meet 3 conditions – clear and convincing evidence of blood relationship, father's written promise of financial support, and either legal legitimation, declaration of paternity under oath, or a court order of paternity by kids 18th b-day. **Rationale:** 2 legit state interests 1) making sure there is a biological relationship 2) make sure parent and child have a relationship. It is more obvious that it is the mother's child (she gave birth.) We may not know who the father is for sure, etc.

C. Gender Based Purpose and Effect

Personnel Administrator of MA v. FEENEY (1979): reject sex discrimination claim of a law that give lifetime preference to veterans for state civil service positions, even though it overwhelmingly helps more men than women. **We ask 1) is it really gender neutral; 2) is the adverse effect a reflection of**

invidious gender based discrimination. Rationale: veteran status is not uniquely male Non-veteran class is not exclusively female. Too many men are adversely effected to say the law was a pretext for preferring men over women. It is not enough to show that there is disproportionate impact – the law would have needed to be made for and maintained for the purpose of discriminating against women. Maintaining "in spite of" is not good enough. **Marshall / Brennan**: *b/c of impact state should have the burden of showing that sex-based considerations were not part of the choice they made.*

IX. Equal Protection – Other

A. Alienage

The 14th amendment say "*no person*" it does not say *citizen*. The following cases involve LEGALLY resident aliens. Illegal / undocumented aliens have not been accorded heightened equal protection scrutiny (w/ the exception of undocumented children barred from school.)

Plyler v. Doe: the court specifically rejects the claim that illegal aliens are a suspect class. Undocumented status is not irrelevant to any proper legislative goal. The status is also not immutable, but rather the product of a conscious, unlawful, action.

Grahm v. Richardson (1971): **Holding:** states could not deny welfare benefits to aliens. **Rationale: Aliens are a prime example of discrete and insular minority where heightened scrutiny is appropriate**. The federal government deals with aliens, and has not taken action regarding what happens when an alien becomes indigent. State laws restricting benefits would attempt to override an area constitutionally granted to the Federal Government to regulate.

In re Griffiths (1973): invalidated CT law saying that aliens could not practice law. State interests in high professional standards, role in protecting clients, or serving as officers of the court were not substantial enough.

Sugarman v. Dougall (**Blackmun** – 1973): invalidated NY law providing that only citizens could hold permanent positions in the competitive classified civil service. **Rationale:** The restriction had little no to relationship to the "substantial" interest in having an employee of undivided loyalty. *He did not mean to say that a state could not require citizenship as a qualification for office*. **Rehnquist:** *suspect class should be limited to race*.

Hampton v. Mow Sun Wong (1976): invalidated s Civil Service Commission reg barring aliens from employment in federal competitive civil service even though recognizing there may be a national interest for the requirement. Stevens said that they were not acting under the emanation of Congress or the President and the procedure they used violated due process (pg. 607)

Mathews v. Diaz (1976): Congress may condition an alien's eligibility for welfare on 1) app for permanent residence; 2) continuous residence in the US for 5 years. **Rationale:** used a DEFERENTIAL STANDARD OF REVIEW – Congress has broad power in immigration and naturalization. Allowing benefits to some, but not all aliens was ok.

Foley v. Connelie (**Burger** – 1978): **Holding:** NY COULD bar employment of aliens as state troopers. **Rationale:** police is in the power of the states. The state therefore needs to show a rational relationship to an interest. Police Officers don't' formulate policy, but they are given the authority to exercise discretionary powers in the law. In enforcement of laws, the citizenship requirement was rational.

AMBACH v. Norwick (**Powell** – 1979): **Holding:** state CAN refuse employment to elementary and secondary school teachers aliens who are eligible for citizenship, but refuse to seek naturalization. **Rationale: there is a less demanding scrutiny when aliens are excluded from "state functions" / bound up in the operation of the state as a governmental entity.** He stressed the importance of

schools in preparing kiMds for participation as citizens and teachers have an opportunity to influence the attitudes of kids toward the government. Therefore, this is enough to say we have governmental function.

Toll v. Moreno (1982): struck down UMD policy of not allowing legal residents to pay in-state tuition. 607

Bernal v. Fainer (1984): could not justify TX from barring aliens from becoming notaries. **Strict scrutiny** applied. **The political function exception must be narrowly construed**. Here the function was clerical. There are no policymaking responsibilities or broad discretion which have been used to categorize governmental function (i.e. police / teachers) in other cases.

B. Age, Disability, Sexual Orientation

MA board of Retirement v. MURGIA (1976): applied rationality standard to sustain a mandatory retirement law for uniformed state police officers. Rejected a claim for suspect classification. **Rationale:** age doesn't count for strict scrutiny ((no history of unequal treatment or stereotyping.) "Old" is not a discrete and insular minority.

