# Contents

AS APPLIED OR FACIAL CHALLENGE?

- As applied: as applied to THIS PLAINTIFF, the law is unconstitutional
- Facial: under no circumstances can this law be constitutionally applied.

# Judicial Review

## Judicial Review of Congressional Authority

### Marbury v. Madison, p. 2 (1803) – ESTABLISHES JUDICIAL REVIEW

Facts: π appointed as midnight judge, end of Adams term signed and sealed, not delivered. Jefferson refuses to uphold the commissions. Π sues in SC under Judiciary Act of 1789

- Holding: (1) Π has a legal right to commission and (2) the laws warrant a remedy BUT (3) SC doesn't have constitutional original jurisdiction to issue mandamus.
    - Act of Congress (§13) cannot create original jurisdiction in conflict with the text of the constitution
    - Constitution controls any legislative act repugnant to is (Supremacy Clause & amendment process in Art. V)
- Degrades and invalidates constitution if Congress can pass any ordinary law and contradict or overrule constitution
- Oath of office taken by judges AND Congress to uphold the Constitution

**Historical debate: Jeffersonians vs. Federalists**

- Jefferson: Narrow view of judicial power.
    - Each branch of government has the authority to make independent constitutional judgments
    - Rejected judiciary as special, final or exclusive arbiters of the meaning of the constitution
    - Concerned about too much consolidation of power in federal judiciary
- Federalists: expansive view of federal judiciary
    - Constitution to be enforced by independent judges, even in the face of popular opposition
    - JR essential part of constitutional structure
    - JR Decisions are final, designed to check the powers of exec and leg

**Marshall could have avoided JR question entirely.**

Other options: recusal, CL (vests upon delivery NOT signed and sealed), political question (mandamus unavailable because discretionary decision of executive), undue interference with separation of powers, different interpretation of §13, lack of SMJ, Art. III language as floor of original jurisdiction instead of ceiling (illustrative not exhaustive)

**Should SC have deferred to executive on issue of vesting?** Individual rights vs. discretion of co-equal branch of government

- Marshall distinguishes between political question (judicially unreviewable) and questions made expressly unreviewable by the constitution itself
- Why was this not a political question?
    - There's no constitutional right to commission, political battle exists, constitution is silent

**Broad vs. Narrow reading of Marbury: "It is emphatically the province and duty of the judicial dept to say what the law is."**

- *Broad: C*onstitutional interpretation as the exclusive purview of the SC. Special constitutional role
- *Narrow:* Constitutional interpretation as incidental to the judiciary's role of deciding cases

### Cooper v. Aaron, p. 20 (1958) – BROAD READING OF MARBURY

Facts: After *Brown* decision, state of AK suspended court's decision and challenged desegregation order, argued not bound because not a party

- Holding: State must obey SC orders resting on constitutional interpretation, even if not a party to original case
- Reads Marbury judicial review as **exclusive** power of the **Supreme Court**
- Makes SC **holdings** into supreme law of the land under the supremacy clause

# Judicial Review of State Court Judgments

## Supreme Court Authority to Review State Court Judgments

### Martin v. Hunter's Lessee, p.17 (1816) – VERTICAL SEPARATION OF POWERS

Facts: VA took land from FB loyalists after war, Δ got land, π sued under protection of federal treaties. Initial case, SC found for π. VA refused to comply with ruling and VASC holds §25 of Judiciary Act of 1789 unconstitutional

- Holding: SC has final jurisdiction over state courts in federal matters
- Article III: It is the case and not the court that gives jurisdiction
    - Text does NOT directly support SC review, but Court says impliedly
- State sovereignty isn't subverted because everyone is subject to the US constitution
- Uniformity (consistent application of fed law among states) and fairness (state prejudice and self-interest) concerns

### *Cohens v. VA*, p. 18 (1821) SUPREMACY CLAUSE OFFERS NO IMMUNITY FROM STATE LAWS

Facts: Δ selling DC lottery tickets in violation of VA law

- Differs from *Martin*: State was a party to the case; they argued that as such the court could only have original jurisdiction, NOT appellate jurisdiction
- Holding: Marshall upheld §25 – judicial power extends to all cases arising under the constitution or law of the US, whoever the parties are
- Expressed additional doubt about the ability of state judges to properly interpret & apply federal laws

**Internal vs. external checks on Congressional power as it relates to SC**

- *Internal*: connected to Art.III itself, determine essential or core functions of the SC
- *External:* ex: Bill of Rights constrains Congress's court stripping power (external to Art.III)

## Political Restraints on SC: May Congress strip SC of Jurisdiction?

### *Ex parte McCardle,* p. 28 (1869) – ART III §2 =PLENARY CONGRESSIONAL POWER, CHECKS SC

Facts : Newspaper editor arrested for publishing libelous article, brought habeas corpus action in fed ct. intervening Act of Congress created exception to appellate jurisdiction for SC. SC cannot issue remedy

- SC cannot hear the case if Congress removes its appellate jurisdiction
- Art. III required Congress to create SC, left lower courts to Congress's discretion
- Art. III §2 is a plenary power, positive grant to affect or modify appellate jurisdiction

# National Powers

- Drafters recognized need for enough centralized power for national government to accomplish tasks without jeopardizing state sovereignty
- Congress's powers are **enumerated** in Article I + **necessary and proper clause** (Art. I. §8, cl. 18)
- **10th Am.**: reserves unenumerated powers to the states

- Constitution does not diminish state police powers.

### McCulloch v. MD, p. 63 (1819) SCOPE OF CONGRESS'S POWER UNDER NECESSARY & PROPER CL.

Facts: Congress chartered national bank under Article I. MD attempts to tax it

- Holding: Congress can charter bank to facilitate enumerated powers and under N&P clause (Art.I)
- Constitution omitted language in 10th Am. from articles of confederation that required EXPRESS enumeration of full powers of Congress. Marshall reads this to mean Congress has some implied powers
- Enumerated powers facilitated by bank: lay/collect taxes, commerce cl., etc, meaningless if Cong can't legislate means
  - Bank facilitates enumerated power, not substantively big enough to require enumeration
  - **Broad view of Marbury:** SC remains as a check on Congress to ensure not abusing power
    - "If it is to be decided, by this tribunal alone can the decision be made"
- Necessary and proper NOT primary basis of argument
  - MD argued N&P limits Congress's power → Court rejected in favor of broad reading of "necessary"
  - Structural argument: placed among powers (§8), not limitations (§9)
- State cannot tax federal bank – undermines congressional power if state can destroy bank by taxing
  - Relies on structure and operation of representative government – political check doesn't work because many US voters couldn't vote MD legislature out

Note: Marshall didn't NEED to decide broad view of N&P. Could have just held that bank WAS necessary & used MD's reading

**State sovereignty debate**

- MD argues *compact theory,* states ratified constitution and gave power to national government → federal government exercises power SUBORDINATE to state's power
- **Marshall rejects**: government OF THE PEOPLE. Federal government is supreme in sphere of actions. Constitution obligates states and binds them

### US Term Limits v. Thornton, p. 76 (1995) STATE SOVEREIGNTY vs. CONSOL'D NAT'L POWER

Facts: AK attempted to impose additional limits on US reps & sens on top of Art. I.

- Holding: State may not create additional qualifications of "non-incumbency" upon Congressmen supplemental to those in Art. I of the Constitution

*Stevens*

- Qualifications clauses: HofR: Art.I§2cl.2, Sen: Art.I§3cl.3
- Uniformity need, nat'l mandate req'd if these are necessary qualifications (*Powell* held Congress can't alter)
- **10th Amendment does NOT reserve these powers to the states**
  - Not within original powers of the states (10 only reserved that which the state had before)
  - Congress intended Art. I to be SOLE qualifications, divested states' powers to alter
- Relies on *McCulloch*: direct link between national government and the people. States can't intervene

*Kennedy (C):* Federalism designed to protect citizens interests as citizens of US + STATES

- *McCulloch* supports the idea of national citizenship, independent of but additional to political identity of state
  - Rejected power of states to interfere with federal government in its sphere – controlled by the people without the collateral interference of the states

*Thomas (D):* Constitution's silence does not bar state action

- DEFAULT RULES OF CONSTITUTIONAL SILENCE: state gets the power, federal government lacks the power
- Doesn't make sense to refer to the people without referencing states – they necessarily intervene (conduct elections)
- Says constitution *wasn't silent* in *McCulloch*

## Commerce Clause – Art. I §8 cl. 3

- Restraint on state actions – free trade is usually the national interest
- Broad source of Congressional authority – judiciary rarely enforced checks on Congress before *Lopez*
- **Articles of Confederation vs. Constitution**

    - Articles were failing to appropriately regulate interstate commerce
    - Constitution grants Congress power to "regulate commerce with foreign nations, and among the several states & with Indian Tribes."
- Fed. 22 – attempt to decrease discord among the states
    - End hostile state restrictions, decrease retaliation and protective tariffs on imports from other states, promote a national market.
- 1937 – Court began to defer to Congressional action under commerce clause
- 1995 – *Lopez* – beginning of movement of partial return to judicial intervention, decrease unlimited Cong. power

## Gibbons v. Ogden, p. 83 (1824) COMMERCE CLAUSE PRIOR TO THE NEW DEAL

Facts: NY leg granted steamboat monopoly to Ogden. Π begins competing service against NY statute under 1793 fed statute.

- Holding: Congress has plenary power in re: interstate commerce. Limited only by constitution itself and political check
- Defines commerce clause to include intercourse – concern more states than one
- Congress can regulate local activities if significantly or substantially affect interstate commerce
    - Examine cumulative or aggregate effect
    - Intrastate regulation ok if part of regulatory scheme

## *Wickard* p. 102 (1942): aggregate the effects of an activity to determine if commercial (wheat case)

- Though individual effect on market is negligible, taken together with many others who are similarly situated there's a large market impact
- Court upholds application of federal Act to home grown wheat because of the cumulative effect of homegrown wheat on national market

## US v. Lopez, p. 107 (1995) CONG MAY REG IF SUBSTANTIALLY AFFECTS INTERSTATE COMMERCE

Facts: Cong. Passes Gun-Free Schools Act, federal offense to have gun in school zone. Lopez criminally convicted

- Holding: Too tenuously related to interstate commerce, no limiting principle. Concern in re: expansion to national police power

Rehnquist

- Three categories generally accepted as within Congress's commerce clause purview:
    - Use of channels of interstate commerce
    - Instrumentalities of interstate commerce
    - **Regulate activities with substantial relation to interstate commerce**
- No congressional finding in re: commerce – not required, wouldn't be conclusive if there was
- Rejects government's arguments that it's commerce (effect of gun violence in schools on national economy, substantial threat to educational process, increased insurance costs)
- No limiting principle to congressional power, interferes with state's traditional role (criminal law)
- THRESHOLD QUESTION: Is it economic or commercial in nature? If not, we don't get to the standard of review

Kennedy (C): imprecision of content-based commerce clause limits, stake in stability of jurisprudence

- Reiterates federalism concern, court's special role to reign in Congress

Thomas (C): originalist argument, substantially affect test too big an extension → national police power

Breyer(D): Congress needs degree of leeway from Court, "significantly affect" test, but consider cumulative effect of all instances

- Congress had rational basis for concluding gun possession has a significant effect on interstate commerce
    - Education has long been linked to commerce/economy, not an expansion of commerce cl.
- Majority reading upsets fairly settled jurisprudence

Souter (D): defer to congressional judgment on rational legislation, exercise judicial restraint, too expansive exercise of JR

- Rejects the existence or absence of finding as having any bearing on the constitutional question

Note: *US v. Lopez* does NOT overrule *Wickard* aggregate rule

**Uncertainty in commercial or noncommercial distinction**

- Rehnquist: admits uncertainty, but says it's constitutionally mandated
- Consistent with *Gibbons*? There, Congress had discretionary power, check comes from political/elections

**Can Congress link spending or taxation powers with the STATE legislature to encourage a particular result?**

- Ex: linked drinking age to federal highway funding
- This is also a traditional state power, shouldn't it raise the same federalism concerns?

## *Katzenbach v. McClung*, p. 113 FORMAL LEG. FINDINGS UNNECESSARY TO SUSTAIN COMM. CL. LEG.

## US v. Morrison, p. 116 (2000) AFFIRMS LOPEZ

Facts: female VPI student claims rape, sues under VAWA, allowing female victims of violence to seek damages

- Holding: VAWA exceeds Congress's authority under the Commerce Clause

Rehnquist

- No economic component at all to link this to commerce
- Declines to adapt categorical rule of anti-aggregation (doesn't overturn *Wickard*)
- Court's role to assess, extensive legislative record can't save the VAWA
- Slippery slope/no limiting principle concern again. Violent crime is in state's police power not Congress's commerce

Thomas (C): substantial effects doesn't cut it and inconsistent basis for commerce clause jurisprudence

Souter(D): Institutional capacity – Congress better suited for empirical analysis. SC's role is rational basis review

- Distinguishes *Lopez* – tons of congressional evidence indicates effect on commerce
- Argues *Lopez* is the odd case in years of jurisprudence
- Majority improperly ignores state support for federal intervention

Breyer (D): too tenuous and arbitrary of a distinction between economic and noneconomic. Where do we draw the line?

**DOES REHNQUIST ADOPT A PER SE RULE?**

- Does NOT overtly overrule *Wickard*
- Rejects the argument that Congress may regulate noneconomic, violent criminal conduct based SOLELY on that conduct's *aggregate effect on interstate commerce*.
- Regulation and punishment of criminal violent private activity is traditionally within the states' province

## Gonzales v. Raich, p. 118 (2005) AS APPLIED CHALLENGE TO CONGRESSIONAL ACT

Facts: CA passes Compassionate Use Act for home grown marijuana for medical purposes. Congress passed Controlled Substances Act under Commerce clause. CA seek injunctive/declaratory relief from CSA enforcement

- Holding: Congress acted well within its commerce cl. Powers in enacting CSA

Stevens

- Rejects argument that homegrown medical marijuana doesn't affect interstate commerce
    - Purely local activity with substantial effect on economic class of activities and interstate commerce → comm. Cl
    - *Wickard* – ok even if not strictly commercial if an inability to regulate intrastate home mfred product to control supply/demand/market price (aggregate)
        - Fungible commodity, just like wheat
- Rational basis exists for Congress's commerce clause authority (can't exempt individual components of larger scheme)
- Distinguishes *Lopez* and *Morrison*
    - *Lopez* – entire provision outside of commerce clause authority (here just one part)
    - *Morrison* – implies still disagrees with outcome, but outside regulation of economic activity. CSA directly regulates economic or commercial activity

Scalia (C): substantially affect activities are **not** strictly within comm. Cl. EXCEPT through N&P clause

- If necessary to regulate interstate commerce, congress CAN regulate intrastate stuff that may not substantially affect
- Relevant inquiry: means "reasonably adapted" to legitimate commerce clause end?
- Immaterial that possession of marijuana is noneconomic

O'Connor (D): federalism allows for state as laboratory of experimentation

- Outer limits of commerce clause exist to protect states from incursion of federal government
- *Lopez* is materially indistinguishable
- Congress's use of all-encompassing legislation does NOT make it immune from commerce clause limits (too expansive, no limit)
- CA has the authority to experiment

Thomas (D): no effect on national market (isn't bought, sold, transported, etc.) outside of framers' intent. NOT valid exercise of N&P

# Tenth and Eleventh Amendment Cases

***New York v. US,*** p. 127 (1946) NY not immune from federal tax on state-bottled water. No majority opinion produced

***National League of Cities v. Usery,*** p. 128 (1976) STATE AUTONOMY DEFENSE TO FED. LEG. SUCCEEDS. AFFIRMATIVE LIMITATION ON CONG. POWER WHEN IT SEEKS TO LIMIT OR REGULATE STATE ACTIVITY

Facts: legislature extended minimum wage and maximum hour requirements to state and local government employees

- Holding: Unconstitutional despite the fact that it is within the commerce clause. 10th Am. prevents intrusion into traditional state activities

Rehnquist

- FLSA amendments interfere with state and local government function and alter states' rights to structure employer-employee relations
- Concern: impermissible interference with **integral** governmental functions
- Undercuts purpose and traditional authority of state – this exercise of commerce clause power violates federalism

Blackmun(C): concurs with result but allows for balancing if federal government's reason > state's

Brennan(D): cites *McCulloch*'s grant to Congress of PLENARY power, urges judicial restraint when states can protect themselves

***Garcia,*** p. 129 (1985) OVERRULES PARTS OF USERY – REMOVES THE JUDICIAL ROLE

- Holding: rejects as unsound in principle and unworkable, a rule of state immunity from federal regulation that turns on a *judicial* appraisal of whether governmental function is **integral or traditional**

Blackmun

- Finds precedent unworkable because there's no clear line – allows judge with not political check to make state policy decisions
- Procedural safeguards > judicial limits on federal power (structure of federalism protects state interests)
- Political process is a sufficient check on the federal government

Powell (D): States can't be at the mercy of political check on Congress (insensitive to state and local values – Congress responds to NATIONAL constituency)

- Democratic self-government *requires* state and local autonomy, more accessible and responsive to populations
- *Marbury* concern: well within judiciary's role to serve as check on Congress

O'Connor (D): ESSENCE of federalism is that states as states have interests.

