JUDICIAL REVIEW

Judicial review: Court's power to review the actions of other branches or levels of government, especially the courts' power to invalidate legislative and executive actions as unconstitutional

- authority for JReview over Exec. And Legislative Actions
  MARBURY V. MADISON:
  - Marbury sued Madison for writ of mandamus, held against Marbury
  - **HELD:** SC has jurisdiction to determine constitutionality of
    - Acts of other branches of the federal government
    - State statutes
    - Judgments of state courts that fall within fed judicial power
  - Constitution highest form of law, and supreme when two laws/branches in contradiction (Supremacy Clause)
  - Rational for Judicial Review
    - Supremacy Clause (Congress is merely an offspring of Constitution)
    - The constitution says that the judicial has the place to decide when two laws are in contradiction
    - They've all taken an oath to uphold the Constitution (yet, everyone even in congress take an oath)
    - Justices are insulated from political pressure; don't need to worry about re-election
  - Next time declare law unconstitutional → Dred Scott Decision 1857
- authority for JReview over State Actions
  - **MARTIN V. HUNTER'S LESSEE** (extend to state statutes
  - **COHENS V. VIRGINIA** (extend to criminal law)

FEDERAL LEGISLATIVE POWER

Two Questions when evaluating constitutionality of Congressional Act:

1. Does Congress have the authority under Constitution to legislate?
2. If so, does the law violate another constitutional provision or doctrine (infringing separation of powers OR individual liberties (think DP)).

Single Question regarding constitutionality of state law

1. Does the legislation violate the Constitution?
   a. Only state has the police power! (under 10th as long as doesn't violate DP)
   b. Exception – FED has police power over Dist. Of Columbia

MCCULLOCH V. MARYLAND: (1819)

- defined scope of federal legislative power and relationship to state government
- Issue – Whether MD could collect a tax from Bank of US.
  - Holding – broadly construed Congress's power and narrowly limit authority of state governments to impede fed govt.
- Background – Bank created in 1790 despite opposition, existed until 1811, recreated n 1816. MD tried to tax it. Bank refused to pay tax, John James sued for himself and state against McCulloch (cashier for US)
- **1st Issue** – Can Congress create the bank? **YES. N/P CLAUSE (Art. 1 §8)**
  - Historical practice established power of Congress (ex of 1st bank)
  - **Rejects compact federalism** (that states ratified Constitution so ultimately sovereign) Marshall – the PEOPLE ratified, states merely convention, only natural for people to act within states
  - Article 1 limits – NO, because what is described isn't dispositive "a constitution doesn't always delineate everything expressly" – not limited to scope of words **drastic expansion here**
  - **Necessary and proper clause – Art. 1**, § 8 grants Congress power "to make all Laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution" → AND not in §9 where powers are denied
    - Can choose any means not denied, that necessary means useful/desirable
    - OPPOSITION – must be truly necessary,

- **2nd Issue** – Constitutionality of MD's tax? **NO. FEDERAL SOVEREIGNTY**
    - the power to create the bank includes a power to preserve its existence
    - State tax can potentially destroy through power to tax
        - Alternate would be to allow state taxation up to point of interfering or endangering the bank; but court rejects this as well, because arbitrary and inefficient to review every tax
    - can the federal government tax state banks?
        - Symmetry theory - in federal action the states are represented in Congress
- In Marbury we had emphatic ideas of what it declared, here not as conclusive; Basic idea about the implied powers

** The Constitution granted "Implied Powers" to Congress under Article I, §8's "necessary and proper clause." This was a response to the weak, decentralized Articles of Confederation, which placed explicit limits on federal power.

- A government that has the right to do an act (make war, collect taxes, coin money) also has the right to take action that is **necessary and proper** toward achieving that act.

- **N/P** in powers, not limitations
- **Use it as a textual argument; history tradition (Marbury)**

Limits of "necessary and proper:

The "Necessary" clause does not limit Congress to choosing one perfect means of accomplishing a goal. Rather, as long as the means is *proper* and it accomplishes a legitimate goal that could not otherwise be accomplished, then the means satisfies the constitutional requirements. This is known as Congress' ***any appropriate means*** test.

Justice Marshall's formulation of "necessary and proper:

"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 the spirit of the constitution, are constitutional."

** Under the **Supremacy Clause,** a State law will be void if it would retard, impede, burden, or otherwise stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress in enacting the federal law.

COMMERCE POWER

Four eras of commerce clause jurisprudence:

1. early to 1890s – commerce power was broadly defined but minimally used
2. 1890s to 1937 – narrowly defined the scope of congress's commerce power and used the 10th amendment as a limit; one the first times this federal power was questioned
3. 1937 – 1990s – time went the ct. expansively defined the scope of the commerce power and refused to apply 10th as limit
4. 1990s – now – again narrowed scope of the commerce power and revived 10th amendment as limit

1. *Initial Era*
    1. What is commerce
        a. It is intercourse. Includes traffic, navigation between nations, and parts of nations, all phases of business.
    2. What is Among States
        a. Among, means intermingled with, but court did not choose the broadest definition "in midst of" because everything is in the midst of the US
        b. Restricted to commerce which concerns more states than one (if completely internal to a state, then reserved to that state
        c. BUT can regulate intrastate if it had an impact on interstate activities
    3. Does 10th Amendment limit congressional power
        a. NO, the power is complete in itself, ie. Congress has complete authority to regulate all commerce among the states

GIBBONS V. OGDEN: (initial era)
Facts:

- the New York state legislature granted Fulton/Livingston (who licensed Ogden) a monopoly to operate steamboats in NY waters. Gibbons operated a competing ferry, thus violated exclusive rights to pair
- Gibbons maintained he had the right to operate his ferry because was licenses under federal law as "vessels in the coasting trade"
- Procedural History: the NY court held for Ogden(injunction), stating that the NY court had the power to grant a monopoly; Gibbons appealed to the Supreme Court **Issue** (Whether NY grant of monopoly was constitutional)

Rationale: The Constitution has enumerated the powers which grant the means for carrying all others into execution, and to make all laws which shall be necessary and proper for the purpose.

- What is this power given to Congress?
    - Power to regulate, to prescribe the rule by which commerce is to be governed; it is complete in itself, may be exercised to its utmost extent and acknowledges no limitations, other than are prescribed in the constitution.
    - What happens if Congress doesn't use its commerce power? States are limited to only reasonable regulation of interstate commerce; no power for the Court to second guess Congress

Holding: Held for Gibbons, that NY could not constitutionally declare a monopoly;

- Gibbons expanded the definition of commerce; it's not just traffic, it's something more: intercourse (commercial intercourse between nations, and parts of nations, all phases of business, including navigation)
- justices more strict, many fed laws invalidated as exceeding scope of Congress's commerce power or violating 10th Amendment
- important time period because first time SC aggressively used power of judicial review to invalidate fed/state laws

1. What is commerce?

2. *Limited federal commerce power 1890s - 1937*

Definitional questions:

1. What is commerce
    a. Narrowly defined as one state of business, separate and distinct from earlier phases such as mining, manufacturing, and production
    b. Not including manufacturing (*US v. EC Knight)* wanted to preserve a zone of activities to state (this duality necessary)
        i. Relationship was too indirect, far-reaching to allow Congress to act whenever interstate commerce may be ultimately affected
    c. Does not include acts regulating wages/hours (*Carter v. Carter Coal)*
        i. Essential to protect states
2. What is among the states
    a. able to regulate when **direct impact** on interstate commerce (*Shreveport Rate Cases)*
    b. **no direct impact** (*ALA Schecter Poultry)* even though all the chickens shipped to other states, code was not regulating interstate transactions but only NY business, NARROWLY DEFINED
    c. intrastate – only regulate intrastate when **direct** impact (to protect states)
    d. **difficulty in distinguishing direct v. indirect** –
        i. one approach – allowed Congress to regulate stream of commerce (*Swift Co. v. US*-allowed to fix cattle prices even in intrastate, because was only a "stop" in stream of commerce*)* (*Stafford v. Wallace* – could regulate rates/standards of stockyards because stockyards in stream)
3. Does 10th Amendment limit Congressional Power?
    a. Ct. held that even if 1. commerce and 2. among the states, could not regulate if intruding into state sovereignty
    b. Power to control production limited to states (*Hammer v. Dagenhart)* – production part of states power to regulate local trade and manufacture
    c. IN CONTRAST – Court upheld *Champion v. Ames (The Lottery Cases)* Although in both *Hammer* and *Ames* dealing with prohibition of specified item, in *Champion* was within Commerce to prohibit an item from entering interstate
    d. THUS – inconsistent, BUT did value dual sovereignty to limit federal power (might have ruled differently, because court valued morals of items)

UNITED STATES V. E.C. KNIGHT CO: (limited federal commerce power)

The American Sugar Refining Co. purchased stock in 4 of Philly's refineries; they were charged with conspiracy to restrain trade on the Sherman Anti-Trust Act

- **court held** that the Sherman Anti-Trust Act could not be used to stop a monopoly in the sugar refining industry because Constitution did not allow Congress to regulate manufacturing (refineries)
- Govt. can control interstate commerce. The manufacturing, in this case refining, is a local issue
- **Harlan, dissenting:**

- Authority of central government is essential to safety, congress able to remove unlawful obstructions, does not interfere with autonomy

CARTER V. CARTER COAL CO.

- **court held** commerce does NOT include wages, labor and working conditions, bargaining etc,
  - commerce includes intercourse for the purposes of trade (transportations, purchase, sale, and exchange of commodities); wages, and employer/employee are "local evils"

What does "among the states" mean?

HOUSTON, E. W. TEXAS RAILWAY V. UNITED STATES (the Shreveport Rate Cases)

Ct. accorded Congress the ability to regulate intrastate transactions because of their impact on interstate commerce
It was extremely cheap to go eastward within TX, but more expensive to go West, and contended that railroads used this price difference to affect commerce of Shreveport

- Govt. ICC found rates unreasonable and set max price; Railroads contend unconstitutional as it was intrastate.
- **Court held** If carriers are instruments of both intra- and inter- Congress has authority over inter- and can exert Fed. Power to intra- when…
- "*whenever the interstate and intrastate transactions of carriers are so related that the government of the one involved the control of the other, it is Congress and not the state that is entitled to prescribe the final and dominant rule"*

A.L.A. SCHECHTER POULTRY CORP V. UNITED STATES (sick chickens case)

- New Deal legislation authorized the president to approve "codes of fair competition" (wages/labor).

Congress cannot regulate intrastate commerce that has only an indirect and remote effect on interstate commerce.

- NOT STREAM OF COMMERCE –court makes a distinction between a "standstill" within a flow of commerce (would have to be a subsequent movement)
  - direct – shown by railroad cases; can't be indirect because that would include everything
- **in this time period, court widely defined (Shreveport Rate Cases) and at other times narrowly defined (Schechter and Alton) – inconsistent**

3. Does the 10th Amendment Limit Congressional Powers?

Two views of how 10th can limit congressional power:

1. 10th Amendment is not a separate constraint on Congress, but rather is simply a reminder that Congress only may legislate if it has authority under the Constitution (wouldn't find a federal law unconstitutional as violating the 10th amendment but for exceeding congressional power under Article 1
2. 10th Amendment protects state sovereignty from federal intrusion (key protection of states' rights and federalism)

HAMMER V. DAGENHART:

Issue – Can Congress regulate the manufacturing process of harmless product on police power grounds because produced by children?

- **court held** – Unconstitutional because regulated production, which is reserved for states
- Commerce clause not means to give authority to control States in their exercise of police power over local trade and manufacture

CHAMPION V. AMES: (The Lottery Case)

IN CONTRAST to Hammer – court upholds Federal Act prohibiting selling of specific item (lottery tickets), HERE says power includes power to prohibit items from being in interstate commerce

- rejected that violated 10th

- the court **holds** that the traffic are subjects of commerce and the regulation of the carriage of such tickets from state to state at least by independent carriers is a regulation of commerce among several states

3.1937-1990s Broad Federal Commerce Power

Definitional Questions:

1. What is commerce?
    a. Greatly expanded what was encompassed (*NLRB v. Jones*) – Congress had power to enact all appropriate legislation for its protection and advancement to adopt measures to promote growth and insure safety, to foster/protect/control/restrain
    b. Includes production (*US v. Darby)* – while manufacture is not OF itself interstate, shipment of manufactured goods interstate is such commerce
        i. At the very least, "production" is not a dispositive "word" (*Wickard*)
    c. No longer distinguished between commerce and other stages of business, could exercise control over mining, manufacturing, and production (all stages)
2. What is among the states
    a. The distinctions between direct and indirect are no longer followed (*Wickard v. Filburn)*
    b. Could regulate any activity that taken cumulatively had an effect on interstate commerce
3. Does the 10th Amendment limit Congressional Power?
    a. 10th Amendment no longer a limit – instead Fed law would be upheld so long as it was within the scope of Congress's power
    b. Congress can control production (overturned *Hammer* where ct. said production regulation limited to states)
4. Shift from **Congress could regulate any activity in substantial effect on interstate commerce →**
    a. After *Wickard* – not necessary that particular person/entity regulated have substantial effect, ONLY that activity looked at cumulatively across country have substantial effect
    b. After *Hodel v. Indiana* – took out "substantial"; Court could only invalidate if could not find reasonable connection between means and end

Illustrate broad interpretation: adopt regulatory, civil rights, and criminal laws

1. Regulatory
    a. Court interpreted that Congress can set terms for items shipped in interstate commerce, even intangible insurance policies or stocks
    b. Could also regulate intrastate (all business aspects) if rational basis for interstate effect) ex. Strip mining in state (*Hodel v. Indiana)*
2. Civil Rights Act (which prohibits private employment discrimination
    a. Not under §5 of 14th because SC held Congress could not regulate private discrimination under 14th, so chose commerce
    b. Ask 1. rational basis that affects commerce? 2. means (act) reasonable?
    c. Discrimination in public accommodation impedes interstate travel/commerce (*Heart of Atlana)*
    d. Movement of meat used in small restaurant affected interstate (*Katzenbach*)
    e. Like in *Wickard* – looked at aggregate effect
3. Criminal
    a. Rational to believe that intrastate loan sharking had a sufficient effect on interstate (*Perez v. US)*

- The combination of narrow interpretation of many Federal powers as well as the Great Depression made the Court's hostility to economic regulation anachronistic and harmful

Key Decisions changing the commerce clause doctrine

NLRB V. JONES & LAUGHLIN STEEL CORP. (end of Lochner) → broadens Congress's power

The D's challenged the National Labor Relations Act which deals with hire/tenure

Court finds that Corp. is clearly a part of interstate commerce (operates in NY and LA, 75% of product shipped from PA, 100,000 workers on operations)

- act challenged as attempting to regulate all industry infringing on states power
- **court held** that an act which directly burdened or obstructed interstate commerce of its free flow are within Congressional power; it is the effect upon commerce not the source of injury

- that Fed power not limited to "flow" but source can be from manufacturing
- overrules "effectively" Carter and Schecter

- **Congress can regulate intrastate activity that has a close and substantial relation to interstate commerce** the act defines the term "affecting commerce" – means commerce, burdening or obstructing commerce or the free flow of commerce; definition of exclusion as well as inclusion
- **dissent** – wants to hold narrow view of Schechter and Carter

UNITED STATES V. DARBY

Co. intended to manufacture and ship lumber in interstate commerce to customers outside state

- **Issue** – Whether Congress has power to regulate wages/hours for workers engaged in production of goods made for interstate commerce?
-
- It doesn't infringe states because not prohibited by other Constitutional provisions
- **Congress has the right to regulate intrastate production activities that have an effect (even indirect) on interstate commerce**
  - OVERTURNS HAMMER
- Finds that the conclusion is unaffected by the 10th Amendment; the amendment is but a truism

From this case…

1) Congress is free to exclude anything from interstate commerce, following its own concerns for public policy. Legislative purpose or motive is irrelevant.

2) Congress' power of interstate commerce extends to activities that have close/substantial effect on interstate commerce. (This reiterates the rule from *Shreveport Rate Case*.

3) If Congress thinks substandard labor practices will have a detriment to interstate commerce, then it has the power to regulate those practices.

Federal Police Power:

** Congress' plenary power over the channels and instrumentalities of interstate commerce includes the authority to ***exclude*** for interstate shipment or travel any goods, persons, or activities found by Congress to be harmful to the public health, safety, welfare or morals.

** Congress' motive in enacting the regulation is ***irrelevant***. S.C. will only consider whether the law, on its face, is an appropriate exercise of the Commerce Power.

** Congress may regulate even a small intrastate activity, because of the ripple effect it will have on the whole of interstate commerce.

** Congress may regulate working conditions, at least as pertaining to workers who make or ship products used as part of interstate commerce.

Wickard v. Fillburn

Facts: Gov't sues Δ, a wheat farmer who barely exceeded the wheat production quota. Δ didn't even sell his wheat; he was only using it for himself and his livestock.

Issue: Can Congress regulate wholly intrastate activity of non-economic nature on "ripple theory"?

Holding: 1) Congress can assert its authority under the Commerce clause as long as the activity exerts a **substantial effect** on interstate commerce, **whether direct or indirect**.

2) Federal government has aim to control interstate commerce of wheat by regulating the amount each farm can produce. This is a legitimate aim under the Commerce clause, and its regulation is in line with that aim.

3) Congress has a **rational basis** for believing that, even if consumed rather than sold, the extra wheat still affects interstate prices by replacing wheat that otherwise would've been purchased.