Cleburne v. Cleburne Living Center, Inc. (**White** – 1985): **Holding:** mental retardation is not a suspect class. Regulations effecting the mentally retarded will be subject to rational basis scrutiny. Requiring a permit to build a home for the mentally retarded is not rationally related to any legitimate governmental interest. **Rationale:** they don't' require permits for apartments, sorority houses, dorms, hotels, hospitals, sanitariums, etc. Being afraid of the community's negative attitude is not good enough. Fear of students harassing the mentally retarded was irrational, they had MR kids in their school. Why no strict scrutiny? Too hard to distinguish from something like age. Legislators need flexibility b/c there is a wide range of problems that need addressing. They are not politically powerless – legislation has been passed to help them. The state can legitimately take mental retardation into account for reasons other than discrimination, and we will let them. They are still not allowed to discriminate on the bare desire to harm a politically unpopular group.

Romer v. Evans (**Kennedy** – 1996): Note – this case comes BEFORE Lawrence v. Texas. **Facts:** Amendment 2 to the Colorado Constitution – homosexuals will not be considered to have minority status, quota preferences, protected status, or claim of discrimination. It repeals existing statutes, and prohibits anyone from enacting future protective statutes. **Holding:** homosexuals will not be classified as a suspect class. However, A2 is unconstitutional. Note this is a facial challenge. **Rationale:** A law declaring that in general it shall e more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. We need more than a desire to harm (Moreno.) State claims interest in consolidating resources to fight discrimination against other groups, respect landlords or employers with religious beliefs against homosexuals – these seem to be perpetuating the discrimination we are trying to avoid. They are not legitimate. All the amendment does it make it harder to seek help from the gov than other groups. Not ok

Sclaia, Rehnquist, Thomas: Bowers *singled out gays for unfavorable treatment. Why not this state? Maybe the political minority wants to preserve sexual tradition. It's not for the court to fix their political process. They should fix it through the political process.*

X. Voting Cases:

Haper v. Virginia State Board of Elections (1966): struck down the poll tax as a violation of equal protection. Wealth bears no relation to voting qualifications. There is no right to vote in state elections in the constitution. However, once the state grants the right it cannot draw lines inconsistent with equal protection. Cite to Yick Wo to show that voting is a fundamental political right. *Also notes that what constitutes equal treatment can and does change over time.
Wealth is not considered a suspect class, but this case has been determined to apply strict scrutiny.

Kramer .v. Union Free School District (**Warren** – 1969): **Facts:** NY Ed law only allows voting in school district election if you 1) own/ lease taxable property w/in district; 2) parents/custody of children enrolled in local public schools **Holding:** Can't do this. **Rationale:** will apply strict scrutiny to voting – unjustified discrimination in who can participate in political affairs undermines our representative government. They do not pass judgment on whether having only those who are "primarily interested" vote is legitimate. Even if we assume it is, they say the provision is no narrowly tailored. It permits inclusion of many who have, at best, a remote and indirect interest, and exclude others who have a distinct and direct interest. (FTN 1 641 example.)
Note: the restriction is coming from the state legislature – the people Kramer had a right to vote for. If he doesn't like their policy, he can vote them out of office.

Richardson v. Ramirez (1974): the exclusion of felons from the vote has an affirmative sanction which was not present in the case of the other restrictions of the franchise. Sec 2 14th A – talks about denying the vote to people for participation in rebellion or other crime. Rehnquist says that this is an exception to equal protection with respect to felon disenfranchisement.

XI. Access to the Courts

Griffin v. Illinois (1956): **Holding:** a state must provide a trial transcript or its equivalent to an indigent criminal defendant appealing a conviction on nonfederal grounds. **Rationale:** The state concedes that a transcript is necessary for a good appeal. It is true that states do not need to grant appeals at all, but once they do they cannot do it in a way that discriminates b/c of poverty. He says there is no difference between denying an original defense and denying an adequate appeal.

Douglass v. CA (1963): **Holding:** a state must appoint counsel for an indigent defendant for the first appeal granted as a matter of statutory right, from a criminal conviction. The policy was originally that if you want to appeal w/ an attorney, you have to show us your case has merit – there can be no equal justice when the amount of counsel you get is determined by the amount of money you have. If you're rich it wouldn't matter if your appeal has merit, you'd get a lawyer. To make someone poor go through an additional step is not fair procedure.

Ross v. Moffitt (1974): refused to extend Douglass to discretionary appeals. Rehnquist said there are differences between trial and appellate stages. There is no right to an appeal. Unfairness results only if indigents are singled out and denied meaningful access b/c of poverty. The fact that a service may provide a benefit in the process does not mean that the service is constitutionally required. There is no denial of meaningful access.

Halbert v. Michigan (2005): invalidated Michigan's practice of denying appointed appellate counsel to indigents convicted by guilty or nolo contedere please. They are still entitled to get a lawyer on a first appeal from a plea.

A. Civil Cases

Boddie v. Connecgticut (1971): indigent welfare recipients could not pay the court fees to get a divorce. Her the court ruled, relying on due process, that due process prohibits a state from denying, solely b/c of indigence, access to its courts to individuals who seek judicial dissolution of their marriage. There is no other way for them to get a divorce – the state makes them use it, and due process says if you are forced to use the courts, then you must be given a meaningful opportunity to be heard.