- Federal judiciary has DUTY to protect legitimate state interests from federal incursion
- Congress's weak self-restraint is insufficient protection

Rehnquist (D): things will just go back to the way they were

## Tenth Amendment

**New York v. United States,** p. 134 (1992) CONGRESS CANNOT COMMANDEER STATE LEGISLATURE

Facts: Fed. low level radioactive waste policy required states to dispose of waste and created incentives & take title for compliance

- Holding: Congress can **encourage** states but **not coerce**

O'Connor

- Cannot derive meaning of 10th Am. from text – literal reading is a tautology
    - Instead, reads it to say court should determine whether state sovereignty is protected by limitation of Art. I power
    - Consistent with *Garcia*?: *Garcia* rejected judiciary and 10th Am. restricted Congress's Art. I power. O'Connor REJECTS textual literalism in re: 10th Am.

- Bases interpretation in federalist papers and structure of the constitution
- Rule: *Congress may not commandeer legislature of the state. Can't make states govern in any way (require or prohibit). Congress may regulate individuals but not compel the states.*
    - MAY encourage state action, offer choice between incentive and preemption. State officials retain power, make the choice, accountable.
- Take title provision REMOVES choice for state – either option offered is beyond Congress's legal authority, forcing states' hand
    - Provision 3 is a "stick," whereas provisions 1 & 2 are "carrots"

White (D): Rejects distinction between regulation of private parties and of states.
Stevens (C/D): once within Congress's Art. I authority, plenary power. Court should stay out of it

**Common threads for 10th Amendment cases:**

- **Who is accountable? Are we blurring the lines of who to hold responsible for laws?**
- **Federal commandeering – is Congress violating state's sovereignty?**
    - **Are we impermissibly expanding the size of the federal government beyond the framers' intent?**
    - **If we adopt a per se rule against it, then should the triviality of an issue matter?**

### *Printz v. US,* p. 139 CONG CAN'T FORCE FED REG SCHEME BY DIRECTLY INVOLVING STATE OFFICERS

- Holding: Brady Act requiring direct state law enforcement officers to administer federal regulatory scheme is invalid.

Scalia

- Does NOT contest Congress's authority under the commerce clause. Constitution is silent, no text on point
- Rejects congressional authority on history, structure of constitution, and precedent
- **Rejects any balancing of state sovereignty against policy interests. Immunity is a PER SE RULE**
    - Refuses to distinguish NY v. US
        - *Government argues* doesn't compel states to make policy, Congress is accountable
        - *Scalia rejects* because it's an interference with sovereignty. States forced to absorb financial burden AND they're the ones who will ultimately answer to constituents
- Distinguishes *Testa v. Katt* – doesn't allow federal government to direct the state executive branch

Stevens (D): framer intent shows intended to EXPAND capacity of federal government, act through local officials to affect individuals
Souter (D): Cites to Fed. 27, state governments will be "rendered auxiliary to the enforcement of its laws
Breyer (D): points to foreign nations, sometimes best way to safeguard individual liberty and state sovereignty is implementing fed

### *Testa v. Katt,* p. 140 (1947) STATE CTS CAN'T REFUSE TO APPLY FED LAW (SUPREMACY CL)

- Silent in re: whether state EXECUTIVE or LEGISLATURE must enforce federal law

### *Reno v. Condon,* p. 142 UPHOLDS FEDERAL LAW AFTER US v. NY and PRINTZ

- Holding (Rehnquist): Congress retains power to regulate states under general law applicable to private industry
- Congress may regulate state and local activity directly
    - US v. NY is distinguishable because that would require state to regulate its own citizens through enactment or enforcement of the law
- LEAVES OPEN whether when Congress *does* regulate states it may do so *only* pursuant to generally applicable laws

## Eleventh Amendment

### *PA v. Union Gas Co.,* p. 143 (1989) CONG CAN ABROGATE SOVEREIGN IMMUNITY UNDER COMMERCE CL

### *Seminole Tribe of FL v. FL,* p. 143 (1996) OVERRULES PA V. UNION GAS CO.

- Holding: Congress may not use commerce power to abrogate a state's sovereign immunity without the state's consent

Rehnquist

- Court concedes Congress's authority to pass the act, 11 does NOT textually bar Congress from acting
    - Only restricts federal court jurisdiction in re: diversity matters.

- TYPE OF RELIEF is irrelevant to the constitutional question
- **11th Am. confirms 2 part supposition:**
  - **Each state is a sovereign entity in our federal system**
  - **Inherent in the notion of state sovereignty is the ability not to be amenable to suit without consent**
- Congress cannot unilaterally decide to abrogate sovereign immunity in favor of granting some other power

### *Ex parte Young*, p. 143 (1908) FED COURT CAN ISSUE INJUNCTION AGAINST STATE OFFICIALS SEEKING TO ENFORCE AN UNCONSTITUTIONAL STATE LAW

### *Fitzpatrick v. Bitzer*, p. 143 (1976) CONG MAY ABROGATE SOVEREIGN IMMUNITY UNDER 14A§5

- LEAVES OPEN whether Congress could also abrogate state sovereign immunity under the Art. I §8 powers (i.e. commerce)

**What's the difference constitutionally between *Seminole Tribe* (Commerce Clause) and *Bitzer* (14A§5)?**

- **BOTH are plenary powers**
- ***Timing?* 14th Am. came after 11. The Civil War Amendments alters balance between the state and fed governments**
- **Commerce clause produces different analysis – can't use Art. I to circumvent Art. III and 11th Am.**

### *Alden v. Maine*, p. 145 (1999) BARS SUITS AGAINST STATES IN STATE COURTS

- Holding: Congress's Art. I powers do not allow Congress to force states to be subject to lawsuits in STATE courts
- **This holding does NOT come from 11th Am**
- Kennedy devices holding from history, constitutional structure and *Seminole Tribe*
- **Relies on 10th Amendment instead**
  - *Souter dissent response:* 10th not intended to constitutionalize state sovereign immunity. Doesn't restrain congressional authority in re: delegated powers, provides no textual hook for sovereign immunity

### *Federal Maritime Commission*, p. 147 (2002) EXTENDED STATE SOVEREIGN IMMUNITY FROM JUDICIAL PROCEEDINGS TO HEARINGS IN FEDERAL ADMINISTRATIVE AGENCIES

- Thomas relies on STRUCTURE, not TEXT of constitution

## Fundamental Rights

- Bill of Rights includes the 1st 10 Amendments as ratified in 1791. Protect individual rights from governmental action
- Widely construed as applicable to federal government only PRIOR TO the Civil War Amendments
- With the passage of 14, relationship between state and federal governments changed → incorporation debate
- Historically, DPC referred to PROCEDURAL DP, not substantive (explains why π relied on P&I in *Slaughterhouse*)

### Barron v. Baltimore, p. 340 (**1833**) BILL OF RIGHTS RESTRICTED FED ONLY, NOT STATES

Facts: City ruined π's wharf by diverting water. Π claimed 5th Am. gave rise to a cause of action against states

- Holding: Bill of Rights doesn't bind states
- Historical opposition to incursions of individual liberty by FEDERAL GOVERNMENT, NOT STATE
  - Art. I §§9-10 indicate framers KNEW how to bind states, chose not to in the BofR
- Purpose of BofR was not to safeguard against local governments
- States limited by their own constitutions, state citizens can seek protection in THOSE documents

### Slaughter-House Cases, p. 342 (**1873**) EFFECT OF 14 ON BOFR APPLICATION TO STATES

Facts: LA law granted 25 year monopoly to slaughterhouse. Butchers challenged right to exercise their trade under 13 (involuntary servitude) and 14 (P&I, EPC, property deprivation without DP)

- Holding: Scope of the Civil War Amendments:
  - 13: Purpose of 13-15 is to protect freed slaves

- NOT 13th violation
- DISTINGUISHES between state and U.S. citizens
  - 14A PorI applies only to US citizens (does not protect citizen against state)
  - Art. IV §2 P&I protects state privileges and immunities of **fundamental rights**
    - Protection by the government, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless to such restraints as the government may prescribe for the general good of the whole.
    - Art. IV didn't *create* these rights, Miller's reading says whatever rights state chooses to give its citizens must be given to other US citizens in the state

- Constitution had limited number of restrictions on states – 14 NOT intended to increase
- Concerned about making SC perpetual censor and referee on the legislation of all states

Fields (D): question of whether US citizens have protection from STATES incurring on their COMMON rights. Questions the point of 14 if states can infringe on the rights, since national rights were already immune by supremacy
Bradley (D): intention of 14 is to provide for national security against violation by STATES.

**Note: Majority description of purpose of civil war amendments (protect freed slaves) seems too narrow.**
**Ex: EPC language is broad, refers to "all persons"**
**Ex: framer of 14 said intended 14 to overrule Barron v. Baltimore**
**Civil War Amendments altered traditional notions of federalism**

## Right to travel

### *Crandall v. NV*, p. 351 (1867) RT TO MOVE FREELY THROUGHOUT NATION IMPLIED FROM STRUCTURE

### *Edwards v. CA*, p. 351 (1941) INVALIDATED STATE LAW RESTRICTING TRAVEL

Facts: Invalidated law making it a misdemeanor to bring into CA any non-resident indigent person

- State argued state interests in protecting health and morals, huge financial burden on the state
- Court split: Myrens rejected on basis of commerce clause, Douglas called it fundamental right to travel

### *Shapiro v. Thompson*, p. 315 (1969) CALLED RT. TO INTERSTATE MIGRATION PART OF 14 EPC

Facts: conditioned welfare assistance on durational residency requirement (1 year), not to test bona fide resident

- Holding: distinguishing between needy residents on basis of durational residency requirement violates EPC
- Concerned about creation of two classes of poor people (based on solely on travel status
- Rejects state's justifications (rejected because)
  - Protect fiscal integrity of state public assistance programs (constitutionally impermissible goal to avoid influx)
  - Discourage indigents from entering for more benefits (id. + statute not tailored for this)
    - Must be shown to promote COMPELLING government interest. Here, insufficient
  - Rewarding contributions to state of individuals through tax payment (can't allow state to apportion all of its benefits and services on basis of past contribution)
  - Administrative ease (not weighty enough to outweigh fundamental right)
- Right to travel implicit in nature of federal union and concept of personal liberty
- **PENALTIES: Durational residency requirement creates penalty or burden on right to travel. Does NOT require ACTUAL deterrence from moving. Welfare is a basic necessity, cannot be conditioned on waiting period.**

### Saenz v. Roe, p. 348 (1999) FUNDAMENTAL RIGHT TO TRAVEL INVOKES STRICT SCRUTINY

- Holding: Limits on welfare benefits to the benefits paid in the old state on basis of durational residence requirement burdens the fundamental right to travel.

Stevens:

- RIGHT TO TRAVEL
  - Protects right of citizen of state A to enter and leave state B
  - Right to be treated as a welcome visitor when temporarily present in another state AND

    - *Right to be treated like all other citizens when you elect to become a resident*
- **PENALTIES:** While it doesn't directly impair travel, BUT right to travel's effect on right to be treated equally in a discriminatory classification between long term residents and new residents IS A PENALTY
    - **However:** does *not* adopt *Shapiro/Maricopa Co./Sosna* reasoning of weighing extent or size of penalty
    - Instead, prohibits ALL classifications burdening bona fide residents (per se rule)
        - Art. IV privileges and immunities clause as additional protection for new residents
- Here, the ENDS are legitimate but the MEANS are impermissible
- Citizenship clause: no justification for creating degrees of citizenship based on length of residence
- Distinction between welfare provision and educational benefits (residency requirement for in-state tuition)
    - Welfare is non-portable benefit, necessity

Rehnquist (D): right to become a citizen of a state is NOT part of right to travel. Equates welfare situation to tuition
Thomas (D): majority misinterprets P&I clause – covers fundamental rights, not every public benefit established by law

Note: Court leaves open WHEN a new migrant becomes bona fide citizen of state OR what a bona fide citizen required.

### *Sosna v. IA*, p. 352 (1975) UPHELD RES. REQ'T FOR DIVORCES IN IA

- Weighs the extent of the penalty, holds that divorce is not a necessity, access to the court can be delayed without too much harm to π, π can ultimately obtain what she's looking for
- IA has sufficient state interest in not becoming a "divorce mill"

### *Memorial Hospital v. Maricopa Co.*, p. 352 (1974) WEIGHS PENALTY OF EXERCISING RIGHT TO TRAVEL

- Free nonemergency hospitalization or medical care, rejects AZ durational residency requirement for divorce
- Medical care is necessity like welfare

## Substantive Due Process: Economic Cases

- Where does the Court derive fundamental rights? Text? Intent? History? Structure?
- Threshold question: should the court be relying on inexplicit fundamental rights absent from the constitution?
- Do fundamental rights come from national consensus or a majority of justices at any given time?
- Is it possible to articulate fundamental rights without subjective judicial decisions?

Historical distinction: Meaning of 5 DPC and 14 DPC:

- 5th Am. was construed narrowly under English CL to mean PROCEDURAL DP ENSURING FAIRNESS
    - Fair notice and hearing presided by neutral officer with application of law
    - Did NOT require evaluation of SUBSTANCE of fairness of law
- Liberty at the time of framers = physical freedom
- Interpretation of DPC shifted in light of its inclusion in the 14th Am. Question of scope remains
    - Broad, open-ended license?
    - Focus on procedure and language?

**DUAL TRACK: PERSONAL RIGHTS → STRICT SCRUTINY. ECONOMIC RIGHTS → RATIONAL BASIS**

### *Calder v. Bull*, p. 362 (1798) EMBRACES NATURAL LAW APPROACH TO CONSTITUTION

Chase

- Inclination to invalidate legislation on inexplicit constitutional basis
- Refuses to defer to state legislature as absolute, fragrant abuses of power must defer to judicial checks
- Certain **inalienable rights** that **the people cannot have meant to give to government**
- Constitution is a written affirmation of a social compact. Doesn't create rights, they already existed
    - **9th Amendment: "deny or disparage others retained by the people"**
        - Speaks to unenumerated rights suggesting the intent of the framers

        - Purpose of 9? Negate fear that BofR extends Congress's power beyond that which is enumerated
        - Traditional view: 9 cannot be used as a "pot of gold"
            - Doubling up 9 & 10 → redundancy. Distinction to be made between rights and powers
            - Should NOT presume any provision of the constitution to be superfluous
    - **14 DPC**

Iredell (D): Rejects natural justice discourse in constitutional interpretation

- No fixed standard exists by which to measure "natural justice"
- Existence of written constitution → should begin in TEXT

In light of Marbury, who has the better argument? Chase or Iredell? Result in Marbury seems to suggest Iredell had it right

***Munn v. IL,*** p. 365 (1877) SC REJECTS ST LAW REG GRAIN ELEVATOR RATES, JR FOR REASONABLE

***Mugler v. KS,*** p. 365 (1887) CT WILLING TO EXAMINE SUBSTANTIVE REASONABLENESS OF STATE LEG.

- Court not bound to accept everything as within state police powers
- Exercise of police power must have real or substantial relationship and cannot invade fundamental rights

***Allgeyer v. LA,*** p. 365 (1897) INVALIDATES ST LAW ON SDP GROUNDS, EXPANDS NOTION OF LIBERTY

- Liberty of K at issue

**Lochner v. NY,** P. 366 (1905) ST POLICE POWERS CAN'T INTERFERE WITH INDIV RT TO K UNDER 14 DPC

Facts: NY labor law prohibited bakery employees from working > 10 hr/day or 60 hr/wk Δ convicted for allowing employee to exceed limit

- Holding: NY statute violates SDP under 14 because state disrupting SDP right to K

Peckham

- Police powers of the state: State leg. doesn't need to point to ANYTHING unless it bumps up against a constitutional provision
- Cites to Allgeyer, distinguishes *Holden v. Hardy*
- State police powers are pretextual if unlimited – would complete undermine if 14 if they recognized no stopping point
- **Police powers: health, safety, morals, welfare → all legitimate ENDS**
    - **Court rejects as impermissible MEANS**
    - No real public interest (safety or health issue) here
- State makes **labor law policy argument:** Court rejects
    - IMPERMISSIBLE END
    - If state can say ANYTHING is public interest, then there's no limit
    - No reasonable ground for interfering with employment K of bakers – need no additional protection from the state
- Act must have direct relationship as means to an end AND the end must be appropriate and legitimate
- **Constitutionality judged by RESULT not by stated purpose**

Harlan (D): liberty to K is SUBJET TO police power regulations

- Concern for unequal bargaining power between employers and employees
- People of NY are well within their rights to decide that working 60+ hours is contrary to public health
- Agrees with majority's standard of review, but interprets facts to come out the other way
- SC MUST DEFER TO STATE LEG. If there is room for debate and honest disagreement
    - Not plainly palpably beyond all question inconsistent with the constitution

Holmes (D): takes issue with underlying economic theory, points to lots of statutes that interfere with personal liberty and rt. to K (constitution is NOT intended to embody economic theory)

Critique of LOCHNER:

- Majority purports to apply rational basis, but the analysis looks like strict scrutiny

***Adair v. US*, p. 373 (1908) FEDERAL YELLOW DOG K LAW HELD UNCONSTITUTIONAL UNDER 5 DPC**

***Coppage v. KS*, p. 373 (1915) STATE YELLOW DOG K LAW UNCONSTITUTIONAL UNDER DP**

- Eliminating unequal bargaining power is an illegitimate end of state police power, inherent in the right to K
- Holmes dissent: workers can unionize to protect their rights. If that's a *reasonable* belief, then state leg. may confirm

***Muller v. OR*, p. 374 (1908) ALLOWED ST LABOR LAW PROTECTING WOMEN FROM LONG HOURS**

- Offensive, sexist opinion advocating paternalism in dealing with women, incapable of protecting their own interests

***Adkins v. Children's Hospital*, p. 374 (1923) MIN WAGE LAW FOR WOMEN VIOLATES DPC**

- Sutherland holds 19th Am. changed relation, made additional protection for women unnecessary (can protect themselves through the right to vote)

**Nebbia v. New York, p. 375 (1934) APPLIES RATIONAL BASIS REVIEW TO STATE LAW REG. ECON**

Facts: NY minimum price for retailing milk statute. Δ sold in a combo that would undervalue the milk

- Holding: NY law does not violate DP because it state could reasonably have concluded rational basis.