The Meaning of "Commerce among the States"

***Regulatory Laws**:*

HODEL V. INDIANA:

- **Congress can regulate the use of private lands under Commerce**
- Rehnquist Concurrence:
  - Cautions against expansion of Congress' power
  - Courts should not defer to congressional findings
  - Congress must support findings by a rational basis

***Civil Rights Laws**:*

HEART OF ATLANTA MOTEL V. UNITED STATES:

Hotel wanted to continue to deny blacks room rental, so brought suit challenging constitutionality of Civil Rights Act. The Hotel was located off 2 highways thus there was a "channel of commerce"; Significant discrimination against Blacks

- Quantitative effect on commerce – discouraged travel → lower economic spending
  - Especially because in the channel of commerce
- Court holds that legislating against moral wrongs does not make the enactments less valid (uses the Lottery Case p. 140)
- "it is the interstate commerce that feels the pinch" – aggregate effect (all the hotels)
- **rule:** Hotel = channel of commerce → Congress can regulate channels of commerce
- **court held** – Act constitutional under Commerce Clause,
- concurring opinion doesn't want to rest solely on the Commerce Clause, would rather use the 14th Amendment

KATZENBACH V. MCCLUNG, SR. AND MCCLUNG, JR.

Ollie's had a take-out for blacks, but the Civil Rights Act would have made the restaurant serve blacks in the dining room; constitutionality of Title II questioned.

150,000 of goods with 46% being meat bought local but shipped from out of state (like *Schechter)*

- **Court held** there was a connection between discrimination and movement of interstate commerce
- **Rule** – If any rational basis to show racial discrimination in restaurants had direct/adverse effect on freeflow, UPHELD, EVEN IF that connection was way in the past (i.e. transporting meat)
- Look to aggregate (*Wickard*) here – refusal to blacks imposed burdens on interstate flow of food and products

Criminal Laws:

PEREZ V. UNITED STATES (loan sharking)

Congress may criminalize extortionate credit transactions because those transactions, though purely intrastate may affect commerce; **Outer reach of Commerce Clause power.**

4. 1995 to Present

- **3 categories when Congress can regulate under Commerce Clause:** (*Lopez)*
    - Congress may regulate the use of the channels of interstate commerce (*Darby and Heart of Atlanta)*
    - Can regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from interstate activities (*Shreveport cases)*
    - Can regulate those activities that substantially affect interstate commerce (*Lopez* – added substantially) (*Jones Laughlin Steel)*
        - Even intrastate is substantially affects interstate
        - Can't regulate non-economic activity by looking cumulatively (*Lopez)*
        - Look to individual, NOT aggregate

4 Factors to analyze "substantial affects" category (not dispositive, for analysis)

1. Jurisdiction, (*Bass* you can interpret if not clear)-court mentioned as issue, but not dispositive
2. Congressional findings of effect (not dispositive- *Morrison*)
    - These two are circumstances that *may* indicate limitation
3. economic or criminal (economic dispositive if intrastate) single stand alone provision (Wickard), if part of a greater regulatory scheme can justify
4. attenuated chain of causation (ex. Gun in school → disruption → loss of learning → less qualified → interstate commerce) – court says that you can make this link, but when lengthy effects constitutionality
    a. normally it is the states that have this police power, is Congress acting outside traditional authority

UNITED STATES V. LOPEZ

Def. charged with possessing firearm within 1000ft of a school in violation of Gun-Free School Zones Act of 1990, Def. challenged constitutionality of Act under Commerce Clause

- wanted to go back to historical principles of Federalism/setting limits, Court understands there is an outer limit (balance state/federal)
- **3 categories when Congress can regulate under Commerce Clause:**
    - Congress may regulate the use of the channels of interstate commerce (*Darby and Heart of Atlanta)*
    - Can regulate and protect the instrumentalities of interstate commerce or persons or things in interstate commerce, even though the threat may come only from interstate activities (*Shreveport cases)*
    - Can regulate those activities that substantially affect interstate commerce
    - **here**, does NOT fit into first 2, so would have to fit 3rd
        - *Wickard* is an OUTER limit
- no legislative findings of affect on interstate commerce (*heart of Atlanta, mcclung cases* – found that the absence of congressional findings is not fatal, as long as it can be inferred, HERE NO!)
- Government tries to argue that substantially affects because costs of violent crime through insurance spreads to population and reduces willingness to travel NO.
- because there is legal uncertainty constitution mandates by withholding from Congress a plenary police power
- can't use *Wickard's* aggregate argument, because repetition elsewhere does not substantially affect any sort of interstate commerce
- Jones, Heart of Atlanta still considered good law

Liberal 4 Dissent:

It is not for the courts to specify limits on congressional power…Congress is comprised of representatives from each state. Those representatives can set limits so as to protect the autonomy of their states. (This isn't really a defined limit on Congress, though)

Justice Thomas' Concurrence

- The ***substantial effect test*** goes too far. The original understanding of the commerce clause did not allow Congress to regulate anything beyond activities which are actually part of commerce.
- The post-1937 cases allow Congress to go beyond the scope of power granted in the commerce clause.

UNITED STATES V. MORRISON

Whether the Civil Damages provision of the fed Violence Against Women Act is constitutional. Govt. enacted when saw state laws inadequate, justified under Commerce Clause.

- reaffirmed 3 part test of Lopez; HERE – Pet. Argues it is constitutional because falls in 3rd
- Applying Lopez factors in this case:
    a. gender-motivated crimes of violence are not economic activity; thus far cases have only upheld Commerce Clause regulation of interstate activity where activity is economic in nature
    b. contains NO jurisdictional element that federal cause of action is in pursuance of Congress's power to regulate interstate commerce
    c. BUT this statute is supported by legislative evidence that it does affect victims and families, BUT this is not sufficient to sustain the constitutionality of Commerce Clause legislation
    d. (causation)P assert a "but-for" analysis, and if accepted would allow Congress to regulate any crime as long as the aggregated impact of that crime has

Congress cannot regulate noneconomic criminal activity based on a cumulative substantial effect on interstate commerce.

Concurrence (Thomas): wants it even narrower still

Dissent (Souter, Stevens, Ginsburg, and Breyer)

- says issue should be one of congressional fact finding, because congress has the time/resources to conduct research, thus should be allowed to enact legislation

GONZALES V. RAICH:

Issue:

- question is whether it is wise to enforce CSA, but if Congress' power to regulate (prohibit!) interstate markets encompasses intrastate commerce
- 1996 – passed Compassionate Use Act of 1996 – allowed seriously ill residents to have access to marijuana
- Raich and Monson suffered from illness and availed themselves to marijuana pursuant to the terms; they really needed it, possibly fatal without, officials took their weed

ARGUMENTS

R's don't dispute that CSA was within commerce power, but argue that CSA's categorical prohibition of manufacture/possession of marijuana for med purposes pursuant to Cali law exceeded Congress' power under Commerce

- Court goes through 3 categories of current era in *Lopez* (here 3rd – regulate activities that substantially affect interstate commerce)
- From *Wickard* Congress can regulate purely local activities that are part of an economic "class of activities" that have substantial effect

Wickard

- **within Congress' power because production of the commodity meant for home consumption, be it wheat or marijuana has a substantial effect on supply and demand in national market (Ct. finds no difference in that marijuana is illegal market)**
- HAD RATIONAL BASIS

R's say different from Wickard because small farming, wickard was quintessentially economic, …look at brief!)

WIckard could actually show the causality between production and market, here cannot, court says doesn't matter

R's rely on Morrison and Lopez

- court says they overlook the larger context of commerce clause

Holding: within authority to regulate fungible commodity

Concurrence (Scalia):

- Emphasizes that Congress gained power through Necessary and Proper Clause to control intrastate activity that will end up in interstate commerce

3. substances manufactured and distributed intrastate from those interstate

Dissent (O'Connor):

4. we enforce the outer limits of the commerce clause to maintain state sovereignty
5. case exemplifies the role of states as labs
    a. California passed the Controlled Substances Act as an experiment

Dissent (Thomas)

6. the R's marijuana was never bought or sold, traveled state lines, and no demonstrably effect on national market
7. abandons attempt to enforce Constitutional limits, and essentially invokes the Necessary and Proper Clause without explanation

GONZALEZ V. OREGON – court considered the legality of an interpretative rule issued by AG that physicians who assist with suicide of terminally ill would be violating Controlled Substances Act

RAPANOS V. UNITED STATES – Court considered Clean Water act and if it could be applied to intrastate wetlands

8. gave narrow construction, and said that navigable waters i
9. includes only relatively permanent, standing or flowing bodies of water

10th Amendment revisited (with Commerce Clause)

NEW YORK V. UNITED STATES (1992)

The 1985 Low-Level Radioactive Waste Policy Amendment Act had three provisions:

- have money incentives for states to comply (**fine)**
- Allow states to impose a surcharge on radioactive wastes (**fine)**
- Made states either 1. take title to any wastes within borders that weren't disposed, OR 2. they would be liable for all damages directly/indirectly incurred (**controversial**)
    - **Holding:** It is unconstitutional for Congress to compel state legislature to adopt laws or state agencies to adopt regulations, although it may hold out incentives to influence decisions
    - **Violated 10th** – cannot compel states to enact or administer federal regulatory program, there is a sphere of dual sovereignty (which get from people, so problematic because Feds didn't really get from states' citizens)
    - Congress can set standards BUT not infringe on sovereignty
- doesn't really give them a choice

Dissent (White)

- does states' consent make a difference? Congress says no, because if a particular branch tries to justify an intrusion, doesn't justify the intrusion

What is different between "Preemption" and "Compelling states to act"?

* The Federal Government can preempt state laws that obstruct its constitutional aims.
* The Federal Government can restrict funding to states that go against its schemes.
* But the Fed. Gov't **cannot force** states to adopt its regulations on intrastate activities.

PRINTZ V. UNITED STATES

Question of whether the Brady Act of the Gun Control Act violated the 10th Amendment in requiring that state and local law enforcement officers conduct background checks on purchasers

- **Court held** – Congress may not require State officers to enforce federal laws
    - Modern – can offer incentives $$, but can't directly coerce CLEOS to do background checks
    - Didn't offer money because then if some states opted out, there was a discrepancy between regulations in states, and money is scarce
- **Reaffirmed** New York v. United States (regarding 10th Amendment)
- Congress violates 10th Amendment when conscripts state governments (violation of separation of powers)

Dissent disagreed with *New York v. US*; Congress can impose affirmative obligations

RENO V. CONDON – narrow interpretation of Printz; can't commandeer states to run Fed programs

CONGRESS'S POWERS UNDER THE POST-CIVIL WAR AMENDMENTS

3 Civil War Amendments: empower Congress to enact civil rights legislation; breeds two questions:

1. can Congress regulate private conduct under this authority?

- Civil Rights Cases remains good law establishing the §1 of 14th only applies to Government not private action (*US v. Morrison* – reaffirmed) (briefly did under *Guest*, but was overturned)
- now has held that Congress may prohibit private under 13th §2 and Commerce Clause (*Runyon*

2. what is the scope of Congress's power under the amendments?

- nationalist perspective – Congress may use s5 to expand scope of right (*Katzenbach)*
- federalist perspective – Congress cannot create new rights or expand scope (*Boerne)*

13th Amendment (1865) – prohibits slavery and involuntary servitude except as punishment for a crime and also provides that Congress shall have power to enforce this article by *appropriate legislation* (speaks to private parties)

14th Amendment (1868) – all persons born or naturalized in the US are citizens and that no state can abridge the privileges or immunities of such citizens; nor may states deprive any person of life, liberty, or property without due process of law or deny any person of equal protection of the laws; Sec. 5 "Congress shall have power to enforce by *appropriate legislation* the provisions of this article (directed to states)

15th Amendment – the rights of citizens of the US to vote shall not be denied or abridged by the US or any state on account of race, color, or previous condition of servitude (direct to states)

CIVIL RIGHTS CASES (held Civil Rights Act unconstitutional)
Congress could only regulate state and local government actions, not private conduct
Civil Rights Act – attempted to prohibit private racial discrimination

- LACKED VALIDITY UNDER
  - 13th - limited to private discrimination regarding slavery and NOW that slavery has been ended now necessary to regulate all other private behavior
  - 14TH – Court broadly held that only applies to government action and thus cannot be used to regulate private behavior

UNITED STATES V. MORRISON **(**analysis for **14th amendment** justification of act)
Alternatively attempted to uphold "Violence against Women" under the 14th (NO!)

- Reaffirmed the Civil Rights cases and US v. Harris – under 14th could only regulate Government action (also in Shelly v. Kramer)
- *US v. Guest* – held that 14th COULD regulate private, BUT HERE overturned
- Remedy against private individuals is the statute in question if not aimed at proscribing discrimination by officials, **which is unlike any** § 5 remedy previously upheld
- **holding** – while the court recognizes that Morrison should receive a remedy, the court believes it should be from Virginia and not the US

Two views of the Civil War Amendments
Narrow – allows Congress only the power to prevent and provide remedies for violations of rights recognized by the Supreme Court

- does not allow Congress to determine additional rights
- argue that Congress is not "enforcing" if creating new rights

Broad – accords Congress authority to interpret the 14th Amendment to expand the scope
The difference

- says "enforcing" but creating greater protection; controversial I'm sure about the word "creating"
- a textual argument over the meaning of "enforce"

KATZENBACH V. MORGAN AND MORGAN (Nationalist - accord Congress broad authority)
Under §5 of 14th Congress could independently interpret Constitution and even overturn SC

- Case dealt with constitutionality of §4(e) of Voting Rights Act providing that no person who has completed sixth grade in Puerto Rican school can be denied vote,
- SC had previously upheld literacy requirement, BUT here Congress tried to effectively overturn Lassiter
- In Katzenbach Court upheld Act as proper exercise of power, but allowing Congress BROAD power (even to overturn SC!) → used rational basis review

CITY OF BOERNE V. FLORES: **(**Federalist – narrow)
Declared RFRA unconstitutional as exceeding Congress's §5 powers

- held that Congress could not create new rights or expand the scope of rights
- Congress is given power to enact laws to enforce the provisions of 14th , "legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforced the Clause

We're not covering the 11th Amendment. Instead look at only Section 5 in Boerne. No exam question about Section 5 of the 14th Amendment.

THE FEDERAL EXECUTIVE POWER

INHERENT PRESIDENTIAL POWER
Constitutional Power – might have explicit authority for particular conduct; then issue is whether the President is acting within the scope of the granted power and whether the President is violating some other constitutional provision
Statutory Power – is there a statute authorizing the President's conduct, then the question is whether that law is constitutional
BUT, what if there is neither constitutional nor statutory authority? **Question of inherent power**-

INHERENT PRESIDENTIAL POWER (*YOUNGSTOWN V. SAWYER)*

4 approaches as to when the president may use inherent powers

- 1. There is no inherent power (Black's majority opinion) (narrow)
    - Can act only when expressed/implied in statute or Const.
    - Wants government to be of limited powers
- 2. Has inherent authority unless interferes/usurps with functioning of another branch (Douglas)
    - In Youngstown – said President was usurping Congress's spending power bu forcing spending of funds
    - Concedes there are SOME powers that are inherent
- 3. Inherent powers not mentioned in Constitution so long as doesn't violate statute or Constitution (Jackson, Frankfurter)
    - Here – found unconstitutional because Congress denied the President this authority
    - Jackson lays out 3 zones of authority
        - 1. when acts pursuant to an express or implied authorization his authority is at maximum (all in Const + Congress's)
        - 2. acts in absence of congressional grant or denial, can rely only on Const. powers (zone of twilight) distribution is uncertain
        - 3. takes measures incompatible with expressed or implied will of Congress, lowest ebb, only rely on own – sustain only by disabling Congress
- 4. Inherent powers that may not be restricted by Congress as long as does not violate Constitution (Vinson) (Broad)
    - Not important that Pres. Is always right in determining the necessity of action during war/emergency; rather only necessary to show that the action was reasonable in the President's judgment
    - Inquiry into necessity; actions subject to the knowledge and approval of Congress, but Pres. Can act before seeking approval in wartime

- no SC case definitively makes one of these approaches correct and the others wrong, approach must be based on how best to check the president

YOUNGSTOWN SHEET & TUBE CO V. SAWYER

1951 – after steel companies notified intention to strike President Truman passed an Executive Order 10340 to take possession of steel mills

Issue – Whether President was acting within his constitutional power

Majority Opinion – President only has enumerated powers from statutes or Constitution.

- here no statutory or Constitutional (commander in chief or executive role) power, in fact the Taft-Hartley that proposed this Presidential power was struck down
- other opinions fall into 4 categories above

CONGRESS'S ABILITY TO EXPAND PRESIDENTIAL POWER

2 views of separation of powers:

1. If Congress and Executive agree, the courts only rarely should invalidate their actions

2. Separation of powers is constitutionally mandated and therefore envisions a crucial judicial role in enforcing its requirements

LINE-ITEM VETO!

CLINTON V. NEW YORK

Congress passed a statute that created authority for a presidential power to line-item veto in budget appropriations

- allowed president to veto or "cancel" particular parts of appropriation bills while allowing the others to go into effect
- HERE – Clinton canceled two appropriations, under the statute,
- **Court held** – was constitutional expansion of power; **violates the Presentment Clause** (that requires President approve all parts of a Bill or reject it in total)
- **Rule** – Procedures for enacting and vetoing laws contained in the Constitution must be strictly adhered to and any changes must be from Constitutional amendment NOT legislation
- Breyer's Dissent
    - Stresses the need for the line-item, because now that the budget is 1.5 trillion, there are so many sub-appropriations, and if the President has to veto the entire thing, have to start again from scratch

- **majority adopts formalistic view of separation of powers, whereas dissent adopts functional**

PRESIDENTIAL POWER AND WAR ON TERRORISM

NOT TESTED.