United States v. Kras (1973): some court fees were ok. In this case bankruptcy was distinguished from divorce in Boddie, b/c Boddie involved the "fundamental" marital relationship. An interest in discharge in bankruptcy did not rise to the same constitutional level. **Stewart:** *would have found* Boddie *applicable.*

Little v. Streater (1981): under due process that state must subsideize an indigents blood proupin tests in a paternity action. The tests were a unique source of exculpatory evidence. Ct also said that there was a quasi-criminal overtone to the trail. Since the indigent must overcome the evidentiary burden, if he was not given the test he would be denied a meaningful opportunity to be heard (cite to Boddie.)

M.L.B. v. S.L.J (**Ginsburg** – 1996): **issue:** may a court condition appeals from trail court decrees terminating parental rights on the affected parent's ability to pay record preparation fees? **Holding?** No. **Rationale:** the court has consistently treated state controls or intrusions on family relationships differently. Mayer v. Chicago – balanced the state interest (money) with the defendant's interest. Here, we say that MLB's forced dissolution of parental rights are more substantial than mere loss of money. They say that it is a most fundamental family relationship. There are now two exceptions to rationality review w/ respect to fee requirements 1) voting – the basic right to participate in political process and "quasi-criminal" cases. We say termination of familial rights is an exception.

Thomas: *there is no end point. Just b/c there is disparate impact does not mean we have discrimination (Washington v. Davis.) We should use rationality test – its facially neutral.*

San Antonio Idep. School Dist. V. Rodriguez (**Powell** – 1993): **Issue:** does TX property tax system violate EP b/c it produced substantial inter-district disparities in per-pupil expenditures due to differences in property values among districts? **Holding:** NO – neither suspect classification nor fundamental interest arguments work. **Rationale:** Suspect class? In old cases wealth mattered b/c people were completely unable to pay and were completely denied the benefits they were seeking. Neither of those things are true in this case. Also, not necessarily true that the poorest families are in the poorest property districts. In terms of wealth, equal protection does not require absolute equality. Wealth is not a suspect class, and education is not guaranteed in the constitution – implicitly or explicitly. We still apply rational-basis. However, taxation always has a disparate impact. **Only where the state action impinges on the exercise of fundamental constitutional rights or liberties must it be found to have chosen the least restrictive means. W**e are dealing with state and local taxes - issues traditionally deferred to state legislature. **Marshall:** *Education is fundamental and deserves higher scrutiny.*

Plyler v. Doe (**Brennan** - 1982): used heightened scrutiny to hold that denial of public education to children of illegal aliens (unless they paid tuition) violated equal protection. Even though benefits may be denied to the parents (illegal aliens are not a suspect class), the children are not in control of their legal status. There can be no deterrent effect on the children b/c they didn't choose to be there to begin with. **States "interests:"**deterring illegal immigration, avoiding burdens on public schools, and reserving education for those likely to reside later in the state. **These were not good enough for Brennan**. Education is necessary to be a productive member in society and is fundamental in sustaining our society. This case leaves open paying for extra-curricular activities

Zobel v. Williams (1982)**: Issue:** whether a law that distributes income that is derived from natural resources among citizens based on how long they have been residents of Alaska is unconstitutional. The scheme paid residents even retrospectively. **Holding:** This does not pass rational basis so we don't need to see if it passes strict scrutiny. **Rationale:** this is unlike Shapiro b/c there is no waiting period for benefits. However it does create distinct classes among residents which gives us EQUAL PROTECTION SCRUTINY. Why doesn't it pass rational basis? 1) create a financial incentive for pple to move to AK? No b/c they aren't getting as much (this is sketch b/c they're still getting something.) 2) prudent management of the fund? But then why apply it retroactively? They're paying out more than they have to. 3) recognize contribution during years of residency? This was rejected in Shapiro. Could allow for too much dividing. We don't' want classes of citizens based on residency.

Brennan: *thinks this should be looked at as a right to travel case! We do not want to create degrees of citizenship based on residency. Residency may not actually relate to actual service to the state so this is not a valid reason. It violates the citizenship clause.* **O'Connor:** *this is a right to travel case. The goal of rewarding contribution is not legitimate. New residents are getting inferior status.* **Rehnquist:** *doesn't this encourage travel? They are getting a benefit! The scheme is an economic and should get deferential review.*

XII. State Action Cases

Civil Rights Cases (1883): **Facts: Civ.Rights.Act 1875** "all persons shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement…" These cases grew out of exclusion of blacks from hotels, theaters, and railroads. **Issue: Did Congress have the authority to make the law? Holding:** 14th amendment prohibits STATE action. **Congress's section 5 power is to correct effect of prohibitive state laws, not individual actions**. **Rationale:** the 14th A was meant to prevent denial for rights for which the state alone is responsible. **Unless an individual's wrong is sanctioned or protected by state law or state authority** congress can't touch it. We need state action. This law is not coming under review as part of the commerce clause **THEY LEAVE OPEN WHETHER CONGRESS COULD PASS A LAW LIKE THIS UNDER THE COMMERCE CLAUSE. 13th Amendment? Gives **congress the power to pass all laws necessary and proper for abolishing all badges and incidents of slavery in the US.** However, CT says it would be running the slavery argument into the ground to make it apply to every act of discrimination.