Roberts

- Law not unreasonable, arbitrary or capricious AND means selected shall have real/substantial relation
- All industry affects public interest, there's no closed class of public interest. DP is satisfied if **nonarbitrary**
- No per se unreasonable rule in re: state-created price controls – state free to adopt reasonable economic policy

McReynolds (D): no grounds for interference with private rights. Price control is arbitrary and contrary to consumer liberty

***West Coast Hotel Co. v. Parrish*, p. 376 (1937) OVERRULES *Adkins*, UPHOLDS ST. MIN. WAGE FOR WOMEN**

- No constitutional basis for freedom of K – no absolute basis for "liberty"
- Legislature can reasonably find minimum wage protection for women without equal bargaining power is reasonable
- Unequal bargaining power → exploitation → necessary community support → drain on public

Sutherland (D): interference with K, arbitrary burden shifting from society TO employer

***United States v. Carolene Products Co.* p. 378 (1938) REJECTS DP CHALLENGE ON FED. BAN**

- Court cannot substitute its judgments for Congress's
- Legislative record/findings are unnecessary

**Carolene Products fn. 4**

- "There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitutuion, such as those of the finrst ten Amendments, which are deemed equally specific when held to be embraced with the 14th … Nor need we enquire whether similar considerations enter into the review of statutes **directed at particular religious or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."**
- Rational basis review BUT increase judicial scrutiny for BofR through 14.
- Prejudice in re: discrete and insular minorities is subject to heightened review
- Concern for decisions that the political process is unlikely to fix

**Day-Brite Lighting, Inc. v. MO, handout DEBATABLE ISSUES NOT TO BE DECIDED BY JUDICIARY**

- Court upholds statute requiring employers to give workers four hours off to vote
- Legitimate end: VOTING, within state's police powers.
- Legitimate means: means chosen related reasonably and substantially to the stated end
- Survives rational basis (might violate some rights under heightened scrutiny) – if debatable defer to leg.

Dissent: Should private citizens be subsidizing voting?

**Williamson v. Lee Optical Co.,** p. 379 (1955) RATIONAL BASIS FOR SOCIAL/ECONOMIC LEGISLATION

Facts: OK law required glasses issued by optometrist or ophthalmologist, opticians sued Douglas opinion

- Holding: OK statute does not violate 14 DPC, since the legislature could reasonably have found rational connection
    - Note: no requirement that they DID FIND
- Legislature, not the court, should weight public interest vs. private right to exercise trade
- Threshold: problem to be corrected + this legislative measure was a RATIONAL way to correct it
- Rejects judicial activism in economic matters
- Court finds possible connection to health making it fall under state police powers

***Ferguson v. Skrupa,*** p. 380 (1963) BROAD DEFERENCE TO LEGISLATIVE JUDGMENT

- Sustains a KS law prohibiting private debt adjusting . KS can decide that legislation is required in this area
- Court "declines to sit as a super legislator"

***BMW of North America v. Gore ,*** p. 381 (1996) INVALIDATES EXCESSIVE PUNITIVE DAMAGE AWARD

- $2M punitive damage award when compensatory damages were only $4K
- Stevens finds award grossly excessive, on PDP and SDP

***State Farm Mutual Automobile Ins. Co. v. Campbell,*** p. 382 (2003) GUIDEPOSTS FOR PUNITIVE DAM.

- Degree of reprehensibility, the disparity between the harm or potential harm suffered and the punitive damages award, and the difference between this remedy and the civil penalties authorized or imposed in other cases
- Subject to PDP and SDP limitations: IF grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property
    - Punitive damages to punish and deter conduct bearing no relation to the π's harm
    - Should not exceed single digit ratio to satisfy DP

***Phillip Morris USA v. Williams,*** p. 383 (2007) USED **PDP** NOT SDP TO INVALIDATE AWARD

## Substantive Due Process: Privacy Cases

***Meyer v. NE ,*** p. 414 (1923) COURT READS LIBERTY BROADLY

- Holding: refuses as unconstitutional law prohibiting German teacher from teaching foreign language to children
- Liberty: "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, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."
- Rejects the law as impermissible END

***Pierce v. Society of Sisters,*** p. 414 (1925) UNCONST. ST LAW REQUIRING PUBLIC ED FOR ALL STUDENTS

- Preserves role of parents in determining education
- No general power for the state to standardize education for all children

***Skinner v. OK,*** p. 414 (1925) STRICT SCRUTINY FOR STATE COMPULSORY STERILIZATION LAW

- Applies EPC NOT substantive due process
- Creates classes of criminals, concerned about irreparable injury in wrong
- Note: is this Lochnerizing? Douglas usually hates that, but seems to be doing something similar

**Griswold v. CT,** p. 415 (1965) **CONFIRMS CONSTITUTIONAL RIGHT TO PRIVACY**

Facts: Contraception case. Criminal liability for contraception and accessory liability for doctor

- Holding: Court affirms a right to privacy as found under penumbras of BofR, SDP and the "zone of privacy"

Douglas

- Rejects SDP, *Lochner* and the judiciary as super legislature
- Parallels *Pierce* and *Meyer* – no explicit constitutional right implicated there either, but SDP upheld
- Zone of privacy found in penumbras of 1,3, 4,5 & 9 and court precedents (*Boyd*)
- Stated purpose of CT law: decrease promiscuous and illicit sexual relationships, protect moral welfare (contraceptives immoral), increase marital fidelity
- State's means are too broad, not narrowly tailored, invade to much of the marital right to privacy

Goldberg (C): rejects total incorporation, argues "liberty" protects personal/fundamental rights

- Relies on 9th Am: says history shows the concern was too few enumerated rights in the BofR
- Fundamental and basic right to privacy retained by the people under 9 and protected by 14
    - 9th Am. serves to support 5 & 14

Harlan (C): rejects majority approach, says CT law violates 14 DPC because contrary to "basic values implicit in concept of ordered liberty"

- Concern about judicial restraint – limit oneself to history, basic values, federalism, separation of powers (NOT SDP)
- NOT providing content by looking at BofR, liberty stands on its own bottom
- Relies on *Poe v. Ullman* dissent
    - Tradition of DP = liberty, **liberty is a CONTINUUM, not enumerated clusters of rights.**
    - Advocates increased scrutiny for infringement
    - States may deal in morality, moral basis as foundational for constitutional interpretation
    - Focus: **selection of means**. Here, state used crim law as enforcer of morality → strict scrutiny
    - NO ABSOLUTE RIGHT TO PRIVACY
        - State could ban private relations altogether (homosexuality)
        - State chooses to promote marriage, so can't regulate within private relation

White (C): Nature of right is relevant in determining standard of review. Liberty automatically invokes strict scrutiny

- Legitimate end: decrease illicit sexual activity
- NO RATIONAL RELATION between *marital* ban and purpose
    - Too broad in scope, at best only marginal utility

Black (D): finds no broad constitutional right to privacy

- Rejects DPC and 9th Am. arguments – concerned about natural justice basis and judicial subjectivity
- Rejects majority's reading of 9, *Pierce, Meyer, & Lochner*

Stewart (D): NO GENERAL RIGHT TO PRIVACY anywhere in the constitution

**Was Douglas just Lochnerizing in Griswold?**

- **Court is making a policy judgment**
- **Douglas concerned with means chosen to reach the purpose.** Seems to be no evidence that cops are invading marital bedrooms searching for contraceptive
    - **Courts are supposed to decide based on actual result, NOT hyperbold**
- **Discussion of marriage as older than BofR – seems to hark back to natural law**

## *Eistenstadt v. Baird*, p. 422 (1972) RECHARACTERIZES GRISWOLD SCOPE OF PRIVACY

- Holding: invalidates law with respect to distribution to contraceptives under EPC
- Broad definition of right to privacy: Brennan characterizes as protecting individuals married or single

## *Carey v. Population Services Int'l*, p. 422 (1977)

- Brennan plurality holds that strict scrutiny was required for restrictions on access to contraceptives
- When "state burdens exercise of a fundamental rt, its attempt to justify that burden as a rat'l means for the accomplishment of some significant state policy requires more than a bare assertion that the burden is connected to such a policy.

## Roe v. Wade, p. 424 (1973) ESTABLISHES LIMITED RIGHT TO ABORTION SUBJECT TO TRIMESTERS

Facts: challenge to TX abortion laws (illegal unless saving life of mother)

- Holding: right to privacy includes the right to abortion under the trimester scheme.

Blackmun

- Confirms privacy right under 14 personal liberty. Pregnancy termination is within personal liberty
    - NO ABSOLUTE RIGHT to abortion
- Court declines to decide when fetus become life. Text and history preclude inclusion of unborn under "person" EPC language
- State's compelling interests:
    - Protection of mother's health
    - Protection of the potentiality of human life
- Constitutionality scheme:
    - Conception → end of trimester 1: absolute discretion of woman and her doctor
    - End of trimester 1 → viability: state regulation in re: mom health
    - Viability → birth: states may ban but MUST include exception to preserve mother's life
- TX statute is unable to survive test, not narrowly tailored to state interest

Stewart (C): *Skrupa & Griswold* discussion. Reads *Griswold* as acceptance of SDP liberty. Liberty > BofR, includes right to abortion
White (D): no constitutional text or history to support majority. Raw exercise of judicial power, lacks judicial restraint
Rehnquist (D): rejects majority characterization of privacy. Says this is closer to *Lee Optical* than to *Griswold*. Liberty is NOT absolute

**Bases right to abortion on liberty component of DPC. Right of privacy (based in 14). Applies strict scrutiny for fundamental right**
NOT absolute right to privacy here.
Distinguishes *Meyer, Pierce,W*oman not isolated in pregnancy (fetus). At some point, state's interest becomes sufficiently compelling

Blackmun concedes there's no explicit right to privacy. Roots in 1, 4, 5, 14 liberty

- Right to privacy only protects *personal* liberty – why?
    - How have they justified personal vs. economic double standard?
    - Can they do it without Lochnerizing?
    - Critics reject Carolene fn. 4 basis – that's for when leg. restricts specific constitutional provisions

### ***Doe v. Bolton***, p. 429 (1973) UNCONST GA LAW REQUIRING STEPS ADDITIONAL TO GET ABORTION

- Invalidates GA requirement of accredited hospital, prior approval by staff committee and two additional doctors' approval
- Court says attending doctor's best judgment adequate

### ***Akron v. Akron Center for Reproductive Health***, p 429 (1983) UNCONST ADD'L REQUIREMENTS

- Court invalidates requirement that after 1st trimester must be hospital, not outpatient facility + info guidelines
- Court held info designed to dissuade not obtain informed consent
- State may assert a generalized interest in potential life

### ***Planned Parenthood of Central MO v. Danforth***, p. 429 (1976) SPOUSAL & PARENTAL CONSENT REQ'TS

- Court eliminated requirement of husband's written consent in 1st 12 weeks
- State cannot delegate the abortion veto – belongs with human
- ALSO removed absolute barrier to minor's abortion without parental consent

### ***Bellotti v. Baird***, p. 430 REQUIRES JUDICIAL BYPASS PROCEDURE FOR PARENTAL CONSENT

- Bellotti I – blanket parental veto distinguishable from requirement of consent without unduly burdening right to seek abortion
- Bellotti II – state could ONLY involve parent in minor's abortion decision IF provides **judicial bypass procedure** so parent doesn't have ABSOLUTE final say

### ***Maher v. Roe***, p. 430 (1977) UPHOLDS STATE LAW, CAN PREFER BIRTH TO ABORTION

- Upholds CT regulation restricting Medicaid funds to pay for childbirth but NOT medically unnecessary abortions

Powell

- Applied deferential rationality review. Strict scrutiny unnecessary because no interference with fundamental right
- **State may make value judgment preferring birth to abortion**
- No actual obstacle placed on woman's right to abortion, just incentivizes birth

- Court regulation does not create or worse woman's indigence
- Distinguishes between state interference with protected activity and state encouragement of preferred alternative

Brennan (D): coercive distinction → unconstitutional impingement upon **right of privacy**
Marshall (D) : imposition of moral viewpoint on women

## *Harris v. McRae*, p. 431 (1980) UPHOLDS HYDE AM. REFUSING PAYMENT FOR ALL ABORTION

- Court upholds state law refusing payment for any (including medically necessary) abortions under Medicaid – rejects SDP claim

Stewart

- Freedom of choice does NOT require entitlement to government subsidization of choice
- Relies on *Maher* – government didn't create indigence. Places no affirmative obstacle in her path to abortion
- Congress doesn't have to authorize Medicaid at all
  - *Pierce* analogy: Pierce does require government to pay for private schooling (need not fund all options)
- NOT DPC issue – decision for Congress, not the court

Brennan (D): concern in re: unequal subsidization of childbirth and abortion

- Because of indigence → interference with freedom of choice
- This law is effectively the same result as regulations and sanctions on abortion

Stevens (D): issue with refusal to pay for medically **necessary abortions.** State agenda can't supersede life of mom

- Subordination of women: forcing women to use bodies to sustain pregnancies as analogy to slavery

Consistent with *Roe*? *Roe* requires exception for the health or life of the mother

## *Rust v. Sullivan*, p. 432 (1991) NO RIGHT TO FEDERAL FUNDS

- Abortion counseling cannot be subsidized by federal family planning funds. REJECTS SDP 5th AM. CHALLENGE
- No right to federal funds. Federal government can favor one option over another constitutional option
- Echoes *McRae & Maher*

Blackmun (D): suppressing information and controlling message → affirmative obstacle

- Woman could reasonably believe that professional advice leads to NO abortion, even though that's a *government* opinion instead of a medical opinion

## *Webster v. Reproductive Health Services*, p. 433 (1989) UPHOLDS BAN IN STATE FACILITIES

## Planned Parenthood of Southeastern Pa. v. Casey, p. 434 (1992) UNDUE BURDEN TEST

Facts: PA statute requires (barring medical emergency) 24 hours in advance, spousal notice, and parental consent for under 18 (with judicial bypass procedure). FACIAL CHALLENGE TO PA LAW.

- Holding: Roe remains good law, establishes the undue burden test. Rejects Roe trimester framework

O'Connor:

- LIBERTY DEFINED VERY BROADLY
  - Right to define one's own concept of existence, of meaning, of the universe
  - Loose connection to 14 DPC
- **Undue burden: state regulation has purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus**.
- Court upholds stare decisis of Roe, but rejects trimester framework (in the face of scientific knowledge)
  - **Weight to be given to precedent**
    - **Workable?**
    - **Reliance?**
    - **Development of legal principle?**
    - **Change in factual assumptions?**
  - DPC as substantive source of protection of right to choose
  - Mere change in court's membership is NOT enough to overrule precedent
  - Likens abortion rights to contraceptives allowed in *Griswold, Eisenstadt, and Carey*

- Rejects analogies to *Plessy* (society understands facts diff'ly)and *Lochner* (facts at base were not true → overrule) lines of cases
- Expresses concern about legitimacy of SC and rule of law if we don't adhere to precedent and just cave to political pressure
- Provisions of the law:
    - 24 hour information – NO undue burden (despite concerns about cost-prohibitive)
        - Overrules *Akron* & *Thornburgh* holdings because they were decided under trimester framework
    - Spousal notice/consent – undue burden because of potential for domestic violence
    - Parental consent – NO undue burden if judicial bypass procedure
    - Collecting data – NO undue burden EXCEPT in re: spousal consent

Stevens (C/D): with O'Connor for the most part, concerned when state's preference of birth becomes PERSUASION of birth over abortion
Blackmun (C/D): *Webster* concern (strict judicial scrutiny) for abortion

- Bodily integrity and family planning as woman's choice, implicates gender inequality
- EPC issues – prefers *Roe* framework to **undue burden standard** because this test is judicially manipulable

Rehnquist (C/D): ROE SHOULD BE OVERRULED

- No historical support for fundamental right to abortion. Women not alone in choice, as it affects fetus
- Constitutional cases must be reexamined MORE because not subject to legislative overruling
- Legitimacy of SC is not rooted in public opinion but in good faith efforts to compare legislation to the constitution

Scalia (C/D): PA statute entirely ok under rational basis

- Rejects O'Connor's reliance on stare decisis, calls it contrived, picking and choosing
- Roe did not produce a settled body of law, was not correctly decided

If challenger is unable to show undue burden (threshold question), then STANDARD OF REVIEW = reasonably related/rational basis

***Does Casey reaffirm Roe? What is left of Roe? What is the essential holding of Roe?***

- **Roe says fundamental right. Casey rejects this view (see Rehnquist's opinion), relies on LIBERTY**
- **Roe says strict scrutiny. Casey uses undue burden analysis**
- **Roe used trimester framework. Casey rejects trimesters**
- **Balances state's interest in potential life differently (Casey focuses on outset of pregnancy, moves potential life WAY up)**

**O'Connor's analysis of 24 hour information and spousal consent are inconsistent, difficult to reconcile**

## *Ayotte v. Planned Parenthood of Northern New England*, p. 443 (2006) UNCONST AS APPLIED

- Constitutional issue need NOT invalidate entire law wholesale
- Declaratory judgment or injunction preventing a bad application is ok

## *Stenberg v. Carhart*, p. 444 (2000) PARTIAL BIRTH ABORTION AND MOM HEALTH EXCEPTIONS

- Debate in re: application of Casey for NE law banning D&X without exception for mother's health

Breyer: health exception required under Casey, language could lead to ban on D&E
Stevens: Doctor's duty = protect woman's health, state law cannot interfere
Ginsburg: NE making thinly veiled attempt to ruin Roe private choice shield
O'Connor: implies only issue is the lack of mother's health exception here
Kennedy (D): Court fails to place adequate weight on state's valid constitutional interest in preventing PBA. Says no substantial obstacle
Thomas (D): rejects majority reading of Casey – woman's choice for METHOD is **not guaranteed**

## Gonzales v. Carhart, p. 445 (2007) UPHOLDS PBA BAN

Facts: federal law bans intact D&E, leaves alone standard 2nd trimester D&E (most common 2nd trimester abortion method)
Kennedy:

- Congress's law is constitutional, could reasonably have believed necessary, not undue burden
- Congress made factual finding that intact D&E is NEVER medically necessary
    - No substantial obstacle, facially valid under *Casey*
    - Health exception negates statute, remains an option

    - Because health questions are unresolved, left to Congress's judgment
- Government MAY regulate methods of abortion

Thomas (C): notes exception to SC jurisprudence in re: abortion

Ginsburg (D): rejects legislation that does not include mom health exception

- Act could not withstand strict scrutiny
- Disparate impact on who ban affects (poor, young, birth defects)
- Intact D&E is **in fact** less dangerous that the kind they left as constitutional
    - CONGRESS DUPED
- Concern about pattern here of discarding precedent

What's left of Roe? Gonzales v. Carhart cannot have survived under Roe because restricts previability abortion options without exception for the mother's help.