9/11 President Bush claimed broad authority to detain combatants and use military tribunals
Proponents– Constitution envisioned expansive presidential power to deal with external threats
Opponents on expanded powers – Power is unchecked and Bush's actions are unprecedented and unconstitutional

TWO PRESIDENTIAL POWERS AT ISSUE:

- **power to detain individuals (***Hamdi v. Rumsfield)*
    - An American citizen apprehended in a foreign country and held as an enemy combatant must be accorded Due Process and a meaningful factual hearing, BUT
        - **1.** Government DOES have a right to detain Citizen under Act of Congress (President authorized by this act) BUT
        - **2.** Detainee MUST be accorded Due Process; (meaningful factual hearing)
            - Minimum – notice of charges, right to respond, and the right to be represented by attorney
            - Must apply **Mathews v Eldridge** test to determine what procedures are required (laid out)
                - weigh importance of the interest to the individual
                - the ability of additional procedures to reduce risk of an erroneous deprivation
                - governments interest
- **constitutionality of use of military tribunals** (*Ex Parte Quirin, Hamdan v. Rumsfeld*)
    - military tribunals violated the Geneva Accords ?

THE STRUCTURE OF THE CONSTITUTION'S PROTECTION OF CIVIL RIGHTS AND CIVIL LIBERTIES

The Constitution has few provisions concerning individual liberties apart from the Bill of Rights

- rationale – Framers though it unnecessary since they attempted to create a government with limited powers without the authority to violate basic liberties

THE APPLICATION OF THE BILL OF RIGHTS TO THE STATES

- some Bill of Rights have no contemporary significance – 3rd Amendment "right against having soldiers quartered in a person's home"

Old view (*Barron v. Mayor)*

- Bill of Rights applied only to Federal Government, if meant to apply to States would have been explicit; States enact their own Constitutions to protect liberties

Privileges and Immunities (cannot be used to incorporate!) (*Slaughterhouse)*

- Privileges and Immunities are left to State Governments for security and protection and not placed under Federal Government
- Rendered nullity (and still today, because never overturned)

Incorporated under "Liberty" protected from State Interference (14th Amendment)

- found at least some of the Bill of Rights part of the liberty protected by due process

BARRON V. MAYOR AND CITY COUNCIL OF BALTIMORE

Barron sued the City for taking property without just compensation in violation of the 5th Amendment

- Court **held** that the Bill of Rights was intended only to apply to the federal government
- Marshall wrote that if it WERE to be intended for states it would be explicit
- Some argue that the 5th in particular did apply to states because didn't say "Congress shall not" like the 1st,
- **Held** – all states will pass their own Constitutions so as to not infringe upon liberties

14th Amendment

- substantive due process – you can't deprive someone of life, liberty, or property
    - no matter how good the procedure is, there are some things government can't do → take the Due Process clause to confer substantive rights
    - primarily liberty = liberty of property (economic)
    - later liberty = personal privacy rights (marry, abortion)
    - even incorporation into states in substantive due process
        - took the 1st amendment to the state (created that right)

SLAUGHTERHOUSE CASES –
BUTCHER'S BENEVOLENT V. CRESCENT CITY LIVESTOCK

- deals with the privileges or immunities clause of the constitution "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US"
- Justice Black's contention is that "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US seem to me an eminently reasonable way of expressing the idea that Bill of Rights apply to states
- Court **held** that the EP and DP of the 14th were only enacted to protect the newly freed slaves, not cause to incorporate the Bill of Rights
- Interpreted all the clauses narrowly, including EP and DP
- This narrow construction was never overturned and thus still cannot use to incorporate
- debate over incorporation centered primarily on 3 issues
    - debate was over history and whether the framers of 14th intended it to apply the Bill of Rights to the States
    - federalism – substantial set of restrictions on state and local governments
        - shift of power from states to federal
    - debate over the appropriate judicial role
        - could "pick and choose"
- **still 5 proposition of the Bill of Rights that are not incorporated and do not apply to state and local governments**
    - 2nd amendment – right to bear arms (which is why courts have upheld state and local gun control laws)
    - 3RD amendment right to not have soldiers quartered in a person's home
    - 5th amendment's right to a grand jury indictment in a criminal case – thus states need not use grand juries and can choose alternatives such as prelim hearings
        - Prefer a preliminary hearing
    - 7th amendment's right to a jury trial in civil cases
        - Refers to courts of the United States
    - Never ruled as to whether the prohibition of excessive fines in the 8th amendment is incorporated
- the rest is incorporated

STATE ACTION DOCTRINE

State Action Doctrine – The Doctrine that suggests that the Constitution's protections of individual liberties and requirements for equal protection apply only to the government, and that private conduct generally does not have to comply.

THE CIVIL RIGHTS CASES – UNITED STATES V. STANLEY

state action doctrine – that private conduct generally does not have to comply with the Constitution (the name is a misnomer because all levels of government are held to the Constitution

- it is state action of a particular character that is prohibited. Individual invasion of individual rights is not the subject matter of the amendment
- **14th Amendment applies to states but not to private parties**
- **Private parties can discriminate unless Congress (Federal Statutes) say otherwise**
    - **Ex. Heart of Atlanta, violates a Congressional statute**

ECONOMIC LIBERTIES

Economic liberties:

- **Contracts clause**: Article 1 §10 "no state shall pass any law that impairs obligation of contracts"
- **Taking Clause**: 5th Amendment "nor shall private property be taken …without just compensation"
- **Due Process (5th and 14th)**: cannot take property, liberty, life without due process of law

- **KEEP IN MIND** - appropriate degree of judicial protection for economic liberties

Lochner Era

- Court through dicta said it would invalidate a law if interfered with natural principles of justice (but hadn't yet using DP - *Slaughterhouse*)
- Court will strike unconstitutional a statute that interferes with the freedom of contract using due Process (*Allgeyer)*
    - *Allgeyer* – Liberty of Due Process enjoyed by all citizens to be free in enjoyment of all faculties, to live/work whatever, pursue livelihood, and enter into all contracts
    - **Finally moved from speaking in dicta to actually invalidating a state law (***Allgeyer)*
- Court will hold unconstitutional if it interferes with freedom of contract and DOES NOT serve a valid police power (*Lochner)*
- **THREE PRINCIPLES OF LOCHNER**
    - 1. Freedom of contracts was a right protected by 5^{th} and 14^{th} - right to enter into all contracts which may be proper, necessary, and essential to carrying out trade or profession
    - 2. **Government can interfere only to serve valid police purpose: direct relation to protect public safety, health, morals, and general welfare of public**
    - 3. It is the judicial role to scrutinize interfering legislation

Beyond Lochner

- court could also regulate to equalize bargaining power and freedom of contract was no longer a fundamental right (*West Coast Hotel)*
- judiciary would defer to legislative choices as long as **reasonable** (*West Coast Hotel)*
- economic regulations should be upheld so long as they are supported by a conceivable rational basis, even if not legislature's actual intent (*Carolene)*
- **FOOTNOTE4** (*Carolene*) Courts generally presume that laws are constitutional, BUT more searching inquiry when it is a law that interferes with individual rights, or a law that discriminates again a insular minority, or restricts ability of the political process to repeal undesireable legislation

- Framers were at least slightly concerned, which is why they included the Contracts Clause/Takings
- Corporations could use the Due Process Power the way persons do

Supreme Courts HISTORY

- ***LOCHNER ERA*** (before 1937) – SC found freedom of contract was a basic right under the liberty and property provisions of the Due Process
    - **IMPORTANT** – in Lochner era, used Due Process NOT Contracts, because it could protect current AND future contracts, not just current like Contracts clause
    - used federalism to limit the ability of Congress to regulate the economy, narrowly defined scope of Congress's powers
- **after 1937 –** Court adopted a policy of great deference to government economic regulations
    - no protection of freedom to contract under Due Process Clause, no federalism to restrict Congress

ECONOMIC SUBSTANTIVE DUE PROCESS:

ALLGEYER V. LOUISIANA

Court held unconstitutional a state law that prohibited payments on marine insurance policies issued by out of state companies that were not licenses or approved to business in the state

- Court says there is a **liberty** right to pursue livelihood and to enter into contracts and if something interferes it better be "really important"; **Congress upheld rt. to contract as a liberty right**
- Citizen has the right to contract outside the state
- **court** – police power cannot infringe upon other Constitutionally protected rights
- acknowledges state's have a police power but cannot infringe upon other rights protected by Constitution

***LOCHNER V. NEW YORK* (1905)**

Court held unconstitutional a NY law that set maximum hours that bakers could work.

- using *Allegeyer v. LA* the Court found that there is a liberty right to make a business contract
- **EXCEPTION: was this statute an exercise of valid police power?**
    - **Here** – no reasonable grounds to interfere with the liberty of a person with the right of free contract, there is no contention that bakers as a class are not equal in intelligence and capacity (**THE TEST FOR EXERCISE OF POLICE POWER)**
        - No reference to health, safety, or morals, or welfare
        - **The mere assertion that subject relates to health is no sufficient → MUST have direct relation**

- BUT there is a limit to police power – the claim of police power would be another name for supreme sovereignty of the state to be exercised free from restraint (Court always asks if it is a legit police power)
- State constitutions act as a **limit**, federal constitution having power

What did the Court mean by "legitimate means" & "legitimate ends"?

Means: The means employed by the government must not be arbitrary or discriminatory

Ends: The legislature must act for behalf of public safety and welfare.

(Under this, the State cannot regulate the economic decisions of regular adult male workers; women, children, retards are OK to regulate.)

Holmes' Dissent:

- The NY legislature had empirical findings that bakers do in fact have dangerous jobs in which long hours pose severe health risks.
- When there is fair ground to disagreement about the merits of a law, the courts should defer to the legislature.

Beyond Lochner

- Need for regulation after Depression
- strong political pressures to change – FDR court packed to get votes to change Lochner
- early on began to question foundations (*Nebbia* - upheld price control law for milk; said neither contract nor property rights were absolute
- **economic/social regulations presumed valid/upheld unless bear no rational relationship to end**

***WEST COAST HOTEL V. PARRISH* (PREVIOUSLY DISAPPROVED IN ADKINS)**

Court essentially overruled Adkins and upheld a statute setting minimum wages for women in Washington

- **court** – says the Constitution "does not speak of freedom of contract" – it speaks of liberty and prohibits the deprivation of liberty without due process of law – there is no "absolute and uncontrollable liberty"
- **TEST** – ONE OF REASONABLENESS
  - thinks welfare of women (HERE) is directly close to public interest
  - unequal bargaining power casts evil on all public welfare
- **After West Coast Hotel → Lochner is no longer good law (except in punitive damages case)**

***UNITED STATES V. CAROLENE PRODUCTS*:**

Court upheld an act that prohibited filled milk because economic regulations should be upheld so long as they are supported by conceivable rational basis → even without evidence of fact of health concern, it was presumed

- regulatory legislation affecting ordinary commercial transaction is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators
- **most lenient Rational basis, and deferred to legislature**

FOOTNOTE 4

- theory for a more searching standard then rational basis test
- dangerous just to tell a group to go to the political processes → because not everyone able to get the change to happen
- **THREE CATEGORIES THAT REQUIRE GREATER SCRUTINY:**
  - A fundamental right/individual rights
  - Law that restricts the ability of political process to repeal undesirable legislation
  - Law that discriminates against a discrete and insular minority

WILLIAMSON V. LEE OPTICAL OF OKLAHOMA,INC.

May the state legislatures enact laws that are economically wasteful and needless?

State legislatures are free to enact laws that may be considered wasteful and needless, so long as there is a public problem that the law might be addressing and the law is a rational attempt to correct it

Statute at issue makes it unlawful for any person not a licensed…to fit lenses…without a prescription

Up until now we were dealing Due Process.

EQUAL PROTECTION

The original Equal Protection Clause was incorporated into the 14th Amendment, and applied to the States; "no State shall…deny to any person within its jurisdiction the equal protection of the law"

- Unused and unrealized until 1950s

- **Reverse incorporation:** *Brown v. Board of Education* brought in the modern era of equal protection, and the Court held that the equal protection applies to the government through the Due Process Clause in the 5th Amendment
- the requirements under the 14th and the 5th are the same

threshold question – is the government's classification justified by a sufficient purpose? Can the government identify a sufficiently important objective for its discrimination?

- This depends on type of discrimination and → the resulting type of review

1. What is the Classification?

- facial discrimination - the law in its very terms draws a distinction among people based on a particular characteristic
- administrative discrimination – Facially neutral BUT there is a discriminatory impact to the law from administration
  - **The SC has made it clear that discriminatory impact is insufficient to prove a racial or gender classification -** Must show that there is a discriminatory purpose behind the law

How to determine the level of scrutiny? Factors to consider

1. **immutable characteristics** like race, national origin, gender, and marital status warrant heightened scrutiny
   a. unfair to penalize persons for characteristics they cannot control/change
2. **political process** - ability of group to protect themselves, for example aliens cannot vote, and women are severely underrepresented in political office
3. **history of discrimination** against the group
4. Court must decide whether **the classification reflects prejudice** and not just a permissible government purpose

How strict are these levels of scrutiny?

- they are firmly established in con law, but
- some criticize (Marshall and John Paul Stevens), arguing that there should be a sliding scale of review rather then 3 levels

2. What is the appropriate level of scrutiny?

- different levels of scrutiny depending on type of discrimination
- **strict scrutiny**
  - suspect classification: race or national origin, for aliens
  - **must be:** proven **necessary** to achieve a compelling government purpose; government must truly have a significant reason for discriminative and show cannot achieve objective with any less alternative
  - **BURDEN:** on the government
- **intermediate scrutiny**
  - classifications: gender; against non-marital children
  - **must be:** it is substantially related to an important government purpose;
  - Court doesn't have to find the government purpose compelling but must characterize the objective as important; means must have a substantial relationship to the ends
  - **BURDEN:** on the government
- **rational basis test**
  - minimum level of scrutiny that all laws challenged under equal protection must meet
  - **must be:** rationally related to a legitimate government purpose; government objective need not be compelling or important, but just something that the government legitimately may do
  - means need only to be a rational way to accomplish the end
  - **BURDEN:** the challenger; this approach is incredibly deferential to the government and only rarely have laws been declared unconstitutional

(impute other factors such as constitutional and social importance into the equation, NOT just based on the type of discrimination)

- others suggest that in reality it is a sliding spectrum of standards of review, i.e. Sometimes intermediate is lax like rational basis and other times like strict
  - that rationale basis can sometimes have a bite

3. Does the Government Action Meet the Level of Scrutiny?

- In analysis - the Government will evaluate both the law's means and ends
- will focus on the degree to which the law is under-inclusive and/or over-inclusive – **with respect to the respective statute**
- **RATIONALE BASIS:** likely allow substantial over and under inclusiveness
    - under-inclusive – if it does not apply to individuals who are similar to those whom the law applies
        - ex. Driving age is 16, because it could include those under 16 who are mature enough to drive
    - over-inclusive – applies to those who need not be included in order for the government to achieve its purpose
        - ex. The governments decision to evacuate and intern all Japanese-Americans during WWII – harmed a large number of people unnecessarily
    - BOTH under-inclusive/over-inclusive –
        - EX. The law evacuating Japanese-Americans; under-inclusive because did not identify those of other races who posed a danger, and over-inclusive because included Japanese-Americans who did NOT pose a threat
    - **the question whether it is under or over inclusive is NOT DISPOSITIVE, because most laws are one or the other**
        - BUT used by courts to evaluate the fit between the governments means and end

The protection of fundamental rights under equal protection

- EP used when government discriminates a people's exercise of a fundamental right
- ex. *Skinner v. Oklahoma* – there was an act requiring the sterilization of individuals convicted 3 or more times for certain crimes
    - SC – found law unconstitutional as violating an equal protection because discriminated among people in their ability to exercise a fundamental liberty (rt. to have children)
    - Court found that deserves strict scrutiny – Court wanted to avoid substantive Due Process
    - However the **effect from protections under substantive Due Process and Equal Protection Clause are the same**

<u>The Rational Basis Test</u>

TEST: is that the law must be rationally related to a legitimate government purpose.

- strong presumption in favor of laws challenged under Rational Basis
- since 1917 – Court will defer to government economic and social regulations unless they infringe a fundamental right or discriminate against a group that warrants special protection
- **consistency** – some laws found unconstitutional under a "harsh" rational basis test, said that test was applied with bite

UNDER-INCLUSIVENESS – when the law does not regulate all who are similarly situated (raises concern that law enacted to target politically powerless group) – but allowed under rational basis, because allows for "one step at a time

OVER-INCLUSIVENESS – when law regulates individuals who are not similarly situation, covers more people than it needs to in order to achieve its purpose

Two Questions to ask:

1. **Does the law have a legitimate purpose? (end)**
    - **a.** What constitutes a legitimate purpose?
        - **i.** Traditional police purposes (protecting safety, public health and morals) (*Railway Express v. NY)(Williamson v. Lee Optical)*
        - **ii.** additional to black letter – any goal not forbidden by the Constitution will be deemed sufficient
        - **iii.** BUT, **no legitimate purpose** in singling out particular group and precluding it from using the political process (*Romer v. Evans*- state argued constitutional as state police power of morality*)*
        - **iv.** **No legit purpose** in singling out unpopular political group (*US. Dept. of Agriculture v. Moreno)*
        - **v.** **No legit purpose** in singling out group through feigned concern (*Clebourne)*
    - **b.** How should it be decided whether there is such a purpose present? (actual or can it be conceivable?)
        - **i.** The actual purpose behind a law is irrelevant and the law must be upheld it any state of facts reasonably may be conceived to justify its discrimination
        - **ii.** Where there are plausible reasons for Congress's action, our inquiry is at an end (*US Railroad Retirement v. Fritz)*
2. **Is the law rationally related to achieving it? (means) "reasonable relationship?"**
    - **a.** Allows Under-inclusiveness – Court doesn't have to eradicate all "evils" or non at all; can allow under-inclusive (*Railway Express v. NY)*
    - **b.** Allows Over-Inclusiveness –especially when any alternative rule is likely to be less precise and be more costly(*NY Transit v. Beazer)*
    - c. Allows BOTH Over and Under-Inclusive – *(Beazer)*

ROMER V. EVANS: argued as a Footnote 4 case, with **suspect classification for homosexuals**
Court found that CO Amendment 2 prohibiting any legislative, executive, or judicial power to grant homosexuals minority status is unconstitutional.