Harlan: *the point was to protect against all discrimination b/c of race. Congress may enact laws to protect that people against the deprivation, because of their race, of any civil right granted to other freemen in the same state. The citizenship clause – citizenship may be protected by congressional legislation. Harlan says the privileges and immunities of being a citizen at least include exemption from race discrimination.*

Smith v. ALLWRIGHT (1944): state delegation to a party of the power to fix the qualifications of primary elections is **delegation of a state function** that may make the party's action the action of the state. Therefore, the party not allowing blacks to vote is the same as state's not allowing blacks to vote, and this violates the 15th amendment.

Marsh v. Alabama (1946): **Holding:** a company town may not limit speech through restrictions that would violate the 1st amendment. **Rationale:** That a corporation owned title to the town could not justify impairing the public's interest in the functioning of the community in such a manner that the channels of communication remain free. This town had all the characteristics of any other American town. **Since its facilities are operated to benefit the pubic and they are basically operation is basically a public function, it is subject to state regulation. What about shopping centers?** Hudgens v. NLRB: shopping center owners were not engaged in state action.

Shelley v. Kraemer (**Vinson** – 1948): **Issue:** does the equal protection clause prohibit the enforcement of racially restricted covenants? **Holding:** standing alone, the covenants are ok and cannot be considered state action. 14th amendment protects the right to acquire, enjoy, own, and dispose of property. **What triggers "state action" is the action of state judges in their official capacity – but for the enforcement of state courts, they would have been able to occupy**. The origin of the discrimination is not what is important: state action at any stage counts.

Terry v. Adams (1953): 15th amendment was violated by the exclusion of black voters from the "pre-primary" elections of the Jaybird Democratic Association, which was a voluntary club of white democrats. BLACK – race couldn't be used in any election where public officials are chosen (people who won this election typically ran unopposed!)

PA v. Board of Directors of Trusts (1957): found state action in the refusal to admit non-white students to Girard College established via trust as a college for poor, white, male, orphans. Court found the board as an agent of the state. Therefore the refusal of admission was discrimination by the state. **After the ruling the school tried to delegate authority to a private trustee but the court of appeals held the substitution was unconstitutional state action.**

BURTON v. Wilmington Parking Authority (1961): **Facts:** Eagle Coffee Shoppe – located in the parking building. The building is owned and operated by Wilmington Parking Authority – agency of

Delaware. It was an integral part of the parking building – profits were necessary to run the building. **Holding:** There was state action involved in Eagle's segregation. **Rationale:** The building served an important governmental function. The building could not function without the profits from Eagle. The state's inaction not only made the state a party to the refusal of service, but elected to place its power, property, and prestige behind the discrimination. Because of the financial interdependence Eagle cannot be considered purely private. **Note:** This is a case by case analysis. We weigh factors to see how involved the state is. This is not a per se rule. *Some* nexus is not enough. It should be significant.

Stewart: *in upholding Eagle's right to deny service, state court relied on a statute which allows restaurants to refuse service to people whose reception would be offensive to the major part of his customers. There is no suggestion that Burton is such a person. Therefore, it equates being black as offensive! This of itself is a violation if the law really allows that.*

Evans v. Newton (1966): **Holding:** a "whites only" park run pursuant to a trust violates equal protection even after the city trustee was replaced by private trustee. **Rationale:** the service rendered EVEN BY A PRIVATE PARK is municipal in nature – it is more like a fire dept, which traditionally serves the community. State courts that aid private parties to perform the public function of running a part on a segregated basis implicate the state in action which violate the 14th Amendment

Reitman v. Mulkey (**White** – 1967): **Facts:** CA had fair housing laws and prop 14 repealed them. **Issue:** Was repealing the fair housing laws a constitutional violation? **Holding:** the mere repeal of antidiscrimination law did not establish unconstitutional state action. However, the state court held that the **intent** of prop 14 was to authorize private racial discrimination in the housing market. Also, state ct found that it would encourage and significantly involve the state in private discrimination. Therefore, not ok. **Rationale:** The right to discriminate was now in the state charter and people could cite it to justify discrimination. We don't want that! (page 689 for language in prop 14!) **NOTE: If there is PURPOSEFUL discrimination and not just disparate impact it survives Washington v. Davis.

Evans v. Abney (1970): upheld the revertor to the senators heirs of the above mentioned parklands. The reverter just shows the intention to effectuate as nearly as possible the terms of the will. **Distinguish Shelley**: In Shelley they tried to uphold discriminatory compacts. Here the court eliminated the discrimination by eliminating the park all together. Members of all races shared the loss equally.