# Family & Marriage Cases

### *Loving v. VA*, p.. 450 (1967) MARRIAGE AS FUNDAMENTAL RIGHT

### *Zablocki v. Redhail*, p. 450 (1978) EP VINDICATION OF RIGHT TO MARRIAGE

- Says EPC & strict scrutiny in re: fundamental rights with narrowly tailored means
- Assumes state interests are important, but they're not narrowly tailored. Less intrusive means available to the state

### *Moore v. East Cleveland*, p. 452 (1977) SDP CASE

- Law did not permit living arrangements if grandkids are cousins, not brothers
- Powell: SDP entitled to scrutiny stricter than rational basis. Institution of family is rooted in history and tradition
- White: tradition is no standard at all, varies in interpretation

### *Belle Terre v. Boraas*, p. 453 (1974) FRAT BOY CASE

- Douglas holds that there are no privacy rights involved in family-oriented zoning restrictions
- Used rational basis because called it a social/economic regulation
- Marshall argues for strict scrutiny

**Tension between *Moore and Belle Terre* – distinguished by Powell's use of SDP vs. Douglas's use of privacy?**

- **In E. Cleveland, Moore had fundamental right to live with her grandkids under SDP**
- **In Belle Terre, frat boys did not enjoy fundamental right**
- Distinguishable because grandma fits more under family line of cases (Meyer, Pierce, etc.) than do frat boys
- Tension arises in the sense that E Cleveland can't define its community, Belle Terre can

### *Troxel v. Granville*, p. 453 (2000) SDP DOES NOT GIVE GRANDMA PARENTAL RIGHTS

- Grandma wants visitation rights to her grandkids
- Parents have fundamental rights under SDP, grandparents do not
- No evidence that the mother was an unfit parent (PRESUMPTION that parent is fit and acting in best interest of kid. No reason for state to interfere with the private realm of the family)
- SC holds that DC failed to place adequate weight on parent's decision
    - **Note: court silent on HOW MUCH weight should be placed on parental determination.**
    - Should there be a per se rule that fit parents cannot be challenged barring extreme situations (irrebuttable presumption)?
        - Not clear that grandma has any rights, why should mom's rights be subordinated to the lesser rights

- Reasonableness is not enough to abridge mom's fundamental right

### *Michael H v. Gerald D.*, p. 455 (1989) DP CREATES NO FUNDAMENTAL CONST RT FOR π – MUST BE TRADITIONALLY PROTECTED BY SOCIETY

- Paternity test establishes man outside the marriage is the father. CA says presumption of child of the marriage is ok
- Marriage is a traditionally protected family unit, father of illegitimate child is NOT
- Scalia relies on **SPECIFIC LEVEL OF TRADITION** (in footnote): points to adulterers, not fathers or parents generally
    - Only should back up to more general if no or ambiguous tradition on specific level
    - Rule of law must stem from text or tradition

O'Connor (C/D): joins opinion but REJECTS footnote

Brennan (D): tradition changes – pretextual way of determining constitutional rights

- Many constitutional precedents (e.g. Griswold and Eisenstadt) would come out differently under this analysis
- Method excludes accounting for developments that make tradition obsolete or unnecessary (scientific paternity testing)
- Scalia obscures societal tolerance: liberty protects things we do that others may not like
    - LIBERTY IS THE FREEDOM NOT TO CONFORM p. 456
        - "We are not an assimilative, homogeneous society, but a facilitative, pluralistic one, in which we must be willing to abide someone else's unfamiliar or even repellent practice because the same tolerant impulse **protects our own idiosyncracies**."
- Scalia's reading steps away from constitution as a living charter

***Equal Protection concern?***

- Statute tends to protect mom in a gender classification. Married man with a single woman → NOT child of the marriage
- If both adulterers married, under CA statute mom gets kids

## Sexuality Cases

### *Bowers v. Hardwick*, p. 456 (1986) NO FUNDAMENTAL RIGHT TO HOMOSEXUAL SODOMY

- As applied
- No connection with family, marriage or procreation. Given US social history, ridiculous to claim that this is deeply rooted
- Concern for expanding DPC → illegitimate judge-made law
- **RATIONALITY REVIEW**

Burger (C): religious & moral roots

Powell: facially valid law against SDP challenge

Blackmun (D): majority defined right in question too narrowly. Instead, should be characterized as **right to privacy**

- "right to be let alone"
- States shouldn't be determining the right way to conduct a sexual relationship

Stevens (D): law targets all sodomy – selective enforcement against gay men should invoke heightened scrutiny under EPC

**NOTE: ONLY MODERN CASE IN WHICH COURT HAS APPROVED MORAL TRADITION AS SUBMITTED RATIONAL BASIS WHEN NO CONNECTION TO HARM.**

### Lawrence v. TX, p. 458 (2003) OVERRULES BOWERS V. HARDWICK

Facts: TX law prohibits same sex sodomy. Police entered apartment in weapons search. Find Δ engaging in sexual act with men

Kennedy:

- State not omnipresent in the home. RELIES ON LIBERTY, not really privacy
    - LIBERTY = AUTONOMY OF SELF AND INCLUDES INTIMATE CONDUCT, freedom to engage in private conduct
- Court overrules *Bowers*
    - Court reexamines *Bowers* in light of *Griswold* and *Eisenstadt* (Griswold not confined to married adults)
    - Bowers framed the inquiry improperly: demeaning to say it's only about sexual conduct – **scope of liberty** question

        - Law purports to deal with sex, really invading privacy and seeking to control personal relationship protected by liberty
    - Bowers improperly construed historical roots – no longstanding tradition of anti-gay laws (early focus = non-procreative sex)
- Casey and Romer cast doubt on Bowers
    - Casey: reads liberty DPC to include protection for personal choices in re: intimate relations for autonomy & dignity
    - Romer: class-based legislation at homosexuals violated EPC
- Court draws from MPC and European Human Rights Court + arbitrary enforcement and increasing social acceptance
- COURT DECLINES TO DECIDE THIS CASE ON EPC – continuance of Bowers precedent is demeaning to homosexuals
- No stare decisis (no reliance on precedent, wrongly decided)
    - **Governing majority view that something is immoral is NOT enough to uphold prohibition**
    - **Liberty DPC protects intimate relations of unmarried people**
        - Adult private & consensual sexual relationships should not be criminalized absent harm
        - No legitimate state interest furthered by intrusion

O'Connor (C): FAILS RATIONAL BASIS REVIEW

- Agrees with result, but would **not** overrule Bowers
- Illegitimate to legislate to harm a particular group
- Holds that moral disapproval of gay sex is NOT a legitimate state interest under EPC

Scalia (D): Rejects idea that morality is an illegitimate basis for legislation

- Lots of laws founded on morality (bigamy, incest, prostitution, etc.) → parade of horrible if can't use as basis
- Reads 14 DPC to allow states to deprive citizens of liberty so long as there is due process of law
- Heightened scrutiny is reserved for fundamental rights in history and tradition (homosexual sodomy does NOT qualify)
- State decriminalization and actions of foreign nations are irrelevant
- Perfectly legitimate state interest, rational basis is satisfied
- Believes SC has taken sides in "culture war" – not neutral observer

Thomas (D): uncommonly silly law but no generalized right to privacy as extension of liberty

**Note: majority does not call this a fundamental right, not does it expressly apply strict scrutiny**

**Gay Marriage after *Lawrence*?**

State laws banning same sex marriage still ok after Lawrence? YES. *Lawrence frames issue narrowly as criminal*.

p. 463 – doesn't involve formal recognition. Law seeks to control personal rel whether or not entitled to formal recognition
State can't criminalize homosexuality, but need not condone or approve of the behavior

Casey paragraph on p. 461 – first thing they mention is marriage. "Persons in homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."

O'Connor suggests other reasons exist to uphold same sex marriage bans BUT doesn't delineate these reasons

- Can't be political animus, marriage as fundamental right after *Loving*
- Not procreation
- Tradition seems weak unless we base in moralitty

Are there reasons beside moral disapproval to uphold same sex bans? Procreation and tradition seem unconvincing. Loving makes marriage a fundamental right

## *Goodridge v. Dept of Public Health (MA)*, p. 468 (2003) STATE OF MA UPHOLDS GAY MARRIAGE

- EPC and DPC state constitution grounds
- No rational relationship between state interest in protecting marriage and excluding homosexuals

### *Bottoms v. Bottoms*, p. 468 (1995)

- Lesbian mom not per se unfit parent, but underlying behavior is a felony (pre-*Lawrence*) so NOT optimal for child development

### *Lofton v. Secretary of Dept. of Children and Family Services*, p. 469 (11th Cir., 2004)

- Despite *Lawrence*, rejected DPC and EPC challenges to barring gay adoption because *Lawrence* silent in re: privacy and adoption
- Legitimate state interest → optimal developmental conditions

## Right to Die Cases

### *Cruzan v. Director, MO Dept. of Health*, p. 470 (1990)

Facts: parents decide to take daughter off life support when no cognition left. MO opposes, asserting interest in protecting human life. TC rules parents as surrogates can represent intent of Nancy Cruzan. MOSC reverses

- Holding: MO can require clear and convincing evidence of incompetent's intent to remove life support under 14 DPC liberty because there is a legitimate state interest in preserving life

Rehnquist:

- Affirms idea that competent person allowed by 14 DPC to refuse medical treatment
- MO may establish safeguard to protect incompetent's life
    - Not everyone has family to make this decision
    - Even if family, may not have best interests in mind
    - State doesn't HAVE to make quality of life considerations
- Consequences of an erroneous decision: this way, error is correctable. Allowing no scrutiny does not result in reversible error

O'Connor (C): doesn't decide whether respect to surrogate is constitutionally required

- Liberty interest in refusing unwanted medical treatment for competent persons

Scalia (C): Federal courts have NO BUSINESS IN THIS FIELD (no plausible or reliable way of determining end of life quality)

- Nothing in the constitution/history/tradition guarantees the right to die

Brennan (D): state's general interest in the preservation of human life cannot outweigh right to death with dignity

- BUT if we take this seriously, then the state's interest in preventing suicide is essentially moot

### Washington v. Glucksberg, p. 472 (1997) ASSISTED SUICIDE CASE

- Holding: WA ban on assisted suicide subject to rational basis review, survives

Rehnquist:

- DPC case requires review of history and tradition, which show broad prohibition of suicide and do not support PAS
- Concern for expanding scope of SDP – limited to twoi features
    - **Fundamental rights objectively rooted in history and tradition/implicit to ordered liberty**
    - **Careful description of asserted fundamental liberty**
        - PAS NOT covered as a fundamental right
        - Nation's universal tradition against right to commit suicide or being aided in doing so (no exception for terminally ill or near death)
- Distinguishes *Cruzan*: difference between right to refuse medical treatment (historically protected as battery) and right to PAS
- Distinguishes *Casey*: DPC liberty does not warrant this kind of autonomy
- Rational basis review → WA law SURVIVES
    - Legitimate state interests
        - Preservation of life
        - Prevention of suicide
        - Protection of medical integrity
        - Protection of vulnerable groups from abuse/neglect/mistakes
        - Slippery slope to euthanasia
- BOTH facially and as applied to terminally ill competent adults, WA law is constitutional

O'Connor (C): no generalized right to commit suicide, wants to narrow holding (because palliative care is available, state's interests are strong enough to justify law)
Stevens (C/D): Says no right to suicide, law not facially invalid. BUT as applied may be incorrect

- Weigh interests – special formula for SDP
- Questions if violates Harlan's dissent in Poe by arbitrary impositions or purposeless restraints
- ORDERED LIBERTY → continuum of rights → fundamental unenumerated rights
    - Requires sufficiently compelling state interest – threshold rationality is not enough (nor is presumption of constitutionality)
- Confines values to those truly deserving constitutional stature
    - Text, nation's traditions, revealed by contrast with the traditions from which it broke
    - Statute need only give way IF arbitrary or pointless
    - Tradition is living thing → moderate steps carefully taken
- **DOES NOT CALL INTEREST FUNDAMENTAL** -- law is not arbitrary or purposeless, interest is sufficiently compelling (protecting life, discouraging suicide, protect terminally ill patients from INVOLUNTARY suicide and euthanasia)

Breyer (C): Considers different framing of the issue, right to death with dignity

- Personal control over manner of death, professional medical assistance, and avoidance of unnecessary & severe phys suffering
- DOESN'T decide if fundamental right
- Law does NOT directly infringe on right to death with dignity because of the availability of palliative care

Palliative care? FIVE JUSTICES hold that states may be constitutionally *required* to give easing suffering medication that hastens death
Is there a clear or logical line between ending life support and intervening to advance death?
This is a step beyond *Cruzan*, extends the holding

***Vacco v. Quill,*** p. 479 (1997)NO EPC VIOLATION IF PROHIBIT PAS & ALLOW PATIENTS TO REFUSE LIFE SAVING MEDICAL TREATMENT

# Procedural Due Process

Procedural due process for substantive due process

- SDP focuses on amount of justification required for state to defend legislative infringement on alleged constitutional right
- PDP's initial focus: is there a constitutional interest at all?
    - Often courts concede it's an important issue but reject as a constitutional issue.
    - Where does the court look?
        - Early: state law or federal legislation (not Constitution) to determine if constitutional issue exists

***Goldberg v. Kelly***, p. 481 (1970) DP: WELFARE RECIPIENTS GET HEARING BEFORE BENEFITS END

- DP requires that evidentiary hearing comes before the benefits are terminated. PDP concern because otherwise eligible

***Bd. Of Regents v. Roth,*** p. 481 (1972) NO PDP RIGHTS FOR TEACHER DENIED REHIRE

- Nontenured teacher has no constitutional right to statement of reasons or hearing before denial of rehire
- Stewart: PDP does NOT protect infinite range of interests
    - 14 PDP protects specific benefits **already acquired**
    - Distinguishes *Goldberg* – no terms of appointment or state statute or university policy securing right
    - No property interest at stake and/or denied by university authorities
        - Just had a 1 year entitlement, no future entitlement to continue teaching
        - Stigma argument proves too much – nothing foreclosed his freedom to get other jobs
        - Stretches liberty too much to say denying future employment → liberty problem

### *Perry v. Sindermann*, p. 481 (1972) PROPERTY INTEREST WITH DE FACTO TENURE SYSTEM

- PDP right to hearing on sufficiency grounds for nonretention because de facto tenure program + tenure
- Property interest for PDP IF **rules or mutually explicit understandings support claim of entitlement to benefit and can be invoked at hearing**

### *Arnett v. Kennedy*, p. 482 (1974) FED STATUTE DISPOSITIVE, "bitter with the sweet"

- Federal employee denied PDP right to hearing before dismissal since federal statute provides removal procedures and no administrative hearing
- Rehnquist opinion: federal statute is dispositive
- Property right involved, but it's "inextricably linked" with limitations.

### *Bishop v. Wood*, p. 483 (1976) NO CONST. PROP INTEREST WHEN COP DISMISSED, EMPHASIS ON ST LAW

### *Cleveland Bd. Of Ed. V. Loudermill*, p. 482 (1985) REJECTS "BITTER WITH THE SWEET"

- White: state law is the primary focus. Statutory procedures are not the source of constitutionally required procedures upon termination of right
- Once DPC applies, must determine WHAT process is due. This is NOT found in state law.