- State's principle argument – that the Amendment puts gays and lesbians in the same position as all other persons; the measure does no more than deny homosexuals *special rights*
- HUGE EFFECT – non-homosexuals enjoy safeguards to guarantee housing, real estate, welfare, and insurance, while homosexuals DO NOT
- **Court** – asserts that these are inherent protections, not "special rights" INVALID
    - 1. Imposes broad and undifferentiated liability on single named group
    - 2. Breath so discontinuous; lacks a rational relationship
- This amendment has no relation to the classification and objective thus infringes EP
- Additional justifications for holding invalid
    - Any law that declares it would be more difficult for a class to seek aid is a denial of equal protection
    - law that harms a politically unpopular group cannot constitute a legitimate governmental interest
    - DENIES STATE'S ARGUMENT – cannot justify by saying state is protecting landlords at the expense of homosexuals.
    - if we applied strict scrutiny it would definitely fail

dissent – Thomas and Scalia

- doesn't think this is a desire to harm a certain class, but a modest attempt by Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority
    - thinks it has been specifically approved by Congress and this Court (in Bowers v. Hardwick)
    - since the Constitution says nothing about the subject, it is left to the states → courts have no right to impose at all

Under-inclusiveness:
RAILWAY EXPRESS AGENCY V. NEW YORK – under-inclusiveness upheld
NY banned ads on trucks, but exempted trucks displaying ads for own companies

Issue: Whether equal protection protects appellants because law is under-inclusive

Congress may proceed one step at a time and may partially eliminate a perceived evil, deferring complete regulation to the future

- used rational basis and found relation to the purported purpose of reducing traffic

Jackson Concurrence –

- safety is a lame excuse for the inequality
- there were probably administration difficulties in regulating all trucks
- can regulate under commerce

Over-inclusiveness

NEW YORK CTA V. BEAZER

Upheld law preventing those in methadone maintenance programs from holding positions at the CTA

Issue: Whether the over-inclusive nature of the statute denies certain applicants Equal Protection.

- **NO** because it is a general rule that includes all in the methadone program, if it specified those who have been in the program for a year to be allowed to be employed would be violation of Equal Protection.
    - the rule is one of general applicability and satisfies the equal protection principle without further inquiry
- **COURT -** finds that it can't make this "line" of one year in the treatment, must be a general denial, because anything short of complete exclusion would be less precise (hence why over-inclusive) it would discriminate between employees or applicants equally or almost equally apt to achieve full recovery
- The "no drugs" policy (exclusive) is justified in that as long as users are IN the treatment program a degree of uncertainty persists – Rational

US. DEPT OF AGRICULTURE V. MORENO

Found Unconstitutional an Act that prevented household that contain individuals who are unrelated to any other member of the household from the food stamp program; denied federal assistance (Hippies)

Struck down as having no rational relation; targeting a politically unpopular group is not a permissible governmental interest

CITY OF CLEBURNE, TX. V CLEBURNE LIVING CENTER

Unconstitutional: A TX statute requiring special use permit for the operation of a group home for the mentally retarded

- **but this court** holds that a rational basis of review is sufficient (not quasi-suspect classification), even though the law fails under it; not quasi-suspect because not politically powerless
- DOES NOT STAND UP TO RATIONAL BASIS
    - The City does not require for other classifications, but solely here because mentally retarded
- Arguments of the city
    - Negative attitude of the majority of property owners in the area
        - **Court –** private biases are out of the reach of the law, and cannot give them effect
    - location of the facility – close to school, and that students would harass
        - **Court** – there are 30 mentally retarded kids at the school
    - was located on a hundred year floor plan –
        - **Court -** concern about flood cannot distinguish the Featherston home from other
    - Council concerned about size of home and number of people
        - **Court –** if it weren't mentally retarded they wouldn't have a problem with it

<u>When a law is over and under inclusive</u> (KOREMATSU)

To sustain, court must find:

- sufficient emergency to justify imposition of a burden upon a larger class than those committing
- **AND** establishment of fair reasons for failure to extend the operation of he law to a wider class of potential offenders

<u>Strict Scrutiny</u>

TEST: Is the classification necessary and narrowly tailored to achieve a compelling government purpose.

Strict Scrutiny for race and national origin classifications originated in *Korematsu.*

RACE AND NATIONAL ORIGIN CLASSIFICATIONS:

Historical Note – before the 14th there were no Constitutional assurances of EP, and there were constitutional provisions that protected aspects of slavery, Article 1, §2 that requires apportionment based on 3/5 a person. And Southern states would not pass a Constitution that abolished slavery.

Classifications either: (ways of determining discrimination)

- on the face of law
- facially neutral, but proven by discriminatory administration or impact

Justifications for Strict Scrutiny

- Do away with all governmentally imposed discrimination based on race
- Relative political powerlessness of these groups (*Carolene Products)*
- It is an immutable trait

CLASSIFICATION ON THE FACE

- **Race-specific classifications that disadvantage racial minorities (on the face)**
  - Restrictions that curtail the civil rights of a single racial group are immediately suspect. Not necessarily unconstitutional, BUT need strict scrutiny.(*KOREMATSU)*
  - (*Palmore v. Sidotil)* **held** – Constitution cannot control prejudices, but also will not tolerate them, CANNOT JUSTIFY a racial classification that induces racial prejudice
  - (*Korematsu v. US)* – **held –** to pass strict scrutiny at the time, BUT OVER-INCLUSIVE, and now realize that it was based on race alone and it was bad
- **Racial classifications burdening both whites and minorities (on the face)**
  - *LOVING* – **held** – is not constitutional because it affects both minorities and whites; the classification is still based on race; restricts the freedom to marry because of race
    - Rejects the "equally apply" argument
  - *PALMORE* – cannot racially discriminate as a moral judgment or to protect from societal discrimination
- **Laws requiring separation of the races (on the face)**
  - *PLESSY* (NOT GOOD ANYMORE!) **held** – laws mandating blacks and whites separate but equal facilities (railroad accommodations) was constitutional
  - *BROWN V. BOARD*(ATTACK ON PLESSY!) Separate but equal, ACTUALLY violates Equal Protection because it deprives equal educational opportunities, because it stamped blacks as inferior that follows them in society
    - **Held** – in public education the doctrine of separate by equal has no place

1st Discrimination on face against minorities

KOREMATSU V. UNITED STATES:

The Court upheld law which said all persons of Japanese descent should be excluded from that area; that it passed strict scrutiny

- **ESTABLISHED STRICT** SCRUTINY as the standard of review for any legal restriction curtailing rights of a single racial group
- pressing **pubic necessity** may sometimes justify the existence of such restrictions – but racial antagonism never can
- Was it necessary? **-** Held that it was necessary because of presence of disloyal members
- Was it least restrictive; best means for the end?
  - Understands that it was over and under inclusive (major point of criticism of the opinion)
- **hold –**
  - **All legal restrictions which curtail the civil rights of a single racial group are immediately suspect and courts must subject them to the most rigid scrutiny**
  - To uphold a law under this SS, the state must identify a pressing **public necessity**

DISSENT – MURPHY

- There were less restrictive means available

2nd type of racial classification on face – burdens both whites and minorities

LOVING V. VIRGINIA

Court held state ban on interracial marriage was unconstitutional on EP (and DP grounds)
- there is not necessary/compelling narrowly tailored purpose

    - No legit purpose
- State argues that **Equal Protection** does not disallow a state law discriminating if it "equally applies" to both races
    - **Court** – that equal application is not enough to remove classification from 14th's EP
- SC asserts that cannot uphold a classification based on race, and MUST APPLY STRICT SCRUTINY
    - Here, patently no legitimate purpose that justifies
- can also be a "right to contract" and "14th liberty issue" dealing with right to marry

STEWART CONCURRENCE – criminality cannot be contingent on race. EVER.

PALMORE V. SIDOTI

Private biases and potential discrimination is not enough to justify removal of custody based on race.

- the **lower court held** that it is in the best interest of child to shield from societal discrimination, thus award custody to father
- **SC** held - **PRIVATE BIASES MAY BE OUTSIDE THE REACH OF THE LAW, BUT THE LAW CANNOT DIRECTLY, OR INDIRECTLY, GIVE THEM EFFECT**

--

3rd type of racial classification case require separation of the races

PLESSY V. FERGUSON

Court upheld Louisiana statute that required segregation using separate by equal for railroad accommodations.

- Court **held** that the 14th Amendment was not intended to abolish distinctions based on race or to enforce equality, and the laws do not imply inferiority of either race
- Court argues it was within the state legislative power and that separate but equal was asserted in other realms: schools and interracial marriage.
- **legislation is powerless to eradicate racial instincts, or to abolish distinctions based upon physical differences and attempt is essentially futile**

DISSENT – HARLAN

- obvious that intent was to discriminate against blacks
    - BUT CONSTITUTION IS COLOR-BLIND
        - Might on this point be opposed to affirmative action
- here there is an arbitrary separation based on race which is inconsistent with the civil freedom and equality before the law

Notes:

- between Plessy and Brown, the ONLY way to attack separate by equal was on the grounds that the tangible amenities were in fact unequal

ATTACK ON SEPARATE BUT EQUAL

BROWN V. BOARD

Court held that a Statute requiring separate but equal schools was unconstitutional even if facilities and tangible factors were equal because it deprived students of equal educational opportunities.

- plaintiffs contend that segregated schools are not equal and cannot be made equal

14th Amendment –

- while the words are traditionally prohibitory, they also confer a positive immunity – the right to exemption from unfriendly legislation against them that would imply inferiority in civil society

The situation "today"

- to separate children from others of similar age and qualification solely because of race generates feeling of inferiority as to their status in the community
- a sense of inferiority affects the motivation of a child to learn
- **hold – deprived 14th rights of equal protection**

Notes:

- Brown focused on education, rather than an all-encompassing mandate against segregation
- one of the reasons focused on education was because Warren knew he needed a unanimous holding
- **does not overturn Plessy**
- separate but equal has no place in educational facilities, so Plessy "overruled" only in education systems
    - another way of looking is that, plessy wasn't even overruled in the education system, but simply does not apply

- we don't know why the court doesn't use the "compelling" language in the inquiry

CLASSIFICATIONS – FACIALLY NEUTRAL WITH DISCRIMINATORY IMPACT ON ADMINISTRATION

- must have proof of discriminatory purpose
  - *WASHINGTON V. DAVIS* – laws that are facially neutral as to race and national origin will receive more than rational basis review ONLY IF there is proof of a discriminatory purpose (just discriminatory impact IS NOT enough)
  - *WASHINGTON V. DAVIS* – facially neutral law will be regarded as creating a race or national origin classification only if there is proof of both a discriminatory impact and purpose
- how is discriminatory purpose proven?
  - Must have proof that the government desired to discriminate, it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences (so hard to prove!) (*Personal Adm. Of MA v. Feeney)*
    - That government took action "because of" not "merely in spite of" adverse effects
- how can plaintiff prove discriminatory intent?
  - (1) statistical trend, (2) history surrounding government actions, (3) legislative or administrative history of law (*Arlington Heights v Metro)*

WHY THE REQUIREMENT FOR PROOF OF A DISCRIMINATORY PURPOSE

- there may be situations where there is a significant impact but not sufficient evidence to show discriminatory purpose
- **Current Law** – governments need not offer racially neutral purpose; need do no more than meet a rational basis test, because the purpose of the EP clause is to prevent conduct discriminating based on race
  - And if you questioned with strict scrutiny all laws that had discriminatory impact it would bring into question numerous taxes, welfare, public service…statutes
- BUT, proving discriminatory purpose if very difficult, IE. Laws might be upheld because of lack of evidence → some argue that should be based on results/impact

WASHINGTON V. DAVIS

The Court held that a statute with a discriminatory impact is insufficient alone to violate Equal Protection. Must also have a discriminatory purpose.

- **Issue** – Whether police officers who believed they were discriminated against because they were black had they EP protections violated
  - **No**. because although there was a discriminatory impact, it wasn't due to a discriminatory purpose
  - UNFORTUNATE BUT – some statutes affect one race more then another ≠ automatic discrimination
  - Disproportionate impact is not irrelevant, but not the sole touchstone of discrimination forbidden by Constitution → alone does not trigger rule that classifications are to be under strict scrutiny
- **THUS, DO NOT NEED TO IMPOSE STRICT SCRUTINY, because no suspect race classification**
- fairness argument – unfair to hold the employer responsible for any discriminatory specification
- pretty demanding test on the plaintiffs…burden to show a discriminatory purpose

HOW CAN YOU PROVE DISCRIMINATORY PURPOSE?

- SC says it requires proof that the government desired to discriminate – not enough to say that government took an action with knowledge that it would have discriminatory purposes

PERSONNEL ADMINISTRATOR OF MA V. FEENY

Court held that there was no gender classification because the law creating a preference for veterans was facially gender-neutral and there was not proof that the purpose was to disadvantage women

- chose narrow definition of what constitutes discriminatory intent
  - Discriminatory purpose ≠ volition
  - Discriminatory purpose ≠ awareness of consequences
  - BECAUSE, discriminatory purpose = more
    - Govt did this **because of** the discriminatory effect, not **in spite of**
- Statute DID apply to women, it did, just unfortunate that not that many women veterans

HOW CAN PLAINTIFF THEN PROVE INTENT TO BE DISCRIMINATORY?

What level of scrutiny should be used for racial classifications benefiting minorities?

- strict scrutiny (*Adarand v. Pena)*
    - HISTORICAL PROGRESSION: strict (Cronson) → intermediate (Metro) → strict (Adarand)

What purposes for affirmative action programs are sufficient to meet the level of scrutiny?

- Remedy Discrimination – different forms

a. Individual

b. Proven violator provide remedy to a class of persons who were subject (*Paradise)*

c. Requiring those in field where there is proved discrimination to provide remedy (*Fullilove- BUT* not expressly overruled but in Cronson found must be proof of discrimination*)*

d. Remedy general societal discrimination – but SC has not accepted as legit reason (*Wygant)*

- Enhancing Diversity

a. Used in school settings, and while **SC** has found it a compelling interest, it must be used as a **factor, not dispositive quota (***GrutterI*- benefits are substantial and education is benefited by diversity)

b. **SC upheld** in business setting (*Metro)*

- Providing Role Models (**SC REJECTS THIS JUSTIFICATION in *Wygant)***
- Enhancing Services Provided to Minority Communities (**SC REJECTS THIS IS BAKKE)**

What techniques of affirmative action are sufficient to meet level of scrutiny?

- Numerical Set Asides
    - Only allowed, if at all if needed to remedy clearly proven past discrimination
    - (*Bakke*- quota found unconstitutional)
    - (*Richmond v. Cronson* – statute allotting certain minority businesses 30% - unconstitutional)
    - *(US v. Paradise* – upheld because remedied SPECIFIC past discrimination)
- Races as a Factor
    - Race or ethnicity can be used as a plus factor is school admissions, as long as all factors are considered (*Bakke*)
    - Race can be used as a factor to increase diversity in business (*Metro* – although Adarand overrule the level of scrutiny holding, did not affect this conclusion)
    - Colleges have a compelling interest in creating diversity and may use race as one factor to benefit minorities (*Grutter*)
        - BUT in (*Gratz*) could not assign/add number of points because this method was not narrowly tailored to meet strict scrutiny (there were other race-neutral ways)
    - **GENERAL RULE:** Can use as factor to ensure diversity, but quotas or numerical quantification of benefits is impermissible

VILLAGE OF ARLINGTON HEIGHTS V. METROPOLITAN HOUSING DEVELOPMENT CORP.

Court dealt with a challenge to a city's refusal to rezone a parcel to allow low income housing

How to Determine discriminatory purpose?

1. starting point is if it bears more heavily on one race (but not dispositive)
2. a **statistical pattern** that can only be explained by a discriminatory purpose
    a. rare – because pattern must be extreme
3. **historical background** is once source → especially if it reveals series of official actions for that same "invidious purpose" or substantial departure from norm in that one case
4. **legislative or administrative history,** especially if there are contemporary statements

AFFIRMATIVE ACTION

FACIAL DISCRIMINATION BENEFITING MINORITIES

BAKKE CASE:

This was an original case that considered what level of scrutiny to apply

Was a challenge to USDavis' Medical School

- 4 said intermediate scrutiny, Powell said strict scrutiny (NO MAJORITY OPINION)
- Powell – any racial distinction are inherently suspect
- On affirmative action – can use race as one factor in admissions to enhance diversity

"Race remedy" is not a justification, and must be narrowly tailored to minimize over and under inclusiveness

Private schools not constrained by Title VI

RICHMOND V. J.A. CROSON CO:

Court finally agreed upon **strict scrutiny** as the level of scrutiny

- RELEVANT STATUTE: Richmond's plan to require prime contractors to hire at least 30% of the dollar amount of the control to one or more MBE (minority business) → meant to be remedial
- **COURT** invalidates the Richmond Plan under strict scrutiny, denying arguments contending it is a remedial plan
    - **Held** – history of discrimination does not justify racial quota, and wouldn't know if it would be better otherwise (ie don't know if it is a remedy
    - If the city were a passive participant in a system of racial exclusion, we think city could take affirmative steps to dismantle the system, because there is compelling interest
- But here, the Richmond Plan denies citizens the opportunity to compete based solely on race!