MOOSE LODGE v. Irvis (**Rehnquist** – 1972): **Holding:** rejected claim that a private club's racial discrimination was unconstitutional b/c the club held a state liquor license. No State Action. **Rationale:** 1) there was no enforcement by the state courts of a private rule of discrimination like Shelley. 2) There is no symbiotic relationship like Burton. 3) PA distributed many licenses so this club did not have a monopoly on liquor distribution. 4) Fear of blurring the line between private and public action. There is no significant state involvement with the discrimination as required in Burton. Only when regulations foster or encourage discrimination will the state be implicated.

Jackson v. Metropolitan Edison (**Rehnquist** – 1974): **holding:** court found state action in the exercise by a private entity of powers *traditionally exclusively reserved for the state.* HOWEVER **utility service is not traditionally the exclusive prerogative of the state. The fact that a business is subject to state regulations does not by itself convert its action into that of the state for purposes of 14th Amendment** (cite Moose Lodge.) We must look for a **sufficiently close nexus**. The fact that a monopoly exists is not enough to say there is state action. The fact that the state has "authorized and approved" the termination practice was not enough. (Note: in Shelley we had state enforcement. Here there is no state enforcement.) ***We seem to be moving away from inaction is action. Burton says you can't get rid of a responsibility by ignoring what's happening. Here, the state tacitly approves the plan by doing nothing.

Flagg Bros. v. Brooks (**Rehnquist** – 1978): **Holding:** NY is not responsible for the warehouseman's decision (to sell goods to satisfy a lien under the UCC) simply because the state permits the decision. **Rationale: the state needs to compel the decision before we find state action. Mere acquiescence**

**is no longer enough to call it state action. ****He expressly rejects the notion that State's inaction is "authorization" or "encouragement."

Blum v. Yaretsky (**Rehnquist** – 1982): **Holding:** Privately owned nursing homes receiving reimbursements from the state for caring for Medicaid patients were not state actors for purposes of a claim by a class of patients that their procedural due process rights had been violated when they were transferred (based on decisions made by doctors and administrators) into less expensive facilities. **Rationale:** the decisions turned on medical opinions. **The extensive state regulation of the homes did not trigger 14th amendment guarantees.** Constitutional standards only apply when the state is **responsible** for the specific conduct. **State can only be responsible for private action when it has exercised coercive power or provided significant encouragement such that the choice must in law be deemed to be that of the state.** Again – mere approval or acquiescence of the state is not enough. *There does not seem to be any evidence that the state compelled the decisions of the doctors.

Rendell-Baker v. Kohn (1982): **Holding:** a private school who gets most of its money from public funds is not said to be a state actor when it discharged certain employees. **Rationale:** This is not different then private companies who do business with the state. Contractors do not become state actors by reason of their engagement in performance of public contracts.

Lugar v. Edmonson Oil Co (1982): **Issue:** whether the private party creditors may be appropriately characterized as "state actors." **Holding:** the issuance and execution of the write of attachment pursuant to the creditor's suit was undertaken by state officials. Therefore, we have state action. **Rationale:** we have always held that "joint ventures" between a private party and state official in the seizure of disputes property is sufficient to characterize that party as a state actor for the purposes of the 14th A.

DESHANEY v. Winnebago County Social Services Dep. (**Rehnquist** - 1989): **Facts:** Josh was beaten by his father and now is mentally retarded and confined to an institution for life. **Issue:** did the state intrude on Josh's liberty or life? **Holding:** father is responsible for the injuries. The state had no constitutional obligation to create a child protective services program. There would have been no violation if it didn't create one at all. **Ratioanle:** If they had taken Josh into their care they would have a duty to care for him. However, the duty to protect arises not from knowledge or expressions of intent to help, but when they act and impose on his freedom to act on his own behalf. The most that can be said of the state here is that they stood by and watched it happen.

XIII. When Can Congress Effect Private Action

Screws v. Unites States (**Douglas** – 1945): This is a fair warning case!! Screws said that although he may have known he violated state law, he did not know he was violating federal law. He claimed the statute was too vague (18 USC 242). **Holding:** there would be a vagueness problem if a police officer did something and a court LATER determined that behavior violated due process. However, 242 is more narrow than that so it is not too vague. There is a high mens rea standard – willfully. You must have the purpose of depriving a person of a specific constitutional right. If they can't prove you knowingly violated the right, then you can't be convicted. This avoids vagueness.

Unites States v. Price (1966): **Facts:** conspiracy to release inmates from jail at night, intercept them, and kill them to punish them and deprive them of due process . **Issue: This is a statutory construction case** (18 U.S.C 241 and 242 – criminal versions of 1983 etc.) **Holding:** The words "color of law" in the statute **did not** bar it from reaching private individuals – **private individuals jointly engaged with state officials in the prohibited action are acting under color of law."** It is enough that the people are willful participants. Charged under 241 the "deprivation of rights" includes 14th amendment rights. This applied to private parties who participated with officials.