Roth Line: DPC protects only entitlements created by state law

### *Town of Castle Rock v. Gonzales*, p. 482 (2005) POLICE ENFORCEMENT OF RESTRAINING ORDER IS NOT AN ENTITLEMENT PROTECTED BY PDP

- Scalia: π not entitled to enforcement of police restraining order
- Π claims property interest in enforcement of restraining order. Non-enforcement tolerant policy = violation of PDP
    - Court rejects – discretion because CO law does NOT make mandatory (shown by tradition of nonenforcement)
    - Indeterminate/discretionary enforcement does not give rise to mandatory duty
    - NOT CLEAR PROPERTY INTEREST UNDER 14 DPC
        - **Incidental interest** from existing state law → arresting criminals
        - Important difference between government action that directly affects citizens' rights and action against 3rd party affecting them incidentally
- SHIFT FROM ROTH – adds a federal component
    - Initial inquiry must be one of state law, but ULTIMATELY a constitutional underlying interest
- DPC guarantees no right to protection. Rejects K theory in Stevens dissent

Stevens (D): though Fed constitution or statute does not create entitlement to police protection, no federal impediment exists.

- CO Law is the functional equivalent of private K → entitlement as property right
- CO history of enforcement for domestic violence
- Π has duty from state + justifiable reliance

### *Paul v. Davis*, p. 484 (1976) NARROWLY DEFINES PDP LIBERTY INTEREST – EXCLUDES REPUTATION

- Two federalism interests to be contrasted with *Roth*
    - If allegations were against private individual tort law issue, but Davis becomes federal issue because by state. Hard to draw line for where federal claim ends for state committing tort against you
    - 14 DP claims should not extend to Davis wherever state is characterized as tortfeasor. 14 PDP NOT intended to superimpose fed claim on state tort law
- Reputation alone is not liberty or property interest as constitutional right. No guarantee to a good reputation
- **14 NOT INTENDED to impose a second layer of tort liability upon the states**

### *Mathews v. Eldridge*, p. 484 (1976) DP FLEXIBLE BALANCING APPROACH

- Pretermination evidentiary hearing is NOT required for disability benefits
- Due process – flexible balancing approach by Powell. FACTORS:

- Private interest affected by official action
- Risk of erroneous deprivation of interest by procedures (value of additional safeguards)
- Government's interests (functions involved/fiscal or administrative burdens)

## Equal Protection: Economic Cases & Rational Review

- EPC scrutiny typically focuses on MEANS, not traditionally concerned with identify fundamental values
  - Eventually begins to examine ends as well
  - Traditionally VERY deferential to legislative means and ends
    - Invalidation only if rests on grounds wholly irrelevant. If any conceivable state of facts justifies, then valid (*Lindsley*)
    - *Royster* adds teeth with fair and substantial relation

### *Royster Guano Co. v. VA*, p. 625 (1920) INTERPRETATION OF RATIONALITY REVIEW

- Reasonable, not arbitrary, and resting on basis with fair and substantial relation to object of legislation, so all treated alike

### *Lindsley v. National Carbonic Gas Co.*, P. 625 (1911) ALTERNATIVE INTERPRETATION

- IF **any** state of facts reasonably relates, existence of state of facts must be assumed
- EXTREMELY deferential
- Seems to have been adopted by most courts

### Railway Express Agency v. NY, p. 625 (1949) FOCUS PRIMARILY ON MEANS, NOT PURPOSE

Facts: §124 of NYC traffic regulations prohibits advertising on business vehicles if used merely or mainly for advertising. Π convicted, operates 1900 trucks and sells ads on sides unrelated to its own business

Douglas:

- Court rejects EPC claim as superficial
  - Standard of review is fairly deferential to the legislature.
  - Legislature may analyze traffic problem, court will not second guess legislature's judgment
- Classification relates to problem and does NOT violate EPC
- EPC does NOT require city to eliminate all distractions or none

Jackson (C): Disagrees with court's method. Thinks DPC should be *harder* to use than EPC, since EPC only requires legislature be broader. CONCERNED ABOUT UNDERINCLUSIVENESS

- Uses *Royster* approach: discrimination requires fair relation to object
- Much more likely to be arbitrary in regulating few than regulating many
- Perfectly rational state interest, but NY arbitrarily refuses some and allows others
  - EPC doesn't assure equality or protection if avoidable by ANY difference between those bound and those left free
  - Reframes the issue, then allows difference in classification between ads for self-interest and those for hire (obnoxious enterprise)

### *Williamson v. Lee Optical Co.*, p. 628 (1955) NO INVIDIOUS DISCRIMINATION FOUND

- **Legislature may act underinclusively or one step at a time in correcting problems**
- Rejects EPC claim – evils in same field may be of different dimensions and proportions requiring different remedies
  - Legislature may make this judgment
- Address limited resources to specific or most acute problem

### *Morey v. Doud*, p. 628 (1957) INVALIDATES EXEMPTION ALLOTTED BY NAME TO PARTICULAR CO.

- Closed class and granting economic advantage that bore no reasonable relation to law's purpose

## *New Orleans v. Dukes*, p. 629 (1976) COURT OVERRULES MOREY

- Reverts to highly deferential stance
- EPC upholds grandfather clause in NOLA street vendor statute
- Don't require mathematical exactitude to make rational distinctions
- Statute satisfies rationality review

## *US Dept. of Ag. v. Moreno*, p. 629 (1973) LESS DEFERENCE: ANUMUS-BASED CLASSIFICATIONS

- Excluded unrelated persons from federal food stamp program (hippie case)
- Departs from deferential stance to create exception for animus based classifications
- No purpose justifies classification under rationality review
- **Bare congressional desire to harm politically unpopular group cannot be a legitimate government interest**
    - Where does this rule come from?
        - Not in the text. Embodied in EPC? Similarly situated equality

**Comparison: Moreno and Belle Terre, Moreno & Maher v. Roe/Harris v. McRae**

- Both are classifications of unrelated persons and benefits, produce different results
- Tension seems to exist about why one classification survived and the other was overturned
- Congress can promote morality in provision of abortion services, why not in distribution of food stamps?

## *NYC Transit Authority v. Beazer*, p. 629 (1979) OVERINCLUSIVE LAW

- Stevens upholds exclusion of methadone users from TA employment
    - Supported by legitimate inference in re: degree of uncertainty about drug use
    - No suspect classification involved here
- White's dissent: not dispositively different, irrational and invidious (thereby subject to invalidation under EPC)
    - Irreconcilable animus against *Moreno*

Consistent with *Moreno?* Isn't this just bare political distaste for this group?

- Background facts + stipulation of concern about adverse public reaction seem to indicate that there's animus involved here
- Doesn't Moreno prove too much if we take it at its word?

## *Allegheny Pittsburgh Coal v. Webster Co.*, p. 630 (1989) RARE RACE CASE CAN'T SURVIVE RAT'L BASIS

- WV property tax system → disparities in property value for those who had property before and after 1975
- Rare case, usually things survive rational basis
- NO REAL CONNECTION BETWEEN STATUTE AND PURPOSE
- State hasn't even complied with equal taxation statute
- Meaningful evaluation of **fairness** requires comparison with similarly situated property holders

## *Nordlinger v. Hahn*, p. 630 (1992) NARROW READING OF ALLEGHENY

- Blackmun: demonstrates narrow holding in *Allegheny*. Upholds CA Prop. 13 benefitting long-term prop holders over new ones
- Distinguishes *Allegheny* – says EPC does NOT require articulated purpose by legislation
- Prop. 13 exists to GET BENEFITS of acquisition value system

Thomas (C): accepts result, rejects *Allegheny* distinction and would rather just overrule

Stevens (D): similarly situated neighbors have equal right to share in benefits of government

- State can't provide less fire or police services on basis of durational residence.
- Inequalities are arbitrary, unreasonable, and do NOT rationally further legitimate state interests

Consistent with *Saenz* per se rule of nondiscrimination of bona fide residents, no degrees of citizenship?

### *Village of Willowbrook v. Olech*, p. 631 (2000) CLASS OF ONE CASE

- 33 vs. 15 foot easement
- Instance of irrationality without regard to motive or animus
- **EPC when class of one IF: intentionally different treatment from others similarly situated AND NO rational basis for difference in treatment**
- Purpose of 14 EPC: protect people from intentional/arbitrary discrim (express or implied) – enough here to support EPC claim

Breyer (C): emphasizes motive, decrease concern in re: transformations of city or state ordinances.

If you have a class of one claim, (under Fritz, any conceivable purpose, even if it's not the one they actually thought of), then it's left open whether the town can just provide a post hoc rational basis.

### US Railroad Retirement Bd. V. Fritz, p. 632, (1980) PLAIN LANGUAGE: BEGINNING & END OF ANALYSIS

Facts: 1974 law gets rid of dual benefits except for grandfather clause for if 1/1/1975 not 10 years, no dual benefits Unretired qualified workers get dual benefits if: (1) performed RR work in 1974, (2) current connection to RRs in 1974 or (3) completed 25 years of RR service Appellees say EPC violation, DC holds distinction based on "active" NOT rationally related to solvency of RRs/protecting vested benefits.

- Holding: Reverses DC holding – court reluctant to invalidate legistlatin on EPC grounds. Plain language is the whole analysis

Rehnquist:

- Congress could have eliminated all windfalls. **Inquiry: Was congress employing patently arbitrary or irrational means?**
    - NO. Congress could rationally decide one group's interest > another's
    - Inquiry stops if plausible reason, even if Congress didn't ACTUALLY consider it.
    - Historical assumption that Congress intends the laws it enacts, even if seems they were misled

Stevens (C): if small class of persons deprived vested rights, constitution requires more than PLAUSIBLE explanation

- Rejects Brennan's ACTUAL purpose requirement
    - Sometimes unknown, could produce different results for same words in different sattes
- Uses ACTUAL OR LEGITIMATE purpose motivating impartial legislation (impartiality protects against harming small class)
- Uses impartial method that satisfies BOTH *Royster* AND *Lindsley*

Brennan (D): Applies rational basis, majority fails to actually apply rational basis. PLAIN LANGUAGE analysis is CIRCULAR (determines purpose from result)

- Rational basis need not be toothless post hoc test, flimsy won't satisfy it
- Inquiries:
    - What is the ACTUAL purpose of the statute?
    - Is classification rationally related to achievement of purpose?
- Deprivation of dual benefits to some is not only rationally unrelated, but INIMICAL to Congress's stated purpose
- Rejects Rehnquist's plain language analysis: insufficient, IDs classification, not the relationship between it and purpose
    - Post hoc rationalization is not the same as actual purpose
    - History, evidence suggest Congress was misled

## Equal Protection: Race Case

### *Strauder v. WV*, p. 487 (1880)

- Black Δ convicted of murder, blacks had been excluded from jury under state law, Δ wanted case removed to federal court. DC said NO, SC holds unconstitutional, should have let Δ remove
- Strong: invokes purpose of Reconstruction Amendments to secure rights to freed slaves.
- WV jury statute is obvious discrimination
- Singling out on basis of race and denying on that basis one's right to participate as jurors is an assertion of inferiority resulting in increased prejudice
- State can make jury classifications based on other things, but 14 EPC purpose was to prevent discriminate based on race

## *Plessy v. Ferguson*, p. 488 (1896) SEPARATE BUT EQUAL

- 13 doesn't apply, 14 enforces absolute equality of races before the law but NOT intended to abolish distinctions based on color
    - **Not designed to enforce social (as opposed to political) equality**
    - Separation laws do NOT necessarily imply inferiority of a race and generally recognized within state's police powers
    - OKs line drawn between political rights and integration in schools, theaters and railway cars
- Concedes that exercises of state police powers must be REASONABLE (good faith intention of promotion of public good, not for annoyance or oppression of a class)
    - Leg. may reference usage custom tradition, promote comfort and preserve peace and order to decide if reasonable
- SEPARATION IS NOT INFERIORITY – not law's fault if "colored people" interpret it that way
    - Constitution cannot force SOCIAL equality

Harlan (D): Rejects racial considerations when civil rights are at stake

- Everyone knows original purpose law was to exclude blacks. Statute interferes with personal freedoms
- Under the Constitution, law knows no superior, dominant or ruling class. No Caste, Color blind
- Concerned about future representation – *Dred Scott*

## *MO ex. Rel. Gaines v. Canada*, p. 490 (1938) UMo LAE SCHOOL REFUSES BLACK APPLICANT

- Discrimination on the basis of race in law school admission
- State had to provide substantially equal legal education available to whites. If no such facility exists, must admit to white school

## *Sweatt v. Painter*, p. 490 (1950) NO SUBSTANTIAL = OF ED. OPPORTUNITY

- Required admission to UT Law School even though state had recently established school for blacks
- UT Law school patently superior by every measure, including unmeasurable qualities → greatness
- Black school can't compete

## **Brown v. Board of Education**, p. 491 (1954) OVERRULES PLESSY, INTEGRATION IN SCHOOLS

- Holding: Segregation on basis of race in public schools, despite equal tangible factors, deprives black students of EP
- Π contend de jure segregated schools are NOT equal, cannot be made equal → EPC violation
- Inconclusive history, even after LOTS of hearings because conditions of public ed. At time of Civil War Ams was too different to indicate framers' intent
- *Slaughterhouse* proscribes state discrimination in re: blacks. Grad school cases reject laws denying black students specific benefits available to white students
    - Neither line of cases dealt with *Plessy* head on
- Examine effects of segregation in light of modern role of education. Today, required to succeed.
    - **If the state chooses to provide education, must be made available on equal terms**
- Psychological effects on black segregated kids as damaging and potentially irreversible. Impact is even greater when state sanctions inferiority (cites to social science in fn. 1, p. 493)
    - NOTE: Isn't this a finding of fact?

Note: Brown applies ONLY to de jure segregation. While it discusses the effects of segregation, not enough to look at tangible factors.

**Does *Brown* holding bar public gender-based schools?** Probably not, as subjected to heightened level of scrutiny

## *Bolling v. Sharpe*, p. 493 (1954) SCHOOL SEGREGATION IN DC VIOLATES 5TH DPC

- Overturns DC public school segregation on 5 DPC grounds
- EPC is not the same DPC, but here discrimination is constitutionally suspect and violative of liberty interest
- ***Equal protection component of 5 DPC***
- No reasonable relation to permissible government objectives + arbitrary deprivation of liberty
    - Makes no sense to strike down school segregation for states and not federal government

## *Johnson v. VA*, P. 494, (1963) SETTLES QUESTION OF SEGREGATION IN PUBLIC FACILITIES

## *Brown II*, P. 496 (1955) IMPLEMENTATION OF BROWN I DIDN'T GO WELL

Warren opinion:

- Places burden on implementation of Brown on localities
- Schools have **primary authority and responsibility** for dealing with the problems
- Role of the courts: deciding if good faith effort to desegregate has been made. Court guided by equity (flexibility)
- Π interest is admission on nondiscriminatory basis. Effectuating interest requires elimination of obstacles. School cannot ignore constitutional principles because they disagree
- Δ must make prompt/reasonable START toward compliance with Brown
    - If state, then can get extension if meet burden (various considerations)
    - Court must adequacy of state's plan.
    - In transition, federal courts retain jurisdiction

## *Green v. Co. Sch. Bd.*, P. 497 (1968) REMEDIES

- School contends: good faith freedom of choice plan adequate for compliance with *Brown* despite continuing high levels of segregation.
- Court unanimously found INADEQUATE: still complete racial identification
    - **Ultimate end: unitary, nonracial public education system**
- Districts that had *de jure* segregation must take affirmative steps to convert white & black schools into schools

## *Swann v. Charlotte-Mecklenburg Bd. Of Ed.*, P. 497 (1971) RESIDENTIAL SEGREGATION

- Problem of residential segregation in large urban school districts is addressed
- Original plan after *Brown* was geographic zoning and free transfers
    - Lower court requires more effective plan after *Green*
- Burger: affirms lower court. BROAD scope of DC's remedial powers if wrong is shown
- *Brown* does NOT require every school to reflect racial composition **BUT if past de jure segregation, PRESUMPTION AGAINST school authorities with substantially different or segregated racial composition**
    - Court has broad discretion in re: gerrymandering school districts
    - Busing ok as long as time and distance of travel doesn't risk health or education process
    - No year-by-year adjustments required after affirmative desegregation duty is accomplished

## *Keyes v. School District*, P. 498 (1973) NO HISTORY OF DE JURE SEGREGATION

- Brennan majority: contends just de jure/de facto distinction, but lays out criteria for district wide remedies when PART of a district is discriminating
    - If π shows segregation is affecting "substantial portion" of students or teachers or intentional segregation of one area, then it's probative evidence for others
- Rehnquist dissent: too big of a leap when no past de jure segregation
    - Cannot require schools to affirmatively undertake racial mixing if it cannot be done by neutral boundaries

## *Milliken v. Bradley*, p. 498 (1974) IF NO INTERDISTRICT VIOLATION, NO INTERDISTRICT REMEDY

- Detroit interdistrict busing – trial court finds de jure segregation
- Burger: remedy too broad, history of public education is local
- Setting aside district lines requires racial discrimination acts of state/local school district as the SUBSTANTIAL cause of racial segregation on the interdistrict level
- May be appropriate if district lines are "deliberately drawn on the basis of race"
- White (D): undue protection of the state, vests too much power with the local school district

## *MO v. Jenkins*, p. 499 (1990) LIMITING FEDERAL COURTS' REMEDIAL POWERS OF DIRECT ORDERS

- Limits court's power to impose financial burden.