Rationale for Strict Scrutiny

- need judicial inquiry to determine which classifications are benign and compelling, remedial and which were motivated by illegit notions of racial inferiority
    - Us v. Carolene – discrete and insular minorities,
- cannot from speculation know if the situation would be any better absent discrimination
    - thus, the 30% quote cannot be said to be tired to any injury suffered

Rationale for invalidating

- OVER-INCLUSIVE – because although history of discriminating blacks, no evidence of other races
- Don't know if plan will actually remedy
- Two observations here:
    - 1. no consideration of race neutral means to increase minority business
    - 2. 30% quota not narrowly tailored to any goal except racial balancing,

Here no identification of need for remedial action

METRO BROADCASTING V. FEDERAL COMM. CASE:

- **Court approved affirmative action programs only need to meet intermediate scrutiny**
- overruled in Adarand

ADARAND CONSTRUCTORS V. PENA

Court adopted **STRICT SCRUTINY** as appropriate test for all affirmative action, but wanted to,

dispel the notion that, strict scrutiny is strict in theory, but fatal in fact

- Case at issue was the validity of a statute that gave financial incentives to contract with minority companies
- **Court** – remanded the case to be tried under strict scrutiny
- **held** – should have consistent level of scrutiny for EP claims under the 5^{th} and 14^{th} (adopt Strict Scrutiny here)
    - **strict scrutiny is not necessarily fatal** – does not preclude from offering relief, but MUST BE NARROWLY TAILORED AND FURTHER COMPELLING INTEREST

CONCURRENCE – SCALIA

- argues that government can never have a compelling interest in using racial classifications

Arguments for Strict Scrutiny	Arguments against strict scrutiny
• regardless of whether benign or invidious should be subjected • Constitution requires that the government treat each person as an individual without regard to his or her race • All racial classifications stigmatize and breed hostility	• that there is a significant different between government using classifications to benefit minorities but to disadvantage • can aid it achieving social equality • that there is a major difference between a majority discriminating against a minority and the majority discrimination against itself

GRUTTER v. BOLLINGER

Court held that the Equal Protection Clause does not prohibit the Law School's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits

- The admissions policy looked beyond LSAT and grades, etc at other important educational objectives (DIVERSITY!) and does not restrict types of diversity eligible for substantial weight
- Grutter was MI resident who applied and contended that she was rejected because school practiced affirmative action
- ***Bakke opinion*** – used as important in this analysis,
    - Here, endorses that opinion that enhancing diversity is a compelling state interest
- Because of 14^{th} and Equal Protection, this is under strict scrutiny
    - Is there a compelling interest?

        - YES, diversity is a compelling educational interest (break down stereotypes, critical mass, pedagogical opinion sharing, etc) -**effective participation of all races in civic life is essential if the dream of on nation, is to be realized**
- Was it narrowly tailored?
    - Yes, as long as a quota system is not used, and race is considered as a "plus" factor
    - Attaining a critical mass ≠ quota, and diversity is not limited to race
    - Cannot unduly harm members of any racial group or burden those not in favored
- Court asserted that affirmative action would eventually die out, become unnecessary

Thomas Dissent – AA hurts the people it is intended to held; students admitted are not prepared, and brands minorities as inferior

GRATZ V. BOLLINGER

Court invalidated an affirmative action program that added 20 points to the applications of minority students.

- **HERE** – adding 20 points is NOT narrowly tailored
    - Made race the decisive factor
- instead asserted using a plan like the "Harvard Plan" (holistic)
    - criteria – individual qualities or experience not dependent on race
    - illustrates problems with MI plan – race becomes dispositive
- "flagging" an application for individual consideration highlights problem with system, because when an applicant gets 20 extra points they will never be individually considered (usually admitted)
- **THUS,** NOT narrowly tailored, cannot take whatever means necessary to achieve goal of diversity

PARENTS INVOVLED IN COMM. SCHOOLS. V. SEATTLE SCHOOL DIST

Court finds statutes assigning students to schools based on race unconstitutional

- the statute must pass strict scrutiny
- District attempts asserts:
    - that it was remedying past discrimination --? NO, because it was never previously segregated
    - purporting an interest in diversity → (*Grutter* is not governed) because race is not part of broader diversity initiative
- there were race-neutral alternatives
- additionally, still a problem of narrow-tailoring

GENDER CLASSIFICATIONS

Ode to Romantic Paternalism.

Level of Scrutiny: Intermediate

ANALYSIS:

1. What is the Level of Scrutiny?
    - **a.** Intermediate scrutiny - statute must **serve important governmental objectives and must be substantially related to those objectives** (*Craig v. Boren)*
2. How can gender discrimination be proved? (ie. When it IS a gender discrimination, must apply intermediate as opposed to rational basis)
    - a. Facial discrimination
    - b. Facially gender neutral, but BOTH discriminatory impact and discriminatory purpose
        - i. There has to be an identifiable nexus between discrimination and gender (*Geduldig* – there was no purpose behind excluding pregnancy)
3. Gender Classifications benefiting women
    - a. Based on Role Stereotypes – will generally be **held unconstitutional** (*Orr, Weinberger)*
        - i. But, will be **upheld if** physical differences (*Michael M. and Goldberg*) – although risky because it seems like role stereotypes
    - b. Based on Past Discrimination – will generally be upheld

Early cases that upheld Gender Discrimination

- *BRADWELL* – prohibited women from being licensed to practice law (ruled that practicing law was not a 14th privileges/immunities; didn't bring up question of gender discrimination)
- *MUTTER V. OREGON* (upheld maximum hours law for women) During Lochner era, even though Court protecting freedoms, more willing to uphold regulations of women

- *GOESART* AND *HOYT*

REED V. REED

Court for the **first time** invalidated a gender classification, BUT professed **rational basis**

- The statute in questions was the hierarchy that persons would be appointed to administer a will
- Court held that there was no ration or reasonable relation between gender and ability to administer the estate
- Not characteristic of rational basis because almost viewed gender as suspect classification

FRONTIERO V. RICHARDSON

Court (4 votes) asserted that gender was a **suspect classification** and should be under **strict scrutiny**

- **Because no majority opinion, level of scrutiny remained uncertain**
- Here the law that women could only claim husbands for insurance if they were dependants doesn't even pass rational basis
- Statutory distinctions relegate entire gender to inferior status without individual review
- There was a possibility of an Equal Rights Amendment (which failed) → some thought opinion should have waited to declare strict scrutiny because Amendment would have done it

STANTON V. STANTON

- statute that says must support girls until 18 and males until 21; held unconstitutional, BUT **did not decide level of scrutiny**

CRAIG V. BOREN

Court held unconstitutional a statute that prohibited the sale of 3.2% beer to men, but legal to women

- **agreed upon intermediate scrutiny**
- statute must serve important governmental objectives and must be substantially related to those objectives

Dissent – Rehnquist – "we don't need another level of scrutiny"

US V. VIRGINIA

UNCONSTITUTIONAL: the exclusion of women by VMI (military institute) because **women were denied an opportunity available for men (**Did it violate EP)

Held

1. State's **important governmental objective** must be genuine, not hypothesized post hoc
2. State's justification for discrimination cannot be based on overly broad generalizations concerning the capabilities of men and women (pure stereotypes)

WHY INTERMEDIATE NOT STRICT SCRUTINY LIKE IN RACE?

- Those who argue for strict scrutiny
  - Immediately visible --? Danger of stereotypes
  - Immutable characteristic
- Those who argue for intermediate
  - Historically, the 14th was only meant to protect minorities
  - Biological differences
  - Women are a political majority, not powerless
- affirmative action debate
  - those who originally wanted strict scrutiny now worried about upholding laws that benefit women

PROVING GENDER CLASSIFICATION - When is it discrimination?

GEDULDIG V. AIELLO (not quasi-suspect)

UPHELD: Court held that it was NOT denial of Equal Protection.

Issue: Whether the provision of the Cali. Program that defined disability excluded pregnancy coverage was unconstitutional.

- Thus, only **rational basis**, which is passes because there is a legitimate fiscal interest and State does not have to compromise legitimate interest to create a more comprehensive social program
  - There was no invidious discrimination (pregnant v. non-pregnant)
  - Allows under-inclusiveness as "one step at a time" approach
- Criticism – that court is implying that pregnancy is not a sex-based characteristic
  - "overturned" in Pregnancy Discrimination Act

GENDER CLASSIFICATIONS BENEFITING WOMEN

- majority of SC cases concerning gender discrimination involve laws that benefit women and disadvantage men

- **two principles**
    - Gender classifications benefiting women based on role stereotypes generally will not be allowed
    - Gender classification benefiting women designed to remedy past discrimination and differences in opportunity generally are permitted

Benefits based on Role Stereotypes

ORR V. ORR

UNCONSTITUTIONAL: Court invalidated a law that allowed women but not men to receive alimony in case of divorce

- thus although it benefited women, it was based on a stereotype so invalid
- did not pass **intermediate scrutiny** –
    - Legislative objectives purported – provide for needy spouses, and compensate women for discrimination during marriage
        - Court concedes the purposes but they are not substantially related
    - Substantially related?
        - NO, there are already other individualized hearing that determine needs

Other **note cases** – found unconstitutional

- *Weinberger v. Wiesenfeld* – widow could receive benefits, male widow only is dependent
- Califano v. Goldfarb – women automatically received benefits on husband's earning, husband had to prove he was supported ½ by wife
- Wengler v. Druggists –widow benefits if they proved that they were dependent on wives' income or physically incapable

MISSISSIPPI Uni. for WOMEN V. HOGAN

UNCONSTITUTIONAL: A policy invalidated that operated a nursing school that excluded men

Issue: Does excluding males from school enrollment violate the EP Clause, **yes.**

- **court** found that was not remedying past discrimination, but based on/perpetuated stereotype
- No legitimate government purpose
    - **RULE** – there is no legitimate objective in excluding gender or protecting gender because they are presumed to suffer an inherent handicap
    - **RULE** – state can evoke compensatory purpose only if members of the gender benefited actually suffer a disadvantage related to classification
- Substantially related?
    - NO, HERE record reveals that admitted men do not affect anything in the classroom, thus record is inconsistent with the claim that excluding men is necessary to meet educational goals

MICHAEL M. V. SUPERIOR COURT OF SONOMA COUNTY

UPHELD: Statute criminalizing men for statutory rape, but not women

- Legitimate governmental interest?
    - Yes → concerned about teenage pregnancy and genders are not similarly situation in the situation
- Substantially related?
    - Yes → Government has burden to show nexus; here, the means is related to preventing pregnancy but preventing/deterring men from having sex with minors
- why not consider gender-neutral alternatives?
    - Defeat purpose because women will not report if they think they will be criminally liable

DISSENT – Brennan

- Believes that the court places too much emphasis on the desirability of achieving the State's asserted goal, and not enough emphasis on the fundamental question of whether the sex-based discrimination is substantially related to the achievement of that goal
- FLAW – other jurisdictions impose on both and it works and has not tried gender-neutral

ROSTKER V. GOLDBERG

UPHELD: Statue with male-only draft registration; Court expressed deference to Legislature in wartime

- Legitimate government interest?
    - Using *Craig v. Boren* test → YES, interest in raising and supporting armies
    - Question is then, by registering only makes does it violate EP ?
    - Objective – to maintain adequate army strength
- Substantially related?

- Yes because women, as a matter of policy, not eligible for combat and conscription for combat; NOT arbitrary

ALIENAGE

PLYER V. DOE

UNCONSTITUTIONAL: A Law that provided a free public education for children of citizens and documented aliens and required undocumented aliens to pay

- even undocumented aliens are persons guaranteed due process by 5th and 14th
- does not declare level of scrutiny, not SS but more than rational basis
- no justification that discrimination is because of physical differences; no benefit in "caste" system

OTHER TYPES OF DISCRIMINATION

- rational basis unless race, national origin, gender, alienage, or legitimacy
- has ruled that should only be rational basis for age, disability, wealth, and sexual orientation
- disability – rational basis
- state governments are able to discriminate for state functions (who is in office, jury service, etc)

Age Classifications

- although many of the characteristics that exist with regard to age (immutable, and visibility) are those of heightened scrutiny, the SC has expressly declared only rational basis review for age

MASS BOARD OF RETIREMENT V. MURGIA

UPHELD: A statute requiring police officers to retire at 50

Standard of Review – Rational Basis

- Why rational Basis?
  - While there is a history of discrimination, this particular person has not experienced a history of discrimination (because not always that age)
- passes Rational Basis – because there is a rational relation → physical ability declines with age

DISSENT – Marshall

- Think that the right to work is a fundamental right
- Although appreciates the state's objectives, thinks they are incredibly over-inclusive

VANCE V. BRADLEY

UPHELD : a fed law that mandated retirement at 60 for Foreign Service Retirement System

- **rational basis**
  - challengers failed to demonstrate that Congress had no reasonable basis
  - there WAS a legitimate interest

Discrimination based on Disability

- SC has held that only rational basis review should be used for discrimination based on disability
- There is a distinction between mentally retarded and mentally ill
- mental retardation is subject to more objective measures than mental illness
- Although only rational basis, the statute Americans with Disabilities Act prohibits discrimination
- *City of Cleburne* – used rational basis to declare unconstitutional required special permit

Wealth Discrimination

- before used to look like discrimination against the poor would get heightened scrutiny, but now only **rational basis (***Dandridge v. Williams)*
- poverty Is not a suspect classification and does not warrant heightened scrutiny (*SA School District v. Rodriguez)*)

FUNDAMENTAL RIGHTS UNDER DP AND EP

FUNDAMENTAL RIGHTS: Liberties so important that government cannot infringe (regulate) unless strict scrutiny is met.

- Not all EP require Strict Scrutiny → some like Economic liberties are rational basis
- Most FUNDAMENTAL RIGHTS are **not** mentioned in the Constitution

- THUS QUESTION: How to determine what is a fundamental right?

Procedural Due Process
Existence of a right triggers 2 distinct burdens on the government – substantive and procedural
Substantive – must demonstrate that the law is necessary to achieve a compelling purpose
Procedural – must provide adequate procedures – notice and hearing

Ninth Amendment
- "the enumeration in the Constitution of certain rights, shall not be construed to disparage others retained by people"
- 9th Amendment is not the source of rights, **there are no 9th Amendment rights**
- **Rather** – 9th amendment used as a textual justification for the Court to protect non-textual rights, such as right to privacy; VEHICLE

PROTECTING UNDER DUE PROCESS (5TH/14TH) OR EQUAL PROTECTION (14TH)
Questions to Ask in Both:
1. Is there a fundamental right?
2. Does it pass strict scrutiny?

Due Process
- **Issue**: Whether the government's interference is justified by a sufficient purpose.

Equal Protection
- **Issue**: Whether government's discrimination as to who can exercise the right is justified by a sufficient purpose.

Which one to Apply?
If a law denies the right to everyone, then Due Process would be the best grounds, but if a law denies a right to some, while allowing it to others, the discrimination can be challenged as offending equal protection OR Due Process

FRAMEWORK FOR ANALYZING FUNDAMENTAL RIGHTS

1. Is there a fundamental right?
   - YES – **strict scrutiny**
     - DEBATE How do we know it is a fundamental right, if not expressed?
     - Factors/Views to consider
       - **Originalists v. non-originalists**; and moderate (general intent but not specific views
       - **History and tradition**
         - Criticism – in a broad light can justify anything
       - **political process** – recognize those rights that enhance and ensure adequate representation
       - **moral consensus**
   - NO – **rational basis**
   - Whether strict scrutiny or rational basis depending on if fundamental right from - (*Carolene)*

2. If YES, a fundamental right, then → Was it Infringed?
   - DEFINITELY YES IF explicitly prohibited (ie. Statute explicitly prohibits abortion)
   - Becomes a DIFFICULT QUESTION of when burdening the exercise of a fundamental right also is considered infringement
     - **TEST** (*ZABLOCKI)* – How direct and substantial was the burden or interference (still a vague test)
       - **If YES,** substantial burden, → INFRINGED
       - **If NO** → constitutional

3. IF YES infringed, was there sufficient justification for government's infringement of a right?
   - **Review under Strict Scrutiny (sufficient justification when there is a compelling interest** – CRITERIA NOT ARTICULATED**)**
   - But the **government has the burden** of persuading the Court that a truly vital interest is served by the law in question
   - ISSUE SPLITS
     - **EQUAL PROTECTION** – Was there sufficient justification of the government discrimination of WHO can exercise the right
     - **DUE PROCESS** – Was there sufficient justification of the Governmental interference
   - If **YES** – then ask if sufficiently related to purpose (Question 4)
   - If **NO** – UNCONSTITUTIONAL!