Unites States v. Guest (**Stewart** – 1966): **Facts:** six defendants charged with conspiracy to deprive blacks of free exercise and enjoyment of rights secured by the Constitution. They moved to dismiss on

the found that indictment did not charge an offense under laws of the US. **Holding:** This is reversed. **Rationale:** Equal protection arises only where there has been state involving or someone acting under the color of state authority. **State involvement does not need to be exclusive or direct**. Here they allege that there was some state involvement. **This case does not reach how much state involvement is necessary to win**. We just know that the allegation is enough to survive the motion to dismiss. There is also interference with the right to travel which is a fundamental right. **Note that the right to travel is independent of the 14th amendment** even though cases talking about it talk about governmental interference. If there is proof that there is specific intent to interfere with the federal right whether it is motivated by racial discrimination or not, the conspiracy theory is proper.

Brennan: *No one will deny that Congress can enact legislation directing state officials to provide blacks with equal access to state schools, parks, and other facilities. Nor could it be denied that Congress has the power to punish state officers who conspire… he then says that there is no principle that denies congress the power to determined that in order to adequately protect the right to equal utilizations Congress would need to punish individuals.*

Jones v. Alfred H. Mayer Co. (**Stewart** – 1968): 1982 – "all citizens of the US shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
Holding: 1982 bars ALL racial discrimination, private as well as public, in the sale or rental of property, and that the statute is a valid exercise of the power of Congress to enforce the 13th Amendment. **Rationale:** 13th A abolished slavery and established universal freedom (Civil Rights Cases.) The enabling clause gave Congress the power to do more – pass all laws necessary and proper to abolish all badges and incidents of slavery in the US. **Congress has the power to determine what the badges and incidents of slavery are**. Badges and incidents of slavery – **burdens and disabilities included restraints upon those fundamental rights which are the essence of civil freedom, namely the same right to inherit, purchase, lease, sell, and convey property**. At the very least the 13th amendment lets blacks buy what whites can buy and live where whites can live. When discrimination herds blacks into ghettos this is a relic of slavery.

Griffin v. Breckenridge (**Stewart**, unanimous – 1971): Held 1985 to apply to private actors. Ct finds that section 2 of the 13th A. gives Congress the right to reach private conspiracies. Section 2 allows Congress to create a cause of action for blacks who have been the victims of conspirational, racially discriminatory private action aimed at depriving them of the basic rights that the law gives to all free men. Ct held that it would not apply to all tortuous conspiracies but **only those conspiracies that an invidiously discriminatory motivation**. He says the "intent to deprive of equal protection" indicate the meaning was to prevent race based animus. **Note the statute itself does not say this!

Runyon v. McRay (**Stewart** - 1976): **Facts:** mailed brochures for schools addressed to "resident," and advertised in the yellow pages. However, they denied admission based on race. **Issue:** Whether 1981 prohibits private, commercially operated, nonsectarian schools from denying admission to prospective students because they are black, and if so whether that law is constitutional. **Holding:** 1981 prohibits racial discrimination in the making and enforcement of private contracts. 1981 can and does reach private action. **Rationale:** Alfred H. – section 2 of the 13th amendment let's congress define the badges and incidents of slavery. 1981 has the same legislative history as 1982 sustained there. Congress showed in section 1 of the 1866 act that they wanted to prohibit discrimination in the making of contracts.

Bray v. Women's Health Clinic (**Scalia** – 1993): **Holding:** animus towards abortion did not constitute a class-based animus towards women, and therefore the animus required under 1985(3) was not required. **Ct does not address whether animus other than racial animus would fall under 1985(3)**. The notion of a **"class" did not extend to those whose connection lay only in a common desire to engage in conduct that a defendant disfavors**. To hold otherwise would make it a general tort, which is why we have the animus requirement to begin with. Demonstrations against abortion are not only directed at women, and there are women on both sides of the line.

XIV. Congress's Power under 14th Amendment Section 5

Lassiter v. Northampton County Election Board (**Douglas** – 1959): The court refused to strike down literacy tests in voting on a facial challenge. **Rationale:** the states have had broad powers to determine voting qualifications absent Constitutional violations. Literacy is neutral on race, creed, color, and sex. The state might conclude that literacy is important to exercise intelligent use of the ballot. There was no challenge here that the literacy tests were being used to disenfranchise blacks.
Congress used their powers to enact the Voting Rights Act to suspend the use of literacy tests in some areas without a judicial determination f discriminatory practices.

South Carolina v. Katenbach (**Warren** - 1966): **Holding:** upheld the congressional ban on literacy tests. **Rationale:** The court found that under Section 2 of the 15th Amendment Congress's power was as broad as the necessary and proper clause under article 1 section 8. Congress can use **rational means** to get rid of racial discrimination in voting. Section 2 allows Congress to prohibit state action that does not on its face violate section 1 of the 15th amendment. **Lassiter is not overruled. Ultimately the court found that the USE of literacy tests was discriminatory and was being used for the purpose of disenfranchising blacks. They were being used to purposefully discriminate.