- State tax law limits on property tax, DC ordered increase that violates constitution
    - Trial court cannot directly order state or locality to increase taxes

Follow up:

- Rehnquist: federal court can't order increased salaries or expenditure on remedial education to remedy achievement gap
- Narrow scope of remedy, **must address specifically to constitutional violation**
- Declaims indefinite extension of educational improvement as too far removed from segregation issue

## *Board of Ed. Of Oklahoma City v. Dowell*, p. 500 (1991) DE JURE SEGREGATION

- 1972: DC orders system wide busing → substantial integration
- 1977: Court enters order ending case/jurisdiction
- 1984: Court holds cannot reinstate segregation by neighborhood school. OK City cannot take an affirmative step to slow or impede integration
- Rehnquist: federal court involvement as TEMPORARY MEASURE – court cannot maintain jurisdiction once segregation orders were followed, violates local control value
- Marshall (D): 65 years of segregation aren't negated by 13 years of desegregation. Brown's stigma concern lives on
    - EFFECTS of past discrimination are still the school's fault if caused by segregation
    - Remedy: elimination of harm

**END, SCHOOL CASES**

## *McLaughlin v. Florida*, p. 500 (1964) INVALIDATES CRIMINAL STATUTE OF COHABITATION

- Invalidates criminal statute invalidating cohabitation by interracial unmarried couples
- White: classification based on race violates purpose of 14.
    - Constitutionally suspect → increased rigid scrutiny
    - EPC prohibits invidious discrimination when no valid state interest

## Loving v. VA, p. 501 (1967) FACIALLY NEUTRAL LAW INVALIDATED, MARRIAGE AS FUNDAMENTAL RT

Facts: interracial marriage (black woman and white man) convicted of violating VA criminal anti-miscegenation law

Warren:

- Violates EPC – VA creates racial classification.
- State argues ok to have classification if it punishes blacks & whites equally
    - Court rejects idea that = application survives EPC invidious discrimination. DENY RATIONAL BASIS REVIEW
    - 14 EPC imposes heavy burden on state racial classification
- State argues Framers' intent is not consistent
    - Court rejects, parallels Brown & says framers inconclusive, facts have changed
- Obvious purpose of 14: eliminate state invidious discrimination
    - Criminal and racial classification results in the most rigid scrutiny
    - If to uphold must be NECESSARY to legit state goal. HERE, no way
- Designed to maintain white supremacy, only insulates whites from nonwhites

## *Palmore v. Sidoti*, P. 502 (1984) CUSTODY BATTLE AND RACE, STRICT SCRUTINY APPLIED

- Custody battle – racial preference in custody award (kid with same race) no good. TC holds best interest of kid to take out of interracial parent's custody because stigma
- Burger: obviously race-based. Race not person decides the outcome
    - Rigid, exacting scrutiny, compelling state interest + necessary to achieve
    - Best interest of the kid is a legitimate state interest. Obviously kid could face some discrimination BUT **private bias is not enough to remove kid from mom's custody**
    - Law can't validate or codify private biases by caving to them
- NOT a per se rule, narrowly read dealing only in removal

### *Johnson v. CA*, P. 504 (2005) PRISON CASE, APPLIES STRICT SCRUTINY

O'Connor:

- Applies strict scrutiny, prison not immune from standard of review when racial classifications
- Under *Brown* & *Loving*, doesn't matter if facially neutral concerned that segregation results in increased racially based violence
- DOES NOT foreclose option that narrowly tailored. Remands to make the state prove it

Stevens (D): unconstitutional. No need to remand

Thomas (D): opposite of Stevens. Strict scrutiny does not apply

- Prison a special case, much more deferential with other fundamental rights
- Ridicules majority for concern with social stigma when prison concerned for life and safety

### *Korematsu v. US*, P. 505 (1944) ONLY RACIAL CLASSIFICATION TO SURVIVE STRICT SCRUTINY SO FAR

- Holding: Court upholds Japanese internment to EPC by implication through 5 DPC challenges (after executive order by Roosevelt in 1941, authorizing military discretion)

Black:

- Military order survives strict scrutiny. Upholds conviction of Δ refusing to comply with West Coast exclusion
- Racial classification automatically suspect → rigid scrutiny
    - Here, "pressing public necessity" ok, racial antagonism is not
- Military findings of some disloyal, no way to separate loyal THEREFORE military imperative
- At war, military discretion authorized by Congress. Hindsight can't invalidate

Murphy (D): Applies REASONABLENESS standard, **not strict scrutiny**

- Military order entitled to great respect but not above review
    - Ordinary constitutional process could prevent danger that is not imminent
    - Obvious racial discrimination therefore denial of EP
        - No evidence of Japanese sabotage. Mil. General testifies to racial motivations
        - Narrower means available (hearings vs. exclusion)
- Exclusion of Japanese is NOT reasonable relation to the removal of danger
- Military order relies on assumption that ALL Japanese → espionage. Based on sociological/racial considerations, not military
- Result: legalization of racism

Jackson (D): expedient military precautions, when enforced by civil courts with commitment to the constitution, set a dangerous precedent. Jeopardize liberty more than the military order alone. Validates racial discrimination in judicial setting

**Note: Seems majority didn't ACTUALLY apply strict scrutiny. Everyone actually using reasonable review**

*Parallel*: 9/11 interrogations of Middle Eastern men in US on visas – interviewed "voluntarily" – AG says not racial/ethnic classifications

- Bush administration: attempts to distinguish as nationality, not race or ethnicity
- Invoke strict scrutiny? Proxy for ethnic classification? In effect, restricting to certain region?
- **Purposeful discrimination is required to get strict scrutiny if the law is facially neutral or lacking express racial classification**

## Purposeful Discrimination Cases

- Under **Washington v. Davis, central purpose of EPC is to prevent official discrimination on the basis of race. Racially disproportionate impact is not enough.**
    - Are these consistent?

### *Yick Wo*, P. 507 (1886) FACIALLY NEUTRAL LAW MAY IMPOSE PURPOSEFUL DISCRIM THROUGH ADMIN

- Laundry permits in wooden buildings granted to 80 whites and 0/200 Chinese applicants. Chinese man imprisoned for operating without a license when denied permit
- Matthews: administration of law shows discrimination
    - No matter the legislative intent, applied with discrimination and violates EP
    - De facto discriminatory application of law falls under EPC

- ONLY POSSIBLE EXPLANATION: racially hostile administration

### *Gomillion v. Lightfoot*, P. 508 (1960) GERRYMANDERING TO DISENFRANCHISE BLACKS

- Mathematical demonstration that legislative underlying intent is to deprive blacks of preexisting municipal right to vote

### *Griffin v. County Sch. Bd.*, P. 508 (1964) FACIALLY NEUTRAL SCHOOL CLOSING

- Public school closing scheme included grants of public funds to white children to attend private schools
- Reason for closing public schools: ensure segregation
- NOT CONSTITUTIONAL

### *Palmer v. Thompson*, P. 509 (1971) SWIMMING POOL CASE

- OK to close public swimming pool to avoid integration
- No duty to have pool, not unconstitutional even if closed to avoid integration
  - TOO hard to ascertain motivation
  - Alone, not enough to invalidate a legislative act
- FUTILITY element of invalidating judicially if legislature will just redo under different "purpose"
- Distinguishes prior "motive" cases saying their focus is actual effect

### Washington v. Davis, P. 510 (1976) DISPARATE IMPACT NOT ENOUGH, PURPOSEFUL DISCRIM SHOWING

Facts: qualifying test administered to police applicants in DC. Blacks do worse on test and not reliable predictor of performance.

- Holding: showing of discriminatory effect is not enough under EPC. Must show intent to discriminate

White:

- De jure segregation: must result from intentional state action
- Standing alone, discriminatory impact doesn't trigger strict scrutiny. Weighed against the totality of the relevant facts
  - Discriminatory purpose need not be <u>explicit</u> in statute: can be implied for totality (see *Gomillion*)
  - If actual effect or no other explanation for disparate impact, then may imply discriminatory purpose
  - IMPACT MATTERS, but not *enough* to make out prima facie case
- Once prima facie case is established, **burden shifts to state to show racially neutral reasons can lead to disparate impact**
- Distinction *Palmer*: warned against grounding decision on legislative purpose/motivation – different because it did not involve legislation with neutral purposes but disparate impact
- **Test:** (1) Facially neutral, (2) Rationally serves purpose government is empowered to pursue

Stevens (C): distinction between purpose and impact is not as bright a line as you might think

- Concern about how this rule will be applied – different impact when applied differently

### *Arlington Heights v. MHC.*, P. 513 (1977) <u>A</u> DISCRIM PURPOSE ENOUGH, NEED NOT BE <u>THE</u> PURPOSE

Challenge to Chicago suburb's refusal to grant request to re-zone property from single family to a multiple family classification

- Holding: Not unconstitutional simply because of racially disparate impact, but if discriminatory purpose plays role → unconst.
- Powell: enough that π show discrimination was a motivating factor, need not be PURELY discriminatory purpose
  - Absent a pattern, impact alone is not enough
  - **<u>Types of relevant evidence:</u>** historical background, sequence of facts leading to passage of law, departures from normal procedures
  - **<u>Showing of discriminatory purpose *only* shifts the burden to the state to rebut presumption</u>***: not satisfied here because there was no showing of discriminatory purpose*
- White (D): majority failed to follow process of remand in light of *Davis*

**<u>Actor intends the foreseeable consequences of his actions</u>**

Does this answer whether post hoc rationalization of political animus? Powell says only needs to be ONE OF the motivating factors. Post hoc rationalization will not work because you can still point to political animus as A motivating factor.

### *Rogers v. Lodge*, P. 515 (1982) PROVING DISCRIM PURPOSE AFTER ARLINGTON HEIGHTS: at-large voting

- White: At large voting schemes minimize voting strength of minority groups
  - ***Discriminatory intent need not be proved by direct evidence*** – circumstantial or historical evidence is enough
  - No strict scrutiny without primary showing of discriminatory intent (consistent with *Davis*)
- Powell (D): inconsistent with *Mobile v. Bolden*. At large voting system uphold – evidence presented not enogh
  - Deeply subjected inquiry into motivations of officials in structuring local governments
    - No individual identified as responsible for government intent.
  - No showing of requisite discriminatory intent
    - NO SMOKING GUN (not even enough circumstantial evidence)
    - No one was actually denied the right to vote – it was just their votes would matter less
  - **Distinguishes between state affecting RIGHT to vote and action affecting a group's relative POLITICAL STRENGTH**

### *Hunter v. Underwood*, P. 516 (1985) STRUCK DOWN FACIALLY NEUTRAL LAW AS REFLECTING RACIALLY DISCRIMINATORY PURPOSE

- Evidence: disparate impact & circumstantial
- Rehnquist: struck down part of constitution requiring that people convicted of moral turpitude crimes would be disenfranchised
  - Would not have been enacted if not for racially motivated discrimination
  - Where impermissible racial motivation and discriminatory impact both exist, *Arlington Heights* is correct analysis

### McCleskey v. Kemp, HANDOUT PROVING RACIAL DISCRIMINATION IN CRIMINAL PROCEEDINGS

- Statistical study showing racial consid in capital sentencing generally shows violation against McCleskey violate 8 & 14 EPC?

Powell

- Mid-range cases involving black Δ and white V are most likely to be affected by Baldus study effect
  - If tremendously if aggravated or mitigated, racial factors have little effect. Only matters if discretion
  - Fn. 11: Baldus says on the average, doesn't refer to the experience of the individual
- Δ had no smoking gun, asks court to infer from statistics that **HIS** sentence was affected by race
  - Court rejects as insufficient evidence – not specific to *his* case
  - Δ must make showing that there was purposeful discrimination in his case
- State of GA has legit reasons for seeking death penalty. SC will NOT infer discriminatory purpose
- Rejects historical evidence of discrimination as too attenuated – **must be reasonably contemporaneous**
  - Consistent with *Rogers*? Seems not to be…
- At what point does risk of discrimination become constitutionally impermissible? 90% likely?
  - Powell says Δ is attacking wrong target by challenging jury and prosecutor
  - Jury is fundamentally about Δ PROTECTION
  - If we remove discretion from prosecutor, lots of people will be *disadvantaged*
- Powell concerned about no limiting principle and institutional competency issue

## Affirmative Action Cases – Race Preferences

### Regents of UC v. Bakke, p. 518 (1978) QUOTA NOT OK, NO MINORITY SET-ASIDES

Facts: UCDavis Med. School reserves 16/100 spots for minorities only. Bakke was white applicant rejected despite higher GPA/MCAT

- Holding: Applies strict scrutiny for inherently suspect nature of all racial and ethnic distinctions, BUT UCDavis CAN consider race

Powell

- Universal terms of 14th Am. indicate framers' intent. EPC applies to **all Americans**
- No principled basis for distinguishing among racial classifications that do and do not trigger heightened scrutiny
  - NOT clear that AFFIRMATIVE ACTION preference is in itself not problematic
    - Benign?
    - Reinforce common stereotypes?
    - Force innocent majority members to bear burden for fixing past problems?

- *Proper scrutiny: compelling government interest + precisely tailored burden*
  - Fn. 4 Carolene Products (D&I minorities) may be important in deciding NEW levels of scrutiny, but *Korematsu* says race is ALWAYS strict

- Stated purposes of special program:
  - Reduce deficit of traditionally disfavored minorities in medical school and medical profession
    - Ct: Increasing percentage based solely on race = facially invalid
    - "discrimination for its own sake"
  - Counter effects of *societal* discrimination (as opposed to actual purposeful discrimination)
    - Ct: legitimate state interest BUT **no good if helps at expense of innocent individuals without finding of constitutional violation**
    - UC can't make such findings without the court
  - Increase number of doctors practicing in underserved communities
    - Ct: No evidence that means are *narrowly tailored* to the ends
  - Obtaining educational benefits flowing from ethnically **DIVERSE student body**
    - Ct: Constitutionally PERMISSIBLE GOAL, compelling diversity interest that implicates 1st amendment right, BUT **not narrowly tailored**
      - Race & ethnicity are just one aspect of diversity
      - Unnecessary to used fixed number
        - EX: Harvard program using race as + factor, includes other types of diversity & does not *insulate* minority applicants from competition
      - **FACIAL INTENT TO DISCRIMINATE is constitutionally impermissible**
      - Racial classification must be <u>necessary</u> to promote substantial government interest

Brennan (C/D): Analogizes to gender cases, intermediate heightened scrutiny (important governmental objective + substantially related to achievement of objective). Rejects per se rule invalidating benign racial classifications (only if stigmatize)

- Concern for stigmatizing and stereotyping → separatism and reinforcement of inferiority views
- *Immutability of race* & historical interest in promotion by merit are INCONSISTENT
- Strict and searching review (not fatal in fact)
- Burdened class inquiry: (1) fundamental right? (2) traditional indicia of suspectness, (3) attempt to stigmatize (4) subject to purposeful discrimination (5) not politically powerless
  - Here, Bakke not stamped with badge of inferiority by rejection, no invidious CEILING quotas on minorities, compensates qualified minority applicants who are subject to same rigors once admitted
- Rejects distinction between set-aside and + factors (Harvard) – same constitutionally, plus at least UC Davis is transparent

Marshall (D): for 200 years, constitution allowed poor treatment of blacks, now creating barrier to advancement or remedy
Blackmun (D): Hopes AA won't be necessary forever. In order to get beyond racism, we must first take account of race
Stevens (D): need not decide whether race can EVER be used as a factor

**Is CA's ability to consider race dicta?**

- **Yes:** Beyond the scope of what was before the court. Once they make a ruling, courts can say they need not go further
- **No:** Addresses SCCA holding which entirely rejected race considerations. Reverses SCCA injunction from all future considerations of race

Is Powell collapsing process (quota/set-aside) & diversity interest?

- Powell's critics: Harvard & UCD are essentially the same thing.
  - Harvard seeks heterogeneity and PAYS attention to numbers (seeking critical mass to prevent racial isolation)
- Powell's response: Davis plan has *facial* intent to discriminate, Harvard's plan does not
  - If the focus is diversity as compelling state interest, Davis's means are MORE unnecessary than Harvard's

## ***Wygant v. Jackson Bd. Of Ed,*** p. 524 (1986) NO MINORITY PREF IN TEACHER LAYOFFS (means & ends)

- Powell: applies strict scrutiny, rejects minority preference in teacher layoffs
- Rejects role model as compelling state interest (societal discrimination alone is not justification for racial classification)

- Requires shown governmental discrimination to remedy
- Could be used to harm minority applicants by justifying small % of minority teachers with small % of minority students
- Further discrimination caused by premise that black students NEED black teachers
- No limiting principle to role model theory

- Rejects means as insufficiently narrowly tailored – diffuse burden in hiring vs. entire burden on individuals for layoffs

White (C): discharge of whites to get blacks is constitutionally impermissible

O'Connor (C/D): no court requirement of finding of discrimination as a prerequisite. If there's a wrong, there's a wrong

- Distinguishes role model theory from goal of promoting racial diversity among faculty
- ASK ROBYN – IS THERE A CONSTITUTIONALLY PERMISSIBLE PRINCIPLED DISTINCTION HERE?