4. Is the means sufficiently related to the purpose?
   - **TEST –** under **strict scrutiny,** must also be **necessary to achieve the purported objective**
     - must show that **there is no alternative** that is less restrictive
     - in contrast, in rational basis means only has to be a reasonable way to achieve the goal and government not required to use least restrictive
   - if **YES** → CONSTITUTIONAL
   - if **NO** → UNCONSTITIONAL

- sometimes all 4 of these questions are at issue, sometimes only a couple, but they all force the judiciary to make value choices

CONSTITUIONAL PROTECTION FOR FAMILY AUTONOMY

Grounds as FUNDAMENTAL RIGHT S – in *Meyer v. Nebraska* – "Liberty denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children …"

- since then Court held certain aspects of family as fundamental rights and strict scrutiny applied

The Right to Marry
- EP – cannot deny certain individuals the right to marry (*Loving, Zablocki)*
- DP – cannot deny the liberty of marriage without due process because it is a vital personal right (*Loving, Boddie, Zablocki)*

The Right to Custody of One's Children
- DP – can only terminate custody if procedural and substantive DP are met; must be given notice/hearing and government must prove that it is necessary to achieve a compelling goal
- EP – unmarried fathers' interest requires protection and cannot be infringed unless showing that he was an unfit parent (*Stanley v. IL)*
- **Unwed fathers' right** – "when unwed father demonstrates full commitment to the responsibilities of parenthood by coming forward to participate in rearing, his interest in personal contact acquires substantial protection under DP clause; BUT mere biological link does not." (*Stanley v. IL)*
    - *Lehr* – upheld denial of unwed father rights because father was not active in child's life; biological link is not enough on its own

The Right to Keep the Family Together
- DP – The Constitution protects family rights not just for parents and children but for the extended family as well (*Moore v. City of East Cleveland)*

The Right to Control Children's Upbringing
- DP - parents have a substantive DP interest in children's upbringing
- **Meyer Doctrine -** is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect (*Meyer v. Nebraska)*
- State can regulate when in best interest of child's well-being (*Prince)* (right is NOT absolute)
- But, deference is given to parents (*Yoder, Parham)*

THE RIGHT TO MARRY

LOVING V. VIRGINIA **(ct. first recognized right to marry as a fundamental right)**
UNCONSTITUTIONAL – Court invalidated the VA miscegenation laws based on racial classifications as violating the EP and DP of 14th.
Violates Equal Protection
- because denies interracial couples a fundamental right that other couples are free to enjoy

Violates Due Process
- because the freedom to marry is a fundamental personal right, this law deprives citizens of the liberty to engage in marriage without due process of the law

ZABLOCKI V. REDHAIL
UNCONSTITUTIONAL – a statute that requires individuals who have minor children to apply for a certificate mandating that all child support costs have been paid
- statute created a separate classification of parents with minor children
- **level of scrutiny**- since in past have found that marriage is a fundamental right → **SS**
    - past cases – Loving, Skinner, and Griswold for rights of privacy; at least same level as procreation, rearing ,etc
    - if it didn't infringe decision to enter marriage → can be merely rational because not fundamental right
- majority applied **equal protection**
    - there was a **fundamental right** and it was **infringed**
    - then finds that there **WAS a substantial state interest** in ensuring that child support was paid
    - BUT the law was **not sufficiently related** to the end (ie. There were less restrictive alternatives to ensure that child support was paid, and it was not narrowly tailored)
        - Was grossly over and under inclusive this irrational and not narrowly tailored
    - THUS **held → unconstitutional**

CONCURRENCE – STEWART
- instead would hold based on DP because EP does not deal with substantive rights but discriminatory classifications
- doesn't think marriage is a fundamental right, but is protected under liberty

Other Marriage Cases

- Boddie - payment of fees for divorce violated individual DP rights
- Califano – upheld provision of SSA that terminated benefits for disabled children at the time they got married
  - Court acknowledged that this might effect a person's inclination to marry
- Bowen – rejected challenged that provided survivor benefits from wage earner's account to widow who remarried after 60
  - Presumed these widows were less dependant

RIGHT TO CUSTODY OF ONE'S CHILDREN

- SC has recognized that parents have fundamental right to custody of their children
- This right is more precious than any property right (**thus DP can be applied**)
- DP would be offended it a state were to attempt the breakup of a family

STANLEY V. ILLINOIS

UNCONSTITUTIONAL: A statute that made children of unmarried mother wards of the state after her death

- the children were taken from the father after mother's death, because they were not married
- State alleges that single fathers are unfit and unnecessary to hold individualized hearings
- **Court** says while it is hard to find a legitimate interest and EP claim doesn't hold merely because they are a classification, BUT have to allow hearing
- As it stands the law is over-inclusive (includes fathers that WOULD be fit)
- SC has in other cases held that the government can terminate the rights of unmarried fathers without bring required to provide due process (*Lehr*)
  - Distinguished *Stanley* because father was actively involved in children's lives
  - In other case, mere biological link does not merit equivalent constitutional protection
- not very clear as to what the standard of review is; seems like intermediate scrutiny
- seems like procedural due process, because others are allowed hearings but in his case he is automatically denied
  - hybrid though, because there is also some substantive
  - hard sometimes to distinguish between substantive due process and equal protection

MICHAEL H, V, GERALD (limits rights of unmarried fathers – significant case concerning substantive DP)

Scalia…**biological fathers do not have custody rights over a child that lives in a nuclear family**

- history and tradition doesn't show → thus no fundamental right
- SC should ONLY protect rights under DP if there is a tradition; because this will limit arbitrary decisionmaking
- <u>state may create an irrebuttable presumption that a married woman's husband is the father of her child if they are cohabitating and he is not infertile</u>
  - allowed that real father COULD rebut within 2 years after birth
- Mike uses *Stanley* – right of unmarried fathers → but the **court** says that it instead comes down to the protected family unit right
  - IE. **If there are two "rights or liberties" have to weigh them, which one is more fundamental**

DISSENT – Brennan

- disagrees that "tradition" allows the majority to purport their opinion
  - pretense that tradition is as malleable as liberty is ridic
  - "ironic that an approach so utterly dependent on tradition is so indifferent to our precedents"
- plurality focuses to narrowly on whether a natural father's relationship would enjoy such protection
- asserts that if we applied "tradition" the way the court did in this decision, many key cases would have come out differently
- in construing 14th to protect only certain interests protected by history, it ignores the kind of society we life in

QUESTION: WHAT DOES THIS HOLDING DO TO STANLEY?

RIGHT TO KEEP THE FAMILY TOGETHER

MOORE V.CITY OF EAST CLEVELAND, OHIO

Struck down a zoning ordinance limiting occupancy to a "nuclear family"

- **court** – held that keeping family together was a fundamental right and part of "liberty in the DP clause"
- while sometimes afraid that Court will allow "too many rights" protected under DP, does not counsel abandonment
- states cannot standardize the definition of family

- history and tradition show that non-immediate family members have often lived together
- **Court will only find an infringement if there is a direct and substantial interference**
- STANDARD – "must examine carefully the importance of governmental interests advanced and the extent to which they are served"
    - Here, the ordinance cannot survive
    - Purported objectives – preventing overcrowding, minimizing traffic and parking

RIGHT OF PARENTS TO CONTROL CHILDREN'S UPBRINGING

- first cases that recognized family autonomy involved the right of parents to control the upbringing of their children
- used substantive Due Process to protect this right

MEYER V. NEBRASKA

UNCONSTITUTIONAL: A statute that prohibited teaching in any language other than English in the public schools,

- based on Substantive DP finding that it violated the rights of parents to make decisions for their children
- The established doctrine is that this liberty may not be interfered with under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect
    - Natural duty of the parent to give his children education suitable to their station in life
    - HERE – knowledge of the German language cannot reasonably be regarded as harmful
- the defendant taught as part of his profession, thus were protected as within the liberty
- double violation - teacher has a right to guide, and parents have a right to prescribe upbringing

PIERCE V. SOCIETY OF THE SISTERS…

UNCONSTITUTIONAL: A statute requiring parents/guardians to send their child to public school where failure was misdemeanor

- thus **under Meyer doctrine**, thinks that act unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control
- expands the doctrine of Lochner to deal with personal rights

INSTANCES WHERE STATE CANT INTERFERE TO PROTECT CHILD'S WELL-BEING

- *Prince v. Mass.* – enforce child labor laws when child was being solicited by Jehovah's Witnesses
    - **This right is NOT absolute**

IN COMPETING CLAIM, SC GIVES DEFERENCE TO PARENTS

- *Wisconsin v. Yoder* – Amish parents had constitutional right to control children's exemption from compulsory schooling
    - Used *Meyer* standard
- *Parham v. JR* – parents have deferential ability to commit their children to institution, without the extent of DP as adults
    - While some parents might abuse no enough because not all will

TROXEL V. GRANVILLE

UNCONSTITUTIONAL: a statute that allowed grandparents to petition for visitation rights at any time.

- **court** found that the parents' DP liberty rights > grandparents
- will hold a statute that protects other family members' right unconstitutional if it violates the liberty rights of parents

THE RIGHT TO PROCREATE

The SC has held that there are three aspect of reproductive autonomy that are fundamental

- the right to procreate
    - cannot discriminate and prohibit certain classes of people from procreating (*Skinner)* – additionally sterilization must meet strict scrutiny
- the right to purchase and use contraceptives
    - right to use contraceptive is a right to privacy protected by the penumbras of the Bill of Rights (*Griswold*)
    - this is ultimately a DP analysis
    - EP – cannot discriminate who is allowed to purchase contraceptives, etc, (*Eisenstadt)*
- and the right to abortion
    - Constitution protects right of women to chose
    - Which types of state regulations are permissible
    - Use of governmental funds to fund for performing abortions
    - Spousal consent/notification
    - Ability of a state to require parental notice/consent

RIGHT TO PROCREATE

BUCK V. BELL (old! SC originally rejected that right to procreate was a fundamental right)
UPHELD: a VA statute allowing the government to involuntarily sterilize the mentally retarded

- court found Buck to be a feeble minded white woman
- Holmes (so offensive) – said that it is better for the world not to have to execute degenerate offspring for crime…three generations of imbeciles are enough" !!!
- **Court** held that it didn't violate P's 14th rights that were protected by **equal protection**
- Could argue under **substantive DP right of liberty to procreate**
- was never overturned, but Skinner effectively overruled it 15 years later by recognizing a fundamental right to procreate

SKINNER V. OKLAHOMA
UNCONSTITUTIONAL: Court rejected the Act that allowed courts to order the sterilization of those convicted two or more times for crimes of "moral turpitude"

- **court held** – the right to have offspring it fundamental
- **equal protection argument** – denies EP, that some are subject to sterilization;
- **Strict Scrutiny** should be applied
    - SS fails because state failed to make the connection that the qualities of those who commit larceny or embezzle are inheritable
    - Basis holding on EP
    - Says that it is extremely overinclusive – includes tons of people that shouldn't be included in combating "moral turpitude"
    - Also under cruel and unusual punishment (standards of decency)

CONCURRENCE – Stone

- Thinks that the Question should be one of DP, and not EP
    - Would've used procedural due process

Notes

- now we're no longer in the Lochner era (DP to protect Economic rights)
- but now, substantive due process has fallen into protecting personal rights
- **substantive Due Process** – no genetic basis which distinguishes from Buck v. Bell

RIGHT TO PURCHASE AND USE CONTRACEPTIVES

GRISWOLD V. CONNECTICUT
UNCONSTITUTIONAL: A state law that prohibited the use and distribution of contraceptives
Relevant Statute: Any person who assists, abets, counsels…or uses to use any drug, medicinal article, or instrument for the purpose of preventing conception shall be fined not less than 50 dollars …

- Prosecution of Griswold a director of planned parenthood for providing contraceptives to a married woman
- **Court** found that the right to privacy was a fundamental right; **BUT** Douglas rejected that it was a right that was protected under the liberty of DP clause
- **Instead found right to privacy** in 1st, 3rd, 4th, 5th amendments
    - That these amendments have "penumbras" that encompass things that aren't expressed
    - Various guarantees create zones of privacy
    - **Douglas tried to hold opinion on these privacy penumbras and avoided substantive Due Process**
        - **But because bill of rights applied to states through DP of 14th, it IS ultimately a DP analysis**
- Douglas focused NOT on right to choose in procreation or make reproductive choices BUT instead on the privacy of the bedroom

CONCURRENCE – Goldberg
Uses a 9th Amendment Argument

- purports that the 9th Amendment hasn't been extensively interpreted before, in sum if protects liberties by the 5th and 14th from infringement, and includes the right to privacy
- it finds the rights of marriage and other private issues to fall under the 9th

CONCURRENCE – Harlan

- Thinks that right to privacy should be protected under liberty of DP clause

CONCURRENCE – White

- That it doesn't even meet the rational basis test

DISSENT – Black

- doesn't think there is a Constitutional right to "privacy" especially because it isn't enumerated
- If the 9th Amendment and the DP clause are "properly construed" they cannot support this holding

DISSENT - STEWART

Personally thinks it should be a personal choice, but as a social policy issue thinks it should be able to be decided upon

EISENSTADT V. BAIRD

UNCONSTITUTIONAL: Found a law that prohibited distributing contraceptive to unmarried individuals and allowed distribution only to married persons invalid.

- person charged with giving a woman contraceptive foam at a lecture at BU
- **court held** that the law denied equal protection because it discriminated against non-married individuals
- three classes of distributes (fact that different classes were given different protections, screams EP case)
    - married persons with prescriptions
    - single people
    - married or single obtained to prevent disease
- fails strict scrutiny
    - no legitimate purpose
- expands Griswold in recognizing a right to control reproduction as fundamental
- in *Carey* SC said that any statute to ban contraceptives must meet SS

RIGHT TO ABORTION

- the debate it partly about Constitutional construction

ROE V. WADE

Government cannot prohibit abortions prior to viability and that government regulation of abortions had to meet strict scrutiny.

- **Court** focused on right to privacy, found either in 14th's conception of personal liberty or from 9th's reservation of rights
    - **Uses 14th here**
- **BUT** court did NOT find it in the "penumbras" like in Griswold (**??** – how valid is the penumbra argument now?)
- **Why does it violate right to privacy**
    - Maternity/offspring might force upon a woman distressful life; physiological harm, mental/physical health
- BUT **right is not absolute –** must be balanced with state's interest in protecting prenatal life
- **Strict scrutiny** used in striking balance because right to abortion IF A FUNDAMENTAL RIGHT
- **Court rejects** – argument that fetus is a "person" thus there is a compelling interest to protect that life
- THERE IS a compelling interest in protecting fetus after the first trimester →this point is at viability
- Three trimesters
    - 1 – government cannot prohibit and could regulate only as it regulated other medical procedures
    - 2 – could not outlaw but may regulate abortion procedure to be reasonably related to maternal health
    - 3 – government may prohibit abortion except if necessary to preserve life or health of mother
- EP argument was not really raised

DISSENT –Rehnquist

Doesn't believe that there is a right or "privacy"

- Thinks it should be left to legislature

SC SEEMED POISED TO OVERTURN ROE IN WEBSTER V. REPRODUCTIVE HEALTH SERVICES

PLANNED PARENTHOOD V. CASEY

Court upheld Roe and that states cannot prohibit abortion prior to viability

- overruled the trimester distinctions in Roe
- the statutes in question here are five provisions of the Pennsylvania Abortion Control Act
- **UNDUE BURDEN TEST Government regulation of abortions should be allowed unless there is an "undue burden" on access to abortion**
    - Test for evaluating constitutionality
    - undue burden is such that the state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus
    - guideline principles
        - the woman's right to make the ultimate decision, not a right to be insulated from all others

        - Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden
- **STARE DECISIS – can overturn precedent when…**
    - If proven unworkable
    - In evolution of legal principles that undermined the doctrinal foundation of the precedents
    - Change in the factual predicate for the decisions
    - RELIANCE! (analyze always)
- VIABILITY
    - Reaffirmed that viability was the dividing line during pregnancy; BEFORE – cannot prohibit, AFTER – can be prohibited except when necessary to save mother
    - Balance women's liberty and state's interest; if women waits so long she should be able to be regulated
- TRIMESTER CLASSIFICATIONS
    - Rejected, but doesn't see it as essential holding of Roe
    - 1. Misconceives the nature of the pregnant woman's interest and
    - 2. Undervalues the state's interest in potential life
- this is a substantive Due Process issue
- privacy does not appear in the entire opinion
- Now instead of talking about privacy they add **autonomy** and **liberty**
- Positive argument for upholding Roe
    - Substantive due process that goes beyond protecting the bill of rights
    - Relies on the privacy cases – marriage, procreation, contraception
    - Shows the Court recognizes the basis for this right. Although have to make sure the case law is correct, since its case law
- burden shifting **??**
- application of Stare Decisis
    - RELIANCE – it's difficult to say precisely what the reliance would be
        - Talks about women's EP
        - Women that have been socialized to abortion being the norm might have shaped their lives unconsciously around the security and in reliance

CONCURRENCE AND DISSENT – BLACKMUN

Believes that restrictions of right to abortion violate a women's right of privacy in 2 ways:

- infringes on a woman's right to bodily integrity
- restricts a women's right to make her own decision about reproduction, and the court has already held that it deems these essential rights
- attacked Rehnquist!!
    - "the chief justice's stunted conception of personal liberty"

CONCUR IN JUDGMENT, DISSENT IN PART – SCALIA

- doesn't think the Constitution should be allowed to require states to allow abortion
- thinks the issue is whether this liberty is protected by the Constitution and doesn't think it is
    - 1. the Constitution says nothing about it
    - 2. The traditions of American society have permitted it to be legally proscribing
    - thinks we will "regret" in the same way we regret dred scott

Doesn't think this is a matter of legislative opinion

STENBERG V, CARHART

Court expressly adopted and applied the undue burden test

- **What is an undue burden**
    - 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
- Three problems with undue burden test
    - Tries to combine three questions into one inquiry (last 3 fundamental rts. ?'s)
    - There is internal tension – opinion says both that the state cannot act with the purpose of creating obstacles to abortion and that it can act with the purpose of discouraging abortion and encouraging childbirth
    - Court implied that undue burden exists only if court concludes that a regulation will prevent women from receiving an abortion
        - *Casey*- spousal notification was undue burden

GONZALES V. CARHART

UPHELD an Act regulating abortion procedures

- was different then the act in Stenberg because it is less vague, and has anatomical landmarks

DOES THIS STATUTE PLACE AN UNDUE BURDEN ON WOMEN?