Katzenbach v. Morgan (**Brennan** – 1966): **Facts:** Section 4e of the VRA – no person who has successfully completed the sixth grade in an accredited school in Puerto Rico in which the language of instruction is not English shall be denied the right to vote in any election b/c of his inability to read or write English. **Issue:** Can Congress do this without a judicial finding that it violates EP? **Holding:** Section 4e **is a constitutional exercise of Congress's section 5 powers under the 14th amendment. Rationale:** we should be looking to see if **4e is enacted to "enforce" EP and plainly adapted to that end and if it is not prohibited by but is consistent with the letter and spirit of the constitution**. **Congress has discretion in determining what is needed to secure the guarantees of the 14th amendment.** It is not enough for us to review the congressional resolution of these factors, but enough that we be **able to perceive a basis upon which** the Congress **might** resolve the conflict as it did. Also cite to Lee Optical – reform can take one step at a time. Neither the history nor the language supports NYs view that Congress must wait for a judicial finding before exercising section 5 powers.
What is left open: no occasion to determine whether such factors would justify a similar distinction embodied in a voting qualification law that denied the franchise to persons educated in on-American-flag schools. **IN A FOOTNOTE: Brennan specifically says that Congress's section 5 powers do not grant the power to restrict, abrogate, or dilute equal protection guarantees

Harlan: *To exercise their section 5 power there must have been a constitutional infringement. It is the judiciary's job to determine whether there HAS BEEN a constitutional violation. He is also critical of the deferential view Brennan is taking. Fear that congress can enact laws which DILUTE equal protection if read as broadly as Brennan allows*

Oregon v. Mitchell (1970): **Facts:** section 302 VRA Amendments of 1970 prohibited denying any citizen the right to vote in any election on account of age if the citizen is over 18. **Holding:** It was upheld for federal elections, but struck down for state elections. **Rationale:** Black's rationale – states can set voter qualifications in congressional elections (article 1, sec 2); however, congress can make or alter THOSE regulations if it deemed it advisable to do so (article 1, sec 4). Congress does not have the same power to check the regulations of STATE elections just b/c they don't like the qualifications. If they found that there was racial discrimination, they could remedy that. However, there is no finding that denying the vote to those under 21 is racially motivated. Since there is no Constitutional violation in the state's voting qualifications for STATE elections, Congress cannot act.

Brennan: *says that if we can perceive a rational basis for Congress's actions, then the law should stand. He notes that 18-21 year olds can fight with the army, are subjected to the full force of the criminal law, etc. He says this is an equal protection question. IF Congress reviews state legislation it does not need to stop if it finds a rational purpose (like the court.) It can make its own determination (Katzenbach v. Morgan.)* **Stewart:** *takes on Harlan's dissent in Morgan – Congress does not have substantive powers under section 5.*

Rome v. United States (**Marshall** – 1980): **Facts:** Sec 5 of the VRA says the Attorney General could approve changes to a voting system ONLY IF it did not have the PURPOSE and the EFFECT of denying the right to vote on account of race. AG found that Rome's new "at large" system did not have a bad purpose, but would in effect be discriminatory. The VRA allows a jurisdiction to "bail out" of the act by proving to a 3 judge panel that no test or device has been used in the jurisdiction during the 17 years prior to the act for the purpose or w/ the effect of denying or abridging the right to vote on account of race. District Court held that individual cities could not "bail out" **Supreme Court agrees that individual cities cannot bail out of the VRA. Rationale:** Congress clearly intended that a voting practice be precluded unless BOTH discriminatory purpose AND effect are absent – and this is ok even if section 1 only prohibits purposeful discrimination. (cite to South Carolina to show that section 2 is like the necessary and proper clause authority.) The **civil war amendments were designed to expand federal power and restrict state power** (this is his argument against why federalism concerns don't exist here.) Rome could not show that their new voting scheme would not dilute the black vote.

Rehnquist: *If you're trying to prevent purposeful discrimination, it doesn't make sense to prohibit conduct which can be proven not to be purposeful. He distinguished* Mitchell *b/c there we had a remedy for prior discrimination and a finding it would remedy current discrimination. Here, we could prove there would be no purposeful discrimination – natural voting patterns, if anything would affect the outcome.*

City of BOERNE v. Flores (**Kennedy** – 1997): **Facts:** RFRA says that government cannot burden religious practice unless it is the least restrictive means to further a compelling governmental interest. **Issue:** did congress have the authority to enact Religious Freedom Restoration Act (RFRA). **Holding:** RFRA exceeded Congress's authority. **Rationale:** Ct exceeds that section 5 gives a positive grant of legislative power – congress can make legislation which deters or remedies constitutional violations even if in the process it prohibits conduct which is not itself unconstitutional (katzenbach v. Morgan), however, here they say that it is a remedial power. **Congress has been given the power to ENFORCE, not the power to determine what constitutes a constitutional violation**. There must be "congruence and proportionality" between the injury to be prevented or remedied and the means adopted to achieving that end. The history of the 14th A. shows that they thought about giving congress a plenary power, but it was taken away in the final draft (this leaves them with remedial power.) They take a narrow view of Morgan – 4e can be said to be remedying discrimination by the NY government and therefore a remedial exercise of power. *RFRA is not designed to identify and counteract state laws likely to be unconstitutional b/c of their treatment of religion.