Marshall (D): AA ok in layoffs as well as hiring (in fact, may be MORE narrowly tailored to RETAIN minority teachers)

Stevens (D): defends role model theory, all students benefit from integrated faculty, union AGREED to this policy

**Possible to create exemplary school for all black boys as remedy to past discrimination?**

***What prerequisite, if any, does Powell impose on government unit before AA program?***

- Strong basis for warranted remedial action (sufficient evidence to justify conclusion of prior discrimination)
  - *Wygant* lacked remedial justification
  - Does NOT require government to admit past guilt in discrimination.
  - Does NOT require explicit finding
  - Ex: Statistical disparity between race of teaching staff vs. qualified teacher MAY be enough. Burden shifts to challenger to show ABSENCE of constitutional violation

## *Fullilove v. Klutznick*, p. 525 (1980) UPHOLDS CONG. MINORITY SET-ASIDE FOR CONSTRUCTION Ks

- Burger: satisfies either test in *Bakke*, accepts neither. ***Applies something LESS than strict scrutiny***
- Congress has plenary power under commerce clause AND 14A§5 – **need not compile record or make legislative findings**
- Congress COULD reasonably conclude necessary to prevent effects of past discrimination

Powell (C): under *Bakke* opinion, justified to correct past governmental discrimination

Marshall (C): under Brennan's *Bakke* test, satisfies intermediate scrutiny

Stewart (D): Racial discrimination wrong in any form (same error as *Plessy*)

Stevens (D): rejects congressional procedures

## *Richmond v. JA Croson Co.*, p. 526 (1989) DISTINGUISHABLE FROM FULLILOVE, STATE (NOT FED)

Facts: VA plan to award 30% of subcontracts to minority business enterprises (MBEs). Population is 50% black, got only .67% of Ks

- Holding: Applies strict scrutiny to racial preference, distinguishes use and intent of 14th Am. between fed. and state.

O'Connor

- Distinguishes Fullilove, a federal case under 14A§5 power, because 14 was designed to limit state power
- Smoke out benign/remedial vs. illegitimate by applying strict scrutiny
  - Here, blacks had sufficient political power (5/9 seats, 50% pop), not the same as maj choosing to disadvantage itself
  - History of private/public discrimination alone is not enough to justify quota
- **No evidence of prima facie showing of current, specific source of discrimination.**
  - **State must identify discrimination BEFORE remedial action**. Otherwise, slippery slope
- DEFINITELY NOT NARROWLY TAILORED: allows for Eskimos and Aleuts – grossly overinclusive
- **State/local actors may still rectify effects of identified discrimination**
  - Some narrowly tailored racial preferences may be necessary to break down barriers in face of findings
  - Race neutral devices were available here (simplify bidding procedures, decrease or eliminate bond requirement, etc.)

Stevens: rejects O'Connor's idea that governmental classification never ok unless remedy for past wrong. Agrees that Richmond just perpetuating stereotypes. Subject to EPC invalidation

Kennedy: Proposes per se rule that ANY racial preference subject to strictest judicial scrutiny

Scalia: Agrees to strict scrutiny

- ONLY TIME ST CAN USE RACE TO UNDO PAST DISCRIM: **necessary to eliminate maintenance of unlawful racial classification**

- Richmond can remedy victims of past discrimination (the class there would be victims, not race)
- Concern about departure from colorblindness

Marshall (D): Constitution allows Richmond to allocate minority Ks

- State interests (1) eradicate effects of past discrimination & (2) prevent city from reinforcing and perpetuating exclusive effects of past discrimination
- OK with patterning the law off *Fullilove,* rejects strict scrutiny for racial preferences

Blackmun (D): Court taking a step back, regressing

**Focus on Scalia: claims in a society of individuals (as opposed to racial groups), cannot take account of class-based discrimination**.

- Response? Marshall's opinion in *Bakke*: years of race-based discrimination were ok, but now that we want to remedy we can't consider race in eradicating effects?
- Scalia *DOES NOT MENTION TEXT OR ORIGINALISM because not consistent with his position here*
- Discrimination was <u>enacted</u> as group-based collective, doesn't make sense to remedy without regard to this

NOTE: DISTINGUISHES BETWEEN Congress's **§5 powers under 14A** and the state's **restrictions under 14A**

## ***Metro Broadcasting Inc. v. FCC,*** p. 530, fn. 1 UPHELD TWO MINORITY PREFERENCE POLICIES

- Intermediate scrutiny applied

## **Adarand Constructors Inc v. Pena,** p. 529 (1995) OVERRULES METRO BROADCASTING/PARTFULLILOVE

Facts: Fed DOT awards K, SubK awarded for soc/econ disadv indivs. Fed. law presumes racial minorities are disadv for purpose of K.
π (other subK bidder) sues on basis of 5 DPC(EPC)

- Holding: ***<u>Applies strict scrutiny to ALL GOVERNMENTAL RACE BASED ACTION</u>***

O'Connor

- Three principles established by Croson
  (1) Skepticism (in re: ANY race-based classification)
  (2) Consistency (independent of WHO is burdened)
  (3) Congruence (same analysis for 5 & 14)
- Overrules Fullilove (holding fed to lower standard) and Metro Broadcasting (intermediate scrutiny, emphasizing future benefit not remedial rationale) to the extent that they applied intermediate scrutiny to minority preference
- **Strict scrutiny: (1) compelling governmental interests + (2) narrowly tailored**
  - O'Connor says NOT strict in theory but fatal in fact: does NOT immediately invalidate race as a tool

Scalia (C): no such thing as compelling government interest in using race to make up for past discrimination

- Can't create creditor/debtor races: victim of discrimination cannot be made whole at the expense of innocent

Thomas (C): applies strict scrutiny to all race, rejects paternalism and good intentions

- No such thing as benign racial discrimination, it's always problematic
- EPC came at high price, favoring one race perpetuates problems (stigmatizing effect, encouraging stereotype, develops sense of entitlement, "badge of inferiority," provokes racial resentment in whites)

Stevens (D): "consistency" concern ignores line btwn benefiting and burdening minorities (diff. when maj. Chooses to disadvantage itself).

- Morally and constitutionally not equivalent to create caste vs. remedy symptoms of discrimination
- "congruence" ignores difference between federal and state government actors – NOT the same

Ginsburg (D): Congress can deal with effects of racial discrimination, state sanctioned discrimination only recently ended

- Historical and practical consequences should allow remedial race based classifications
- Rejects majority's strict scrutiny as fatal in fact

NOTE: No justice argued 5A was expressly understood to prohibit racial segregation or bar use of racial classifications for ***<u>benign</u>*** purposes

**What deference is owed to Congress when it acts pursuant to 14A§5 powers? – broad reading of *Marbury***

- O'Connor says strict scrutiny doesn't contravene appropriate respect for co-equal branch
- Issue is NOT the scope of congressional power or the amount of deference owed to that power
- ***Even when acting under 14A§5 power, CONGRESS IS SUBJECT TO STRICT SCRUTINY FOR RACE-BASED CLASSIFICATIONS***
- *Marbury*, read broadly, says NO PROBLEM for court to second guess Congress

## Grutter v. Bollinger, p. 534 (2003) UPHOLDS UM LAW SCHOOL ADMISSION PROGRAM

Facts: admissions use race as a factor. Policy seeks diversity on a variety factors but considers race and achieving "critical mass"

O'Connor

- Racial diversity is a compelling state interest, race may be used in admissions (upholds *Bakke*),
- Std. of review: strict scrutiny under *Adarand*
    - Must consider **context** (evaluate importance and sincerity of government's reasons/use of race)
    - Shift from her position in Wygant, Adarand, Croson?
- **Purpose** asserted by UM Law: educational benefits flowing from diverse student body
    - Croson does NOT foreclose this purpose.
    - Court defers to judgment of importance (NOT using racial balancing, confirmed educational benefits of diversity, amicus briefs of business and military, law school as route leadership roles)
- **Narrowly tailored means?** Here, used as plus factor like Harvard, no quota, no insulation of minorities
    - Race can be used in flexible, nonmechanical ways. Desire for critical mass does NOT make it a quota
    - **Requires meaningful, individualized consideration**
        - Holistic review of applicants is undertaken by UM Law. LOTS of ways to be diverse
    - Π argues not narrowly tailored because there are race neutral ways of achieving the same ends
        - Court REJECTS – ***narrow tailoring does not require exhaustion of all race-neutral alternatives***
        - "Serious, good faith consideration of workable race-neutral alternatives" to achieve diversity → ok
- Not intended to maintain forever, just remedial. 25 years into the future, expect won't need them
    - IS THIS A RULE? Need the court reevaluate AA in 2028? Aspirational dicta or law?

Ginsburg (C): uses data to support unequal opportunity exists for minorities in current reality. Concern in re: 25 year forecast

Scalia (C/D): Concerned about Grutter/Gratz split → more confusion and litigation. Race should be left out of equation

Thomas (C/D): Rejects under strict scrutiny

- No need for deference to UM judgments here, blacks don't need meddling or pity (demeaning use of race)
- Diversity is a means to an end (educational benefit), not an end in and of itself
- UM Law should choose between decreasing selectivity and aesthetic of diversity

Rehnquist (D): critical mass unconvincing. %s of minority applicants and minority admitted students line up too well, racial balancing

## Gratz v. Bollinger, p. 542 (2003) OVERTURNS UM UNDERGRAD ADMISSION PROGRAM

Facts: UM undergrad program automatically gives 20 of 100 points for race

- Holding: Undergrad program does not satisfy strict scrutiny because not narrowly tailored – no individualized consideration

Rehnquist:

- Concerned because race outweighs as a factual matter other types of diversity contributions
- Court rejects UM's convenience point (administratively impossible to use Law system for undergrad) – administrative ease does not justify constitutional violation

O'Connor (C): distinguishes Grutter and Gratz. Selection index's treatment of soft variable makes it impossible to individually assess each applicant's diversity contributions

Thomas (C): concurs in result, but would eliminate use of race altogether

Souter (D): if the two guideposts are *Grutter and Bakke*, this is closer to *Grutter* than *Bakke*.

- All applicants compete for all spots with lots of diversity variables. Race is not decisive
- Rejects suggested percentage plans, which only obfuscate underlying racial purpose (candor shouldn't kill constitutionality)

Ginsburg (D): corrective or remedial use of race should be weighed differently

- All admitted students are qualified, selection index just helps distinguish among applicants
- Nation still feeling effects of legalized racial discrimination

# Race-Conscious Redistricting Cases

## Parents Involved, p. 552 (2007) RACIAL BALANCING IS IMPERMISSIBLE

Facts: voluntary racial diversity in public school plans in Seattle and Louisville

- Holding: Schools with no de jure segregation or finding of discrimination may not opt to classify by race in order to make school assignments, means are not narrowly tailored

Roberts:

- STRICT SCRUTINY APPLIED
- Stated compelling interests:
    - Remedying past intentional discrimination (no showing of intentional governmental discrimination)
    - Grutter's diversity interest in higher ed (Court rejects, this is closer to Gratz, race is decisive)
        - Court rejects similarity between diversity in K-12 and diversity in higher ed.
        - ***Court does not decide whether goals are compelling under strict scrutiny because NOT narrowly tailored***
- **Means:** Argue interest at stake is RACIAL diversity so it makes sense to rely on race.
    - Court rejects as not narrowly tailored. IMPERMISSIBLE RACIAL BALANCING
    - Racial composition is sought be % of population, not be educational benefits. Can't work backward like that

Thomas (C): no threat of segregation. Racial imbalance is NOT segregation.

- Racial imbalance does NOT necessarily reflect past de jure segregation, no established benefits from racial balancing
- Invokes Harlan's colorblindness argument in *Plessy* dissent

Kennedy (C): dissents to the extent that Roberts rejects school disruption of racial status quo

- Racial composition is ONE ASPECT of diverse student body
- Race-conscious measures with individualized attention and no systematic race factors are ok
- Directness of use of race poses a problem, but compelling interest in avoiding racial isolation

Stevens (D): Roberts misapplying Brown

Breyer (D): Roberts reaches wrong conclusion with application of precedent

- Schools can voluntarily adopt race-conscious goals for POSITIVE race related reasons
    - Invokes purpose, history, intent of EPC
- No precedent requires strict scrutiny to treat all racial classifications the same. Roberts application is fatal in fact
- **Contextual approach to strict scrutiny**:
    - **Historical/remedial element, Educational element, Democratic element**
- This plan would survive Grutter, would survive strict scrutiny

Note: UNCLEAR whether a majority of the Court agrees that the district's interest in achieving a racially integrated school is not compelling.

- Thomas says definitely not
- Roberts refers to *Brown* and says stop considering basis of race (does this suggest agreement with Thomas's colorblindness?)
- Kennedy rejects, says compelling state interest in use of race sometimes

Does Roberts (colorblindness) or Stevens (ending oppression & discrimination) have the better reading of ***Brown***?

## *UJO v. Carey*, p. 561 (1977) REAPPORTIONMENT OF VOTING STRENGTH IN HASIDIC JEWS

- Challengers claim reapportionment dilutes their voting strength in order to create 65% black population
- SC upheld dismissal of complaint in the absence of de jure segregation because state's action taken to comply with VRA §5
- Good faith efforts to overcome racial underrepresentation ok under ***RATIONAL BASIS scrutiny***
    - No one denied a vote, no dilution of WHITE voting strength, no racial slur or stigma conveyed

## Shaw v. Reno, p. 562 (1993) APPEARANCES MATTER IN DRAWING VOTER DISTRICTS

Facts: Racial gerrymander to achieve majority-minority districts in NC, highly irregular shape. Π sues to vindicate right to participate in COLORBLIND ELETORAL PROCESS

- Holding: Relief can be granted on basis of irregular appearance of districts

O'Connor

- Court has never held race-conscious decisionmaking impermissible in all circumstances. Does NOT lead inevitably to impermissible use of race
    - BUT just because hard to prove racial bias does NOT mean lesser scrutiny
- Concerned with impermissible racial stereotypes and the perpetuation of bloc voting and catering to racial groups
- Irregular shape can ONLY be explained by racial motivation in facially neutral legislation → basis for EPC claim
    - "uncomfortable resemblance to racial apartheid" – odd choice of words
    - Even remedial racial gerrymandering not good, perpetuates racial stereotypes
- Difference between permissive and requisite action under VRA

White (D): court sidestepping UJO precedent. Baseless distinction created

- Appearance is not more constitutionally injurious if the purpose is the same
- Compliance with VRA is DEFINITELY compelling
- Doesn't question whether narrowly tailored
- Not affirmative action, no preferential treatment. Attempting to equalize treatment is different

Blackmun (D): concerned about setback when NC voluntarily takes action

Stevens (D): distinction between gerrymandering to DISADVANTAGE minorities (*Gomillion*) and for benign purposes

- No violation when majority voluntary acts to diminish its own power, enhance that of minority
- Particularly salient given history and intent of framers of 14

Souter (D): Electoral districting has always allowed for race conscious policies. Legislators have to consider to avoid minority vote dilution

## ***Miller v. Johnson,*** p. 566 (1995) RACE-BASED DECISIONMAKING INHERENTLY SUSPECT

Kennedy

- Holding: 3rd majority black district unconstitutional under Shaw, fails to satisfy STRICT SCRUTINY
- Rejects need for irregular shape as threshold question. Relevant in re: use of race, but not necessary
- **Race-based decisionmaking inherently suspect. Presumption of good faith by legislature until challenger shows impermissible use of race.**
    - *Π's burden:* show race was the ***PREDOMINANT FACTOR*** motivating legislature's decision to place voters in district
- Legislature must have subordinated traditional race neutral principles (compactness, contiguity, respect for political subdivisions or communities defined by ACTUAL shared interests)

## ***Shaw v. Hunt I*** , p. 568 (1996)

- Rehnquist: strict scrutiny, no compelling interest justifying the use of race. Rejects DOJ's expansive description of VRA requirements, Doesn't address narrowly tailored issue
- Stevens (D): would not apply strict scrutiny AND would satisfy it anyway

## ***Bush v. Vera,*** p. 568 (1996) FOR STRICT SCRUTINY, π MUST PROVE OTHER LEGIT DISTRICT PRINCIPLES WERE SUBORDINATED TO RACE (AS PREDOMINANT FACTOR)

- O'Connor: compactness criteria subordinated, triggers strict scrutiny
- Souter (D): entire line of cases creates unworkable and unpredictable standard. Court should withdraw from the area and leave faith in political process

## ***Lawyer v. Dept. of Justice,*** p. 569 (1997) 'DEMONSTRABLY BENIGN AND SATISFACTORILY TIDY"

- Souter: no procedural problem with settlement of district. No need for racial balancing in composition of district vs. pop
- Scalia (D): state sovereignty issue

## ***Hunt v. Cromartie,*** p. 570 (1999)

- District drawn for primarily race-based reasons

Breyer

- Issue is evidentiary (need evidence that primary motive was racial, not political)
- Must show legislature subordinated traditional race-neutral districting principles to racial considerations

- Requires showing that facially neutral law distorting is inexplicable other than on basis of race

## Sex and Gender Classifications

- IS OUR GOAL A GENDER NEUTRAL CONSTITUTION? ***OR***
- SHOULD WE SAY MEN AND WOMEN MUST BE TREATED THE SAME WHEN SIMILARLY SITUATED?

***Bradwell v. State,*** p. 573 (1873) REJECTS CONST PROTECTION FOR WOMEN TO PURSUE CAREERS (federal P&I clause doesn't include right of women to practice law in IL)

***Minor v. Hapersett,*** p. 573 (1874) WOMEN ARE PERSONS UNDER 14 BUT NOT GUARANTEED RT TO PARTICIPATE IN POLITICAL OR PROFESSIONAL REALMS (denied rt of women to vote in state elections)

***Goesaert v. Cleary,*** p. 574 (1948) UPHOLDS LAW LIMITING WOMEN BARTENDERS

- Defers to MI legislature in drawing lines distinguishing between the sexes
- Line is drawn on a rational basis protection of women in bar)

***Reed v. Reed,*** p. 574 (1971) HEIGHTENS SCRUTINY IN SEX CASES, CLAIMS TO APPLY RATIONAL BASIS

- Court did not define sex a suspect classification, but sustained discrimination claim (PURPORTS TO APPLY RATIONAL BASIS)
- Holds administrative convenience is NOT enough to survive rational basis scrutiny

***Frontiero v. Richardson,*** p. 575 (1973) HEIGHTENED SCRUTINY, DEPARTS FROM RATIONALITY

Facts: EP challenge to fed. law giving automatic dependency for wives for servicemen but required husbands to make showing

- Holding: PLURALITY treats gender as a quasi-suspect class, APPLIES STRICT SCRUTINY

Brennan

- ***Traditional indicia of suspectness for EPC purposes:***
  - **History of discrimination**
  - **High visibility of class**
  - **Under-representation in the political arena**
  - **Immutability of the characteristic**
  - **Characteristic bears no relation to ability**
- Women face pervasive discrimination & sex is **immutable** like race. Gender is visible and [sometimes] bears no relation
  - Counter: sometimes not similarly situated, women not D&I minority and access to political process isn't blocked
- Statutory scheme that draws sharp line between sexes solely for administrative convenience violates EP
- **Legal burden should bear some relationship to individual responsibility**
  - Note: unlikely that framers originally intended EPC to apply to women

Powell (C): unnecessary to characterize sex as suspect class. Wait on Equal Rights Amendment

**Craig v. Boren,** p. 577 (1976) APPLIES INTERMEDIATE SCRUTINY TO GENDER

Facts: OK statute prohibits sale of non-intoxicating beer to men under 21 and women under 18

- Holding: Gender classifications subject to review that (1) important governmental objectives + (2) means substantially related to achieving those objectives.

Brennan:

- Denial of EP to males 18 – 20 – weak congruence between gender and characteristic it supposedly represents
- Legislature must (1) realign law in gender neutral way or (2) adopt procedures id'ing instances where sex generalization aligns with reality
  - Important governmental interest in traffic safety
  - BUT not tied to 3.2% beer – didn't ban drinking just the purchase, disparity not enough to draw gender line
  - NOT substantially related (are men and women similarly situated for the purposes for drinking and driving?)

Powell (C): court doesn't need to read *Reed* so broadly. Means do not reflect "fair and substantial relation" to objective
Stevens (C): there's only one EPC – two tiered method of EP is only really applying one standard
Rehnquist (D): objects to heightened standard of review, wants rationality review

## *MS Univ. for Women v. Hogan*, p. 580 (1982) STD. SAME FOR SEX NO MATTER WHO DISADVANTAGED

Facts: State nursing school only accepts women, male challenged

- Holding: heightened scrutiny still applies, doesn't matter whether man or woman challenges sex classification

O'Connor

- Fixed notions about roles of men and women should not enter analysis
- To uphold statute classifying based on gender, must show **exceedingly persuasive justification** – *show that classification serves important government objectives and discriminatory means used are substantially related to achieving objectives*
- NOT compensatory because women have not been shown to have suffered a disadvantage in nursing school admission (rule would perpetuate stereotype that nursing is woman's job, not man's)
- Classification isn't substantially related, since it allows men to audit

Powell (D): rejects heightened standard of review to invalidate state efforts to expand woman's choices

**State may not pursue exclusion or protection because of presumption of inherent handicap or innate inferiority.** Statutory objectives may not reflect stereotypes.

## *J.E.B. v. Alabama*, p. 582 (1994) EXTENDS PEREMPTORY CHALLENGES TO GENDER

Facts: challenges were used to strike on basis of gender for paternity/child support case. All woman jury empaneled.

- Holding: Extends *Batson:* Court rejects as unconstitutional gender-based jury selection

Blackmun

- Cannot survive exceedingly persuasive justification, won't constitutionalize gender stereotypes

O'Connor (C): like race, gender matters in reality

- Person's gender → life experience, relevant relative to decisions and views
    - If she's right, then *women are NOT similarly situated*. Why unconstitutional?

Rehnquist (D): NOT stereotyping, different than using race
Scalia (D): experience shows real differences between men and women, not similarly situated

## United States v. VA (VMI), p. 583 (1996)

Facts: VMI uses adversative method for men only. VA creates VWIL for QUALIFIED women, not comparable

- Holding: VA's exclusion of women from VMI denies qualified women EP. VWIL is an insufficient remedy

Ginsburg:

- Standard of review: exceedingly persuasive justification → heightened/intermediate scrutiny
    - Burden rests with state to show important governmental obj. and means subst. related
    - May not rely on overbroad generalizations about inherent talents, capacities and preferences of women/men
- Does NOT preclude use of inherent physical differences
- Justifications offered by VA
    - Singles sex education provides important ed. Benefits – option contributes to diversity in ed. Approaches
        - COURT REJECTs: not *actual* purpose, post hoc rationalization after long history of VMI
        - Not persuasive, even if it furthered diversity only favors men
    - Adversative method would have to be modified if VMI admits women
        - COURT REJECTS: while admitting women requires accommodations, VMI methods could be used to train qualified women. Some women would prefer it and can meet physical demands
            - Rejects female/male tendencies as tendencies
- VWIL inadequate remedy: **remedy must closely fit constitutional violation**
    - Pedagogy different, lacks opportunities available at VMI, not equal in faculty, quality, etc.
    - Cites to *Sweatt*, no substantial equality in separate educational opportunities

- Suggests only proper remedy is admitting women

Rehnquist (C): would only consider VMI's history since *Hogan*. Diversity only benefits men, not women

- Suggests other remedies available other than admitting women or closing
    - Genuine effort to create facility for women may avoid EP violation
    - *Sufficient if two institutions offered same quality of ed., same overall caliber*

Scalia (D): not court's place, if want things changed go through democratic process

- Alleged court applied strict scrutiny, intermediate scrutiny does NOT require least restrictive means analysis
- If we're going to reexamine, should be rational basis, not strict scrutiny
- **Believes majority has held single sex public ed. Unconstitutional, concerned about private schools
- Federal court shouldn't be determining whether or how much state must adapt program to accommodate women

Unclear whether Ginsburg leaves open strict scrutiny for gender classifications. Scalia implies irresponsible and misleading to do so.

- Rehnquist: Concerned with element of uncertainty of exceedingly persuasive justification. Too vague
- Scalia: intermediate scrutiny doesn't require least restrictive means analysis under Hogan

Consistent with *Grutter*? There deference to university, here second guessing VMI

p. 584, fn. 1 **Ginsburg acknowledges value of diversity with single sex schools – DISSIPATE [evenhandedly?] rather than perpetuate**

## ***Geduldig v. Aiello,*** p. 591 (1974) RATIONAL BASIS REVIEW → NO GENDER DISCRIM

Facts: CA law excludes pregnancy from covered disability insurance

- Holding: applies fairly deferential rational basis review, holds no gender discrimination because the distinction is between pregnant and non-pregnant.
    - Both men and women are members of the non-pregnant class and gain benefits of lower premiums
- State interest = keeping state health insurance care costs low = valid

Brennan (D): two sets of rules based on classifications linked inextricably to sex. Men are fully covered for all disabilities, including some that only affect men. State interest in preserving fiscal integrity does not justify this

## ***Michael M. v. Superior Court,*** p. 591 (1981) STATUTORY RAPE LAW & GENDER CLASSIFICATION

- HOLDING: will uphold statute that realistically reflects fact that sexes are not similarly situated in certain circumstances
- State interest: preventing teen pregnancy. Men and women are not similarly situated for the purposes of pregnancy
- Means are substantially related, Under a gender neutral law, no female is going to report statutory rape.
- Standard of review is unclear, seems not to be intermediate scrutiny
    - Underinclusive law, but women suffer consequences of pregnancy, need no additional deterrent

## ***Rostker v. Goldberg,*** p. 593 (1981) WOMEN EXCLUDED FROM MILITARY DRAFT

- Registration for draft of men and not women does not violate EP component of 5DPC
- Institutional competency issue: Congress has power to make determination under Art. I §8 (plenary)
    - Power to raise and support armies – how much deference must the court afford Congress?
    - Congress made legislative findings after hearings
- Purpose of registration: facilitate possible conscription from available pool of armed services
- Congress finds not similarly situated

Note: is the EPC about groups or individuals? If about individuals, how do we justify a categorical exclusion of women from both the benefits and disadvantages of combat positions?

## ***Pers. Admin. of Mass. V. Feeney,*** p. 597 (1979) ABSOLUTE LIFETIME VETERAN PREFERENCES

Facts: MA granted absolute lifetime preference to vets for state civil service positions (mostly male)

- Holding: Court rejected constitutional challenge to the law, not an EP violation

Stewart:

- Davis & Arlington say 14A guarantees facially equal laws, not equal results.
- **Twofold inquiry**
    - **Is the statutory classification neutral (not gender-based)?**
    - **If yes: Do adverse effects reflect invidious gender-based discrimination?**
        - Impact is a good starting point, but need *purposeful* discrimination to offend the constitution
- Challenging absolute lifetime preference, NOT hiring practice of vets generally
    - Law serves legitimate and worthy purposes & is NOT for the purpose of discriminating against women
    - Not pretext for gender discrimination (lots of non-vet males)
    - ***Discriminatory purpose requires more than awareness of consequences – BECAUSE OF, NOT MERELY IN SPITE OF***

Stevens (C): defines issue whether covert gender basis is the same as adverse effects. Almost as many males disadvantages as women
Marshall (D): follows from laws restricting women from being bets. Neutral in form but non-neutral in application. Means not tailored

# Alienage

### *Graham v. Richardson*, p. 604 (1971) STATES CAN'T DENY WELFARE TO ALIENS, STRICT SCRUTINY

- Justification: favor citizens over aliens in the allocation of limited resources
- NO GOOD – federal preemption, since Congress didn't to impose additional burdens

### *In re: Griffiths*, p. 605 (1973) APPLIES STRICT SCRUTINY TO EXCL. OF ALIENS FROM CT BAR

- None of the asserted justifications were sufficiently substantial to satisfy strict scrutiny in excluding aliens from being atty

### *Sugarman v. Dougall*, p. 605 (1973) POLITICAL FUNCTION EXCEPTION

- NY cannot prevent aliens from holding classified civil service positions, not a high policymaking position
- **Political function exception: state can require citizenship with an appropriately defined class of positions (policy making). State functions that go to heart of republic government are firmly within state's constitutional prerogatives will not get such high scrutiny** → RATIONAL BASIS

### *Foley v. Connelie*, p. 606 (1978) RATIONAL BASIS FOR COPS ON BASIS OF ALIENAGE

- Applies Dougall exception
- Police have considerable discretionary powers → policymaking.

### *Ambach v. Norwick*, p. 606 (1979) RATIONAL BASIS FOR ALIENS AS TEACHERS

- Decreased scrutiny when aliens are excluded from "state functions" bound up with operation of a state as a government entity
- Teachers have opportunity to influence students' attitudes toward citizenship act as role model
    - ISN'T THIS JUST STEREOTYPING ALIENS AS LESS TRUSTWORTHY?

### *Bernal v. Fainter*, p. 606 (1984) NARROWLY CONSTRUES POLITICAL FUNCTION EXCEPTION

- Limits political function exception to exclude notaries – duties essentially clerical

### *Toll v. Moreno*, p. 607 (1982) IN-STATE TUITION & ALIENS. FEDERAL PREEMPTION

- U of MD grants preferential tuition to in state students. Nonimmigrant aliens were not eligible even if living in state
- Ancillary burden not contemplated by Congress – policy violates Supremacy clause

### *Hampton v. Mow Sun Wong*, p. 607 (1976) FEDERAL CIVIL SERVICE & PDP

- Asserted national interests not enogh – didn't explicitly come from Congress (NOT decided under 5th Am. EP)
- Because people were admitted by Congress/President's decision, any deprivation of liberty must be done through DP

### *Mathews v. Diaz*, p. 608 (1976) CONGRESS AND CONDITIONING MEDICARE ON ALIENAGE

- Rational basis review – very deferential to fed government in immigration and naturalization

- Congress can condition alien eligibility for Medicare on admission for permanent residence and 5 year durational residency reqt

# Other Classifications

When is heightened scrutiny appropriate?

- Traditional indicia of suspectness
  - **History of discrimination**
  - **High visibility of class**
  - **Under-representation in the political arena**
  - **Immutability of the characteristic**
  - **Characteristic bears no relation to ability**
- Under *Murgia*, if individuals in group have distinguishing characteristics RELEVANT to state's interest → rational basis review (age, disability, etc.)
- White in *Cleburne* indicates we should look to relevance as a GENERAL matter of the category or class

## Disability, Age and Poverty

***Disability*** → rational basis (at least in the context of mental retardation, perhaps some wiggle room under Marshall dissent's view)

***Age*** → rational basis (classifications are not under traditional indicia of suspectness)

***Wealth*** → rational basis, no heightened scrutiny (NOT ENOUGH)

### Cleburne v. Cleburne Living Center, p. 609 (1985) RATIONAL BASIS FOR MENTAL RETARDATION

Facts: City denied special permit for group home for mentally retarded under municipal zoning ordinance. **AS APPLIED challenge**

- Holding: Mentally retarded are NOT a quasi-suspect class, but here cannot survive rational basis review

White:

- Mentally retarded have lower ability to function, but does not justify heightened scrutiny because characteristics matter
  - Institutional competency: Legislature has better information to make this decision
  - Legislature already protects disabled, willing to take action
  - Class is NOT politically powerless because can attract attention of leg
  - Hard to include amorphous class and justify exclusion of others (elderly, other disabled, mentally ill, etc.)
- Legislation must be **rationally related** to **legitimate government purpose**
  - Here, mere concern with negative attitudes of neighbors isn't enough
    - Consistent with idea that unsubstantiated fear invalid under *Dept. of Ag. v. Moreno*
    - Inconsistent with: *Belle Terre* (frat boys) and/or attitudes in re: immorality in *Bowers?*
      - In *Bowers,* historical discrimination (NOT in Belle Terre, distinguishable)
      - Record doesn't establish fears and concerns, but rational basis requires only plausible or conceivable justification (*Fritz*)
  - No rational basis for believing home a threat

Stevens (C): Rational basis can apply to all EP decisions – reasoning is more a question of whether characteristic is relevant to case
Marshall (D): This ordinance WOULD be valid under rationality review. Majority sub silentio applied heightened review. Should openly apply heightened scrutiny

### *Mass. Bd. Of Retirement v. Murgia*, p. 613 (1976) RATIONAL BASIS APPLIED TO AGE

- Holding: age classifications are ineligible for heightened scrutiny
  - No history of purposeful unequal treatment

- No discrete and insular group in need of special protection (amorphous)
- No unique disabilities not truly indicative of their abilities

- Maintains state's mandatory retirement age for uniformed officers

### *James v. Valtierra*, p. 614 (1971) POVERTY IS NOT A SUSPECT CLASS

Facts: EP challenge to CA constitutional requirement banning low rent housing projects without approval in local referendum

- Holding: no distinctions based on race, poverty alone is not enough to trigger strict scrutiny

Marshall (D): provision on its face constitutes invidious discrimination, rejects constitutionality of explicit classification based on poverty

## Sexual Orientation

### Romer v. Evans, p. 615 (1996) FACIAL CHALLENGE TO CO AM. 2 IN RE: HOMOSEXUALITY

Facts: CO Am.2 repealed protection to gays in local ordinances and prohibited government action protecting the class. FACIAL challenge

- Holding: Cannot put homosexuals in a solitary class – withdraw from them only specific legal protection from discrim, imposing special disability

Kennedy

- **Unclear whether suspect class, doesn't decide since statute can't survive application of *rational basis***
- Not legitimate purpose (denying special status, putting them in same place as everyone else) and no rational relation
  - Confounds process of judicial review
  - Too narrow & too broad – conflicts with central idea of EPC
    - Facial challenge, here law disfavors an entire class of people
  - Unilaterally denies protection to people identified by a single trait
    - *Moreno* concern: motivated by a bare desire to harm a politically unpopular group

Scalia (D): statute is not bare desire to harm, preserve morality against politically powerful minority

- Rational basis for CO to express disapproval of conduct it finds immoral
- Faults majority for failure to mention *Bowers*

What about the political process?

- Homosexuals can vote. They won at the local level and lost at the state level. Should political actors be insulated from loss in the political realm in this way?
  - Denver could decide never to pass public accommodation protections for homosexuals → no constitutional problem
  - Title VII doesn't protect sexual orientation
- Are other groups entitled to his kind of insulation? Smokers, dog owners, unwed mothers, etc.
- When *Romer* was decided, *Bowers* still good law. CO could criminalize homosexual conduct but not withdraw protection?

INSERT: homosexuality and the military cases

# Fundamental Interests Branch of EPC

## Voting