- court says no because there are alternatives
- arguable because some of the alternatives seem dangerous
- Dissent says that at least for some women there is a huge undue burden
- seems like they didn't just "overturn" Stenberg" because it would be obvious that it was politicized decision
- the court does kind of say that they are not going to invalidate on a health exception but in certain cases they will entertain objections
- exceptions
    - if you are in the 2nd trimester and you have difficulties, do you bring a law suit then, you would probably just do it, and hope that your doctor would be released from liability or that the danger was so grave.
    - Could find it is a classification for that particular type of difficulty, and announce that for this type of difficulty we can do abortion

GOVERNMENT RESTRICTIONS ON FUNDS AND FACILITIES FOR ABORTIONS

MAHER V. ROE

UPHELD constitutionality of a law that denied the use of Medicaid funds for non-therapeutic 1st trimester abortions.

- Appellees contend that CT must accord equal treatment to both abortion and childbirth, and that the regulation presents a question under the EP clause of the 14th
- **Court** – says that no, because there is no discrimination against a suspect class; an indigent (poor woman) is not recognized as a suspect classification for pursing EP
- **Issue** – Whether the regulation impinges upon a fundamental right protected by the Constitution
- *Roe* – did not declare an unqualified constitutional right to an abortion, there was no limitation as to a State's judgment to allocate public funds
- The statute place no additional or does not create any burden to a woman's path to an abortion
- Additionally, in the end, should be determined through the legislature

HARRIS V. MCRAE

UPHELD, the Hyde Amendment that prohibited that use of federal funds for performing abortions, except where the mother would be endangered.

- BUT **it does differ from *Maher*** in that there are some necessary abortions that it excludes
    - **Court** – says but, regardless it just doesn't follow that a woman's freedom of choice carries with it a constitutional entitlement to the financial resources availed to a range of protected choices
    - Appellees try to use this point to differentiate from Maher
- like in Maher, the amendment places no governmental obstacle in the path of women who chose to terminate her pregnancy, BUT with the unequal subsidy they encourage childbirth
- **court** – says that ATLEAST Congress subsidizes some
- **THUS,** although liberty protected by 5th affords protection against unwarranted government interferences it does not confer entitlement to such funds as maybe necessary to realize all advantages of the freedom.

SPOUSAL NOTICE AND CONSENT REQUIREMENTS IN ABORTION

PLANNED PARENTHOOD V. DANFORTH (spousal consent)

UNCONSTITUTIONAL, a state law that required a husband's written consent before married woman could receive an abortion unless physician otherwise certified

- while acknowledged the husband's liberty right to procreate, and decisions within the marriage, here the woman is an independent entity and she is more affected by the pregnancy and thus the balance weighs in her favor
- If the state does not have "veto power" then the spouse should not either

PLANNED PARENTHOOD V. CASEY (revisited) – gives the general test for abortion

UNCONSTITUTIONAL, state law that required spousal notification before married woman could receive an abortion

- while ideally in marriage this is a joint decision, understand the statistics about spousal abuse
- there are some alternates of notification, and the statute indicts the physician NOT the woman

- THUS the spousal notification requirement is likely to prevent a significant amount of women from obtaining an abortion → **undue burden**
- Res. Argue – statute imposes a burden of such a small percentage of the women, BUT **court says**,
- Uses *Danforth* as guiding principle
    - The notice requirement will be tantamount to the veto found unconstitutional in Danforth
- State cannot delegate power!!
    - The husband's interest does not permit State to empower him
    - If his interest > wife's interest, then yes, but IT DOES NOT
- marriage as an institution argument
    - If we allowed the "sanctity" of marriage argument we would be following the view of marriage in common law
- the standard is not clear
    - two very different standards (**GET THEM**)
    - court picks the more lenient, substantial infraction

PARENTAL NOTIFICATION IN ABORTION

BELLOTTI V. BAIRD

UNCONSTITUTIONAL: a statute that required consent from both parents of a minor to obtain an abortion

- physician held liable for abortion
- **court** holds that although parents have a constitutional right to control the upbringing of their children, but also acknowledged that females of all ages have a right to abortion
- **found compromise –** could require parental consent for unmarried minors', but only if there was a bypass procedure where minor could obtain by persuading judge its in her best interest
- **in that procedure minor has opportunity to show:**
    - she is mature enough and well enough informed to make her abortion decision in consultation with her physician(ie. Without her parents)
    - even if not able to make decision independently, the desired abortion is in her best interest
- previously held in *Danforth* that a State could not lawfully authorize an absolute parental veto
    - states cannot delegate power
    - in *Roe*, court emphasized the role of the attending physician, ie. Many children who bypass their parents will resort to clinics → less safe

AYOTTE V. PLANNED PARENTHOOD OF NORTHERN N.E.

Holds that invalidating the statute entirely is not always necessary or justified.

- 3 circumstances in which physician may perform without notification
    - When necessary and insufficient time to notify
    - When pertinent person pre-certified approval
    - When minor petitions judge to authorize
- 3 propositions
    - Parents have legit interest
    - State does not dispute abortion necessary for preservation
    - NH has not taken real issue - that few actually need emergency abortion
        - **Maintains** that the judicial bypass and State's competing harms protects both physicians and patients
- **remedies**
    - 3 principles
        - Try not to nullify more of a legislature's work than is necessary
        - Restrain from "rewriting" state law to conform it to constitutional requirements
        - Legislative intent – do not want to circumvent intent, thus also **ask** "would the Legislature have preferred what is left of its statute to no statute at all
- **HERE – lower courts** – chose the most blunt remedy and permanently enjoined enforcement – INVALIDATED COMPLETELY
    - **Do you have to ask for specific relief**? Like in Sternberg?
- **HERE** – analysis
    - Only a few of the provisions are unconstitutional
    - Thus as long as they are faithful to legislative intent
    - Act contains a **severability clause** – stating that if any provisions of subdivision is held invalid, such invalidity shall not affect the provisions of statute

CONSTITUTIONAL PROTECTION FOR SEXUAL ORIENTATION
AND SEXUAL ACTIVITY

LAWRENCE V. TEXAS

UNCONSITTUTIONAL:, a statute prohibiting private consensual sexual activity between consenting adults of the same sex.

- *Bower v. Hardwick*
  - Court ruled right to privacy does not protect a right to engage in private consensual homosexual activity
  - **Court** – upheld the law – that the right to privacy protect family, reproduction, and homosexual activity did not fit within this category
  - That court should only protect those rights that are fundamental and if supported by Constitution's text
- **Court** overrules *Bower*
  - First – distinguishes that Bower referred to both homo and heterosexuals, whereas here only homosexuals (screams EP argument!)
  - **Holds** – there is constitutional protection for all individuals in the most intimate and private aspects of their lives
  - **This right of personal relationships/intimacy** – is a liberty right protected by DP clause
- **reach of decision**
  - affirmation of a right to privacy under the Constitution
  - that sexual activity is a fundamental aspect of personhood entitled to Constitutional protection
  - no legit state interest is regulating homosexual conduct
- from Bower and beyond, the society cannot use the law to proscribe a "moral code"

2 Principle Cases after Bowers

- *Casey*
  - Reaffirmed the substantive force of the liberty protected by the Due Process Clause
  - In choices central to personal dignity and autonomy are central to the liberty protected by 14th
- *Romer v. Evans*
  - An alternative argument is the EP Clause; Said rationale basis
- STANDARD – something "more" from rationale basis…but not clear at all

CONCURRENCE – O'CONNOR

She concurs that the statute is unconstitutional, BUT does want to overrule Bowers,

- she thinks that the conclusion should not be based on Substantive Due Process, but instead **the EP of 14th**

Applies the Rational Basis Standard

DISSENT – SCALIA

- court didn't declare homosexual sodomy a fundamental right under Due Process Clause
- nor does it subject the law to standard f review that would be appropriate if it was (strict scrutiny)

Doesn't think Bowers should be revisited – because failed to show why need to move away from stare decisis

- **breeds trouble, because Roe satisfies all though categories, thus maybe now vulnerable to overturning ?** also includes a slew of other cases possibly over-turnable

Discusses Substantive Due Process and strict scrutiny

- there is no right to "liberty" under DP, instead States can deprive so long as there is DP
- only fundamental rights qualify for heightened scrutiny, and Court doesn't hold that this IS a fundamental right
- thus should only be rational basis → which it passes

Equal Protection

- argues that men and women are subject to the prohibition equally, and thus there is no denial of EP, since its precisely the same distinction regarding partner that is drawn
- thus is O'Conner continues her argument she would have a hard time upholding the laws prohibiting same-sex marriage

Notes:

- a potential amendment restricting marriage to man and woman, would be interpreted narrowly
- **standard of review** – court shies from stating an actual standard of review, although it says a "legitimate purpose"
- eventually may de-emphasize rigid standards of levels of scrutiny

FIRST AMENDMENT: FREEDOM OF EXPRESSION

Historically:

- Undoubtedly was a reaction to the suppression of speech and the press that existed in English society
- **There is little indication of what framers intended**
- SC cases dealing with freedom of expression focus less on framer's intent than do other cases

Fundamental Right?

- although the Amendment is written with absolute language "no law" SC never accepted that view (Aside from Hugo Black)
- Line drawn – defining what is speech, where and when speech will be allowed

Four theories: (not mutually exclusive) on why fundamental right

- Self-Governance – that speech (especially in politics) is fundamental/core of the 1st
- Discovering Truth – marketplace of ideas, expression (but everyone isn't always truthful!)
    - "marketplace of ideas" – that freedom of speech is essential to the discovery of truth
- Advancing Autonomy – to voluntarily engage in act of speech
    - Freedom of speech is an essential aspect of personhood and autonomy
    - Critics – that there is no inherent reason to find speech an inherent right
- Promoting Tolerance - That it is integral to tolerance valued in society

Strict Scrutiny is used for content-based restrictions, while intermediate scrutiny is used for content-neutral restrictions

TURNER BROADCASTING V. FEDERAL COMMUNICATIONS COMMN.

Section 4 and 5 of the 1992 Act required cable television to devote a portion of other channels to the transmission of local broadcast TC stations

Issue – Whether these provisions abridge the freedom of speech of the press (was it content based?)

Rationale:

- must-carry's "regulate" in two ways:
    - reduce number of channels over which cable operators exercise unfettered control,
    - they render it more difficult to compete for carriage for cable programmers
- 1st amendment goes not allow governmental control over the content of the messages expressed by private individuals
- STRICT SCRUTINY – for content-based, INTERMEDIATE for content neutral

HERE

- must-carry on face impose burdens and confer benefits
- 1. but while there is a requirement for number, etc, no requirement regarding the content
- 2. minimum of programmers also not content, because it extends to all cable programmers irrespective of programming

DISSENT- O'CONNOR

- agrees that not all speaker-based regulations need to be subject to strict scrutiny
- there is substantial governmental interest in ensuring its continuation
- preferences for diversity, localism, educational programming, and for news and public affairs all make reference to content
    - thus thinks the courts view that interest in diversity is content-neutral

Notes:

- court did not decide constitutionality but remanded for intermediate scrutiny
    - eventually upheld the constitutionality under intermediate scrutiny
- Kennedy reasserted that if a law is content-neutral and it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.

Some categories are unprotected or less protected by the 1st Amendment such as incitement of illegal activity, obscenity, and defamation

- these categories are content based
- exceptions of strict scrutiny

How is it determined whether a law is content-based

- if not, will be contend-based and must meet strict-scrutiny
- view-point neutral – government cannot regulate speech based on ideology

BOOS V. BARRY

Court found that the law was view-point neutral although subject-matter based

RELEVANT STATUTE – prohibited the display of any sign within 500 ft of foreign embassy if sign brought foreign government into public odium (P's wanted to carry sign critical of Soviet Union)

Rationale:

- display clause is content based – because if they can picket is dependent on whether they are critical of the government or not
    - ie. Difference between favorable speech about foreign government or critical

- **Court** says that is it no viewpoint based (because no way to specify which view is prohibitied because that is determined by particular governments policies) but it is content based (no criticism!)
- Content –based so SS
    - **Court** – says that other private individuals do not have the luxury of someone shielding them, and are not persuaded that the differences between foreign officials and regular citizens require us to deviate from these principles
- **This actually seems to be more view-point based**
- Strict scrutiny applied, in content-based
- Does NOT clearly apply the strict scrutiny test

REPUBLICAN PARTY OF MINNESOTA V. WHITE

Issue – Whether the 1st Amendment permits the Court to prohibit candidates for judicial election in that State from announcing their views on disputed legal and political issues

- **Facts:** HERE – Wersal distributed literature criticizing decisions on abortion, crime, and welfare.

Rationale:

Text of statute

- prohibition extends to the candidate's mere statement of his current position even if he does not bind himself to maintain that position after election
    - because there is a separate "pledges and position" clause

Overall – prohibits statement of any views that are not complacent

SS - Narrow tailoring?

- No, because there were alternative means and cannot control what judge will have opinions about
- is it content based? YES. Tell you the sort of topics that you can and cannot address → strict scrutiny applies
- compelling interest?
    - Alleged is judicial impartiality, and the appearance thereof
    - narrowest sense of impartiality, lack of bias to either party, for or against
- judge has to be learned in the law → ie. They would probably already have opinions in the law
- impartiality – openmindedness
- if the concerns is the views, then they should all be regulated
    - if they were regulated can they ban all the other stuff?
    - Scalia thinks it is under-inclusive, that Minnesota must be pursuing some other purpose
    - might be an incumbent protection scheme

Why can't the state have a different election system for judges, why won't the 1st amendment tolerate that? Should there be a separate form of analysis?

- there are certain situations where the government must allow content-based regulations
    - examples – public library buying certain books, subsidizing certain speech, theaters etc
- recently, the court indicated that in such circumstances the government must be view-point neutral, but otherwise can consider content

CITY OF RENTON V. PLAYTIME THEATRES

RELEVANT STATUTE – ordinance that prohibits adult motion-picture theaters from locating within 1,000 ft of any residential zone…etc

- **Court** comes to the conclusion that it isn't content based, argue that it is entertainment as a general category
- Time, place, manner restrictions are supposed to be content-neutral and these are not
- Rely on DC findings of the secondary effects of adult theatres and not the content itself
    - Although isn't necessarily mutually exclusive
- **TEST for content based** – Strict Scrutiny

Notes:

- STRONG CRITICISM
- BUT, *City of Renton*, is always an argument
- Looks like a special rule for adult entertainment
- No general doctrine of secondary effects (where speech has negative secondary effects)

NATIONAL ENDOWMENT FOR THE ARTS V. FINLEY

RELEVANT STATUTE: A federal Act that requires art receiving subsidies to encompass artistic excellence and merit

- after the "piss Christ" painting, the act was amended by Congress to require the Chairperson to take into consideration the general standards of decency and respect for the diverse beliefs and values of American public

Rationale:

- the R's bring a facially discrimination challenge
- Argue that the provision is viewpoint discrimination because it denies those who don't conform to general public views
- **Court** finds that the government's argument that the amendment was aimed at reforming procedures rather than precluding speech, undercuts the R's arguments that it is being used as a took for invidious viewpoint discrimination
    - **In past cases of viewpoint discrimination** – the discrimination was more evident and more substantial
- thus until the amendment is applied in a manner that raises concern about suppression of disfavored viewpoints; UPHOLD the provision
    - here – as long as legislation does not infringe on other constitutionally protected rights, Congress has latitude to set spending priorities
    - it is NOT discrimination if choosing to fund one activity to the exclusion of the other

DISSENT – SOUTER

- thinks the act mandates view-point based decisions, and feels that the government fails to provide adequate justification as to why it is exempt from "1st Amendment protections"
- this should follow rule that government cannot prohibit the expression of an idea simply because society finds the idea offensive or disagreeable
- thinks an Act that fails to respect America's diverse beliefs and value IS inherently viewpoint discrimination

Notes:

- it's really hard to find a compelling government interest that doesn't have to deal with suppressing speech

US V. AMERICAN LIBRARY

RELEVANT STATUTE: a library will not receive federal assistance to provide Internet Access unless it installs software the block images that constitute obscenity or child pornography

- SC upheld

Rationale:

- Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its objectives
- The library is entitled to control/limit pornography in other media sources, thus shouldn't be any different with Internet (HISTORY/TRADITION REGARDING SUBJECT MATTER)
- Apply rational basis; don't explicitly state "standard of scrutiny"
- Dissents argue that it is over-inclusive, in that it over-blocks sites that are innocent because it limits sites based on a word search of keywords
    - **Court** says that it is easily remedied because the patron merely has to ask the librarian to unblock and they will
- **held** – that since use of Internet filtering software does not violate patrons' 1st amendment rights, the CIPA act does not induce libraries to violate the Constitution

CONCURRENCE – KENNEDY

- that on request the library will unblock the filtered material
- if any challenge, the appellees should have asked for an as-applied challenge not the facial challenge
- there are substantial government interests here

CONCURRENCE – BREYER

- thinks a heightened scrutiny should be applied
    - NOT strict scrutiny, but not rational basis either
    - SS too limited and rigid; 1st Amendment doesn't need it
    - Factors to consider
        - If it's the right fit
        - If there are less harmful alternatives
        - If there is a legitimate government objective
        - Is it the right means to the governments purported end
- thinks there should NOT be a presumption in favor of the statute's constitutionality

DISSENT – STEVEN

- wrong to impose a blunt nationwide restraint
- there are fundamental defects in the filtering software
    - its NOT narrowly tailored because it does not have the capacity to exclude precisely defined category of images
    - inevitable that some material will never be blocked (under-inclusive)
    - also, it is over-inclusive in that it'll block innocent site
- remedy is not adequate for over-inclusiveness

- because the patron may not know something is being blocked, and they have to prove a need to see that site

DISSENT – SOUTER

- the action WOULD violate if libraries took it by themselves, thus should be violation if the government did it
- wants SS

Why doesn't the court stick with its analogies to more traditional libraries?

Vagueness and Overbreadth

- Regulating Laws can be challenged as facially unconstitutional on the grounds that they are unduly vague and overbroad
- Successful facial challenged usually means that the law is entirely invalidated
  - THUS – these are **powerful doctrines**

VAGUENESS

A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited/permitted

- important to emphasize that unduly vague laws violate DP whether or not speech is regulated
- doctrine is about fairness, it is unjust to punish a person without providing clear notice
  1. minimum that for state to be able to penalize you for speech, they should be clear
- vague law risk selective prosecution – government can choose who to prosecute based on views or politics

COATES V. CITY OF CINCINNATI

RELEVANT STATUTE: Makes it a criminal offense for 3 or more people to assemble, on sidewalks and there conduct themselves in a manner annoying to persons passing by

Issue – Is it unconstitutional on its face. YES.

Rationale:

- vague because what is "annoying" is subjective
- it is broad enough to encompass many types of conduct within the city's constitutional power to prohibit
- there are other alternatives better suited
- 1st and 14th do not allow Congress to make criminal the exercise of the right to assembly because the exercise is annoying
- **No litmus test as to what is vague**

OVERBREADTH

- law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated
- overbreadth v. over-inclusiveness – overbreadth **includes** over-inclusiveness
  1. **overbreadth is over-inclusiveness PLUS, "plus" is the point about standing (that you can bring the case**
  2. the party challenging the law can challenge on its face that it violates the rights of others
  3. even if the plaintiffs could be criminally prosecuted, they are doing a "service" by getting it off the books
  4. risk that people will NOT bring a challenge, because they couldn't criminally prosecute, and they take the risk
- standard for facial challenges
  1. **not responsible for this outside the 1st amendment**
  2. is overbreadth if substantially overbreadth
     - will often be challenged on arbitrariness
  3. if application of the statute can be unconstitutional in many cases if can be challenged on its face
- substantial overbreadth
  1. no "test"

SCHAD V. BOROUGH OF MOUNT EPHRAIM – prohibits live entertainment but so overbreadth that it included non-obscene, nude dancing – deters privileged acts

Overbreadth Doctrine: 2 aspects

Law must be substantially overbroad – restrict significantly more speech than Constitution allows to be controlled

- in both conduct and speech
  1. what is substantial? – realistic danger that statute will significantly compromise recognized proptections
  2. if a significant number of situations are within the prohibition – and vice versa

A person to whom the law constitutionally may be applied can argue that it would be unconstitutional as applied to others

1. allows someone who is protected to bring it up for someone who is not
2. Court says that because overbreadth is perceived as "strong medicine" it will avoid invalidating laws by allowing courts to construe statutes narrowly and avoid overbreadth

RELATIONSHIP BETWEEN VAGUENESS AND OVERBREADTH

- laws are often challenged under both simultaneously (it is overbreadth, BECAUSE it is vague?)
- best understood as overlapping not identical

BOARD OF AIRPORT COMM OF LA V. JEWS FOR JESUS

Issue: Whether a resolution banning all 1st Amendment activities at LAX violates the 1st amendment **YES.**

- The overbreadth doctrine – an individual whose own speeh or conduct may be prohibited is permitted to challenge a statute on its face because it threatens others not before the court AND it was substantial

Vague but NOT overbroad

Sometimes a law can be vague but not overbroad

- ie if law prohibited only speech not protected by 1st (vague as to what is protected)

But often a law that is vague is also objectionable under overbreadth doctrine

- if the limits are vague, there is a change it is overbroad

Notes!!

- **if there is an overbreadth argument, the Defendant can argue that the statute COULD be construed narrowly**

Compelled Speech

The Government also can infringe the 1st Amendment by compelling speech; there is also a right to be silent

WEST VIRGINIA STATE COARD OF EDUCATION V. BARNETTE (pledge case!)

RELEVANT STATUTE: All teachers and children required to participate in the pledge

- failure = insubordination for which students was expulsion and parents could suffer fines/jail

Rationale:

- the pledge is a form of utterance; symbolism that requires affirmation of a belief
- **current standard** - censorship/suppression of expression toleration ONLY when clear and present danger of action
- the 14th amendment → that this is a fundamental right and it does not different that the flag is America
    1. no ability to force citizens to conform
- **silence in a form of expression/speech** which is foundation of compelled speech arguments

DISSENT – FRANKFURTER

- believes that the Court cannot say that this is a liberty outside of regulation
- there is a legit state interest in promoting good citizenship

Notes:

- Court maintained this position in *Wooley v. Maynard* where it ruled that an individual could not be punished for blocking out the portion of license plate that contained the NH motto
    1. "right of freedom of thought protected by the 1st includes both the right to speak freely and the right to refrain from speaking at all"
- right now to speak includes a right to not disclose one's identity when speaking
    1. *Talley v. California* – SC declared unconstitutional a ban on anonymous handbills

RUMSFELD V. FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS

There was a law that law schools would lose funding unless they complied to on campus interviews from military recruiters. (guise that they have an interest to raise armies) (lower standard because deference to military?) there were protests

Issue: Is the condition unconstitutional?

- the school could put in policies for those who disagree
    1. issue of what kind of protests to allow, etc
- declared there was a freedom of speech and a freedom of association
- do we have literal compelled speech? NO.
    1. there is no text saying that the law school HAS to speak
- Grutter and how law schools have an autonomous mission

MCINTYRE V. OHIO ELECTIONS COMMN

Issue: Whether an Ohio statute that prohibits the distribution of anonymous campaign literature is a law abridging the freedom of speech within the 1st

- P acted independently and distributed literature that was not false, libelous, etc.

Rationale:

- the name is like any of the other information to which author has discretion to include/disclose
    1. here what she did IS the essence of 1st Amendment expression – handing out leafless in the advocacy of a politically controversial viewpoint
- thinks we should exact SS and uphold ONLY is narrowly tailored to serve overriding state interest
- State argues that even under SS, the disclosure requirement is justified by 2 huge state interests
    1. 1. interest in preventing fraud and libel
        - **Court** says this isn't a narrowly tailored prohibition to bring the means to an end of fraud/libel
    2. 2. interest in providing the electorate with relevant information to be sufficiently compelling to justify
        - **Court** says means nothing more then provision of additional information, and thinks the identity is no difference from other content
- says the restriction is overreaching because it applies regardless of character or strength of author's interest in anonymity
- **Anonymity is a shield from the tyranny of the majority**
- **Political speech is the CORE of freedom of speech**

CONCURRENCE – THOMAS

- thinks the dispositive question should be if freedom of speech as originally understood protected anonymous political leaflets – thinks it did
- analysis should focus on practices and beliefs held by Founders

Notes:

- should've mentioned the Federalist Papers
- in order for there to be SS. There has to be a burden on speech: that you have to sign your name
    1. may make people reluctant / would suppress some speech
- they call it "exacting scrutiny" → SS

BUCKLEY V. AMERICAN CONSTITUTIONAL LAW FOUNDATION

RELEVANT STATUTE IN QUESTION: required circulators to wear id badge and report all names and addresses of paid workers

- DC – the requirement limited the number of people willing to work for us and degree they were willing to go work in public → thus inhibited the process
- State argues that it enables public to identify and the state to apprehend misconduct
- While McIntyre is controlling, HERE the infringement is even greater
    1. Because this is a more heightened experience
        - Circulator must endeavor to persuade electors to sign and forces personal information at that moment
    2. The badge requirement does not qualify the more limited election process alluded to in McIntyre
- THUS – requirement forces circulators to surrender the anonymity they enjoy by volunteer counterparts
- Thus fails exacting scrutiny

UNPROTECTED AND LESS PROTECTED SPEECH

Incitement of Illegal Activity

Poses a value question: How should society balance its need for social order against its desire to protect freedom of speech?

HISTORICAL PROGRESSION

Clear and Present Danger Test → Reasonableness Test → Reformulated Clear and Present Danger Test → narrowly defined incitement to maximize protection of speech

- current incitement approach (advocacy can only be punished if there is a likelihood of imminent illegal conduct and the speech is directed to causing imminent illegality

CLEAR AND PRESENT DANGER

SCHENCK V. US

- violation of Espionage act (alleged that D conspired to have printed and circulated to men in armed forces a document set forth and alleged to be calculated to cause insubordination and obstruction
    - document "assert your rights" to oppose the draft

Court finds that the only purpose could have been to instigate opposition

- **have to look at under the circumstances that it was war time**
- **GUILTY**
- Court adopts a clear and present danger that he speech would bring about the substantive evils

FROHWEK V. US
- D alleged to have circulated a publication that was counted to have caused disloyalty, mutiny, and refusalof duty in military
- Court says no particular problem, that this should be able to be written or said during war time,
- It is impossible to say that it might now have been found that this spark was enough to evoke violent actions

DEBS V. US
- That D attempted and did obstruct recruiting and enlistment service of the US
- D was a former presidential candidate
- Statute here seems more onerous then Espionage act

ABRAMS V. US
- court says it'd be really difficult to find the intent
- Holmes says that conduct/intent cannot be found here
    - Must protect under "marketplace of ideas belief"
- Question isn't was there rational basis, but was there a compelling interest

THE REASONABLENESS APPROACH

Holmes' test – suggests that government has to show that there was an imminent danger
- beginnings of 1st Amendment theory
- reasonableness test – will uphold laws and their applications so long as the government's law and prosecution were reasonable

GITLOW V. NY
- this case incorporated the 1st Amendment into the states
- **Law upheld** – the law made it a crime to advocate the duty, need, or appropriateness of overthrowing government by force or violence
- "every presumption is to be indulged in favor of the validity of the statute" – rational basis
- Thinks, this speech might be spark → flame → etc
- DISSENT – HOLMES – says that there was no clear and present danger
    - There has to be some clear probability that the result will happen

WHITNEY V. CALIFORNIA
- Free speech rights are not absolute
- Upheld a conviction for criminal syndicalism (raised a threat to society)
- Invoked Holmes' clear and present danger test further that state has the power to punish those who abuse their rights of speech …"by utterances inimical to the public welfare, tending to incite crime, disturb the public peace, or endanger the foundations of organized government and threaten its overthrow." In other words, if words have a "bad tendency" they can be punished. At the convention she actually advocated reform through ballot measures.

CONCURRENCE – BRANDEIS **– great defense of freedom of speech**
- citizens have an obligation to take part in the governmental process fully and without fear; and it government can punish unpopular views, then cramps freedom and will strangle process, thus free speech cannot be abstract value, but KEY ELEMENT IN DEMOCRACY
- advocacy v. incitement
    - nothing is danger if there is full opportunity for discussion

THE RISK FORUMULA APPROACH

DENNIS V. US
- UPHELD conviction for violation of Smith Act; D was president of Communist Party
- In upholding, invoked Hand's BPL test
    - **In each case must ask whether the gravity of the evil, discounted by its improbability justifies such invasion of free speech as necessary to avoid the danger**

THE BRANDENBURG TEST

BRANDENBURG V. OHIO

Held cannot punish inflammatory speech unless it is directed towards inciting and likely to incite

- seems to adopt the DISSENTS from Whitney and Dennis; **more protective of speech**

Was the indictment of a KKK leader who invited a reporter to attend a rally and film the events; he was indicted for violation of a Criminal Syndicalism statute for advocating…duty, necessity…of crime, sabotage, etc,

- FILM 1 shows the figures burning a cross, no one outside the KKK and newsman were present; **most of the words were incomprehensible → BUT those comprehended were scattered about Negroes and Jews**
- FILM 2 the appellant was said to be making a speech referencing Negroes and Jews

Rationale: Dennis, fashion principle that the constitutional guarantees of free speech do not permit a state to forbid discussion of use of force unless it is directed to inciting or producing imminent lawless action

- "the mere abstract teaching of the moral propriety or even moral necessity for a resort to force and violated is not the same as preparing a group for violent action and steeling it to such action"
    - Statute that fails to draw this distinction intrudes upon 1st and 14th freedoms
    - HERE – this act is unconstitutional, because it punishes mere advocacy and to forbids advocating certain assembly
    - WHITNEY IS OVERRULED

AFTERMATH OF BRADENBURG

- the more speech-protective formulation of incitement test
- conviction after Brandenburg constitutional only if: (1) imminent harm, (2) likelihood of producing illegal action, and (3) intent to cause imminent illegality (this is new to this test)
- BUT doesn't answer how to appraise imminence or likelihood
- *Hess v. Indiana* – cannot indict for potential of future action and an unknown time
    - There was no evidence of an imminent disorder
- *NAACP v. Claiborne Hardware* – mere advocacy of use of violence is not indictable under Brandenburg, **it being emotionally charged doesn't make a difference**

FIGHTING WORDS

When may speech be punished because of the risk that it may provike an audience into using illegal force against the speaker (in reaction)?

Fighting words are unprotected

CHAPLINSKY V. NEW HAMPSHIRE

Jehovah's witness was on the sidewalk calling religion a "racket"

- D shouted "you are a god-damned racketeer" and a "damned Fascist" and was arrested under the statute preventing intentionally offensive speech directed at others; D appealed arguing that the law was"vague" and infringed 1st and 14th
- **Court** upheld the arrest unanimously
- Purported 2-tier approach to 1st Murphy wrote: **despite the 14th protections**

  There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.
- Although the Court continues to cite Chaplinsky's position on "fighting words" approvingly, subsequent cases have largely eroded its initial, broad formulation; libelous publications and even verbal challenges to police officers have come to enjoy some constitutional protection
- **this opinion says you can criminalize fighting words**
- **two situations where speech constitutes fighting words**
    - **where it is likely to cause a violent response against the speaker**
    - **where it is an insult likely to inflict immediate emotional harm**
- SC can't interpret state statutes for autonomy reasons
- SC hasn't upheld a fighting words conviction since – even though not overturned
- 3 ways SC has used in overturning convictions
    - Narrowed scope of fighting words by saying that it only applied to speech directed at another person that is likely to produce a violent response
    - Unconstitutionally vague or overbraod (thus facially invalidated)
    - Some statutes that prohibit expressions against race to be impermissible content-based restrictions

Narrowing Fighting Words
Street v. NY – burning a flag is not unprotected fighting words
Cohen v. California – speech was not directed at a particular person

Fighting Words Laws Invalidated as Vague and Overbroad

GOODING V. WILSON (narrowing fighting words doctrine)
Law indicted any speech that was opprobrious words or abusive language

- "SOB I'll choke you to death"
- Chaplinsky forbids punishment of speech not within narrowly limited classes of speech
    - Power to regulate must be exercised as to not infringe the protected freedom
- using "opprobrious and abusive" gives greater deference then "fighting words"
- 2 dissents – have beef with the overbreadthness
    - Thinks it is facially invalid

RAV V. CITY OF ST. PAUL, MN
Court struck down the ordinance and overturned conviction of teenage boy who burned a cross on a black family's lawn

- the cross was created from broken chair legs
- P moved to invalidate saying that the statute was overbroad and content based

On its face it looks like it is broader then the Chaplinsky rule

- said we're narrowing this statute so it applies to those acts involving swastikas, etc

Facts:
Minor, RAV → could have been prosecuted under a number of other charges

- **two principles**
    - When the "entire basis for the content discrimination consists of the very reason the entire class of speech is proscribable (legally) no significant danger of viewpoint discrimination exists
    - A valid basis for according different treatment to a content-defined subclass of proscribable speech is that the subclass "happens to be associated with particular secondary effects of the speech so that the regulation is justified without reference to the content of the speech"
        - Ex. Allow all obscene live performances except those involving minors
- HERE – facially unconstitutional

Although the phrase in the ordinance, "arouses anger, alarm or resentment in others," has been limited by the Minnesota Supreme Court's construction to reach only those symbols or displays that amount to "fighting words," the remaining, unmodified terms make clear that the ordinance applies only to "fighting words" that insult, or provoke violence, "on the basis of race, color, creed, religion or gender." Displays containing abusive invective, no matter how vicious or severe, are permissible unless they are addressed to one of the specified disfavored topics. Those who wish to use "fighting words" in connection with other ideas -- to express hostility, for example, on the basis of political affiliation, union membership, or homosexuality -- are not covered. The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.

- This is also viewpoint discrimination
- **Political sound truck analogy**
    - can ban all use of sound trucks, but not just one political parties usage
    - BUT counter argue that banning a sound truck is about the volume, presence in residential areas, has nothing to do with the content, but about the mode

There is a good argument that the Court misapplied its own test
Scalia – there were some decisions that might be better left to the Legislature

- it seems pretty hard to find viewpoint discrimination here
-
- P is arguing for Chap to be modified/narrowed, court says no
- But If Chap stays as it is, this ordinance is not overbroad

Concurrence – would decide on the basis of overbreadth doctrine

- hard to justify because as interpreted by MN courts, it is NOT overbreadth
- thus concurrence should probably be dissent
- even if purported that there is viewpoint discrimination, must ask the question of whether it passes SS

VIRGINIA V. BLACK

Court invalidates a statutes criminalizing cross burning because it takes cross burning as prima facie evidence of intent to intimidate

- it blurs distinction between proscribable threats of intimidation and the KKK's protected message of shared ideology; BUT it can be a criminal offense if the intent to intimidate is proven

Court found that statutes "cross burning done with an attempt to intimidate is constitutional because such expression has a long and pernicious history of impending violence"

- O'Connor's opinion created new area of unprotected speech for "true threats"
- Under new area, state may choose to prohibit only those forms of intimidation that are most likely to inspire fear of bodily harm
- BUT did **strike down** provisions that any burning = prima facie evidence of intent to intimidate…facially unconstitutional **thus** state must prove every element, (including intent to intimidate

THOMAS – cross-burning itself should be a 1st Amendment exception like flag-burning due to historical associations with terrorism
SOUTER – believe that cross-burning even with the proven intent to intimidate should not be a crime under RAV precedent because of the statute's content-based distinction