Last paragraph: congress can determine whether and what legislation is needed to secure the guarantees of the 14th amendment, but their discretion is not unlimited and the courts retain the power to determine is Congress exceeded its authority. RFRA violates the principles necessary to maintain separation of powers and the federal balance.

FLORIDA PREPAID v. College Savings Bank (1999): **Holding:** invalidated a Patent law which had expressly abrogated the states' sovereign immunity. **Rationale:** adopts the Boerne standard: "for congress to invoke section five it must identify conduct transgressing the 14th amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Congress had not identified a pattern of patent infringement by the states nor did it find a pattern of constitutional violations! **Proper sec 5 legislation has responded to a history of widespread and persisting deprivation of constitutional rights'.** They cannot be considered remedial or designed to prevent unconstitutional behavior. *Also noted no remedial element restricting the application to laws that actually ended up violating the constitution or against states with a history of misconduct.

College Savings Bank v. Florida Prepaid (1999): Rights protected by the federal statute (her about trademark) were not the kind of rights that qualify as "property" under the due process clause. Therefore, Congress exceeded its power.

United States v. Morrison (**Rehnquist** – 2000 2nd appearance! Commerce clause case also!): **Facts:** violence against women act provides a civil remedy for victims of gender-motivated violence. **Holding:** 14th A only prohibits state action. US v. Harris: congress's sec 5 powers could not be directed

exclusively at individuals w/o reference to the laws of the state or their administration by her officers. VAWA is not providing a remedy at a state or state actors, but at individuals who have committed criminal acts. Congress cannot just reach individuals. The remedy is not "corrective in its character adopted to counteract and redress the operation of such prohibited state laws or proceedings of state officers" (Civil Rights Cases.) Also, the act was too broad. Congres did not find discrimination in all or even most states.
NOTE- in Guest six judges went on the record saying that the civil rights cases were wrongly decided. Rehnquist dismisses this as dicta! Also he says that Guest (to the extent that Congress can reach private actors) – is simply not the way that reasoned adjudication proceeds… (remember, this was not the official holding in Guest!)

KIMEL v. FL Board of Regents (**O'Connor** – 2000): **Holding:** Congress exceeded its authority in allowing state employees to sue the state for violations of the Age discrimination in employment act. **Rationale:** We have already held that Age discrimination does not violate the equal protection clause. The states can draw lines on the basis of age if they have a rational basis. There was no pattern of age discrimination by the states, nor any discrimination that rose to the level of constitutional violations. It seems like Congress is trying to elevate the standard of review to heightened scrutiny. Can't do it.

Board of Trustees of the University of Alabama v. GARRETT (**Rehnquist** – 2001): **Holding:** the state can discriminate against the disabled as long as the discrimination is rations. **Rationale: it is the responsibility of the court not congress to define the substance of the constitution.** Citing Cleborne – there only needs to be a rational relationship between classifications based on disability and legitimate legislative ends. Again – no pattern of unconstitutional employment discrimination adequate to show irrational discrimination. Some discrimination that was found were committed by "units of local governments such as cities and counties which DO NOT enjoy immunity from suit." What could be attributable to the states were not unconstitutional acts. 1) it makes reasonable alternative unavailable to the states; 2) it shift the burden of proof to the state, where as under rational basis the party seeking to invalidate must show the rule is irrational; 3) disparate impact alone is not even sufficient when we apply strict scrutiny!
Left Open whether 11th A permits suits against state for money damages.

Nevada Dept of Human Resources v. HIBBS (**Rehnquist** – 2003): **Holding:** upheld the family medical Leave Act under section 5 of the 14th A. **Rationale:** Congress may enact prophylactic legislation that proscribes facially constitutional conduct in order to prevent and deter unconstitutional conduct. We already decided that statutory classifications distinguishing between men and women are subject to heightened scrutiny. Congress found that STATES continued to rely on invalid gender stereotypes in the employment context (leave benefits.) Reliance on stereotypes cannot justify the state's gender discrimination. The persistence of unconstitutional discrimination invokes section 5! He distinguishes age / disability b/c there you need to show a widespread patter of irrational reliance.

Tennessee v. Lane (**Stevens** – 2004): **Holding:** the act was constitutional as applied to cases involved access to the courts. **Rationale:** We grant the constitutional right to be present at all stages of the trial where persons absence might frustrate the fairness of the proceedings. We also allow civil litigants a meaningful opportunity to be heard by removing obstacles to their full participation in judicial proceedings. Congress learned that many were being excluded from courthouses and proceedings by reason of their disabilities. This finding together with extensive record makes clear that inadequate provision of public facilities was an appropriate subject of prophylactic legislation. **Congress had the authority under section 5 to enforce the constitutional right of access to the courts**. There means were appropriate b/c it **asked the states to take RASONABLE measures to remove architectural and other barriers to accessibility** (does not require any and all means and does not require the state to change their eligibility criteria!) **Scalia:** *no longer likes the congruence and proportionality test b/c it leaves too much room for judicial arbitrariness. He would limit Congress under sec 5 to remedying conduct that itself violates a provision of the 14th amendment – would grandfather in Voting Rights Act and other in the area of race discrimination.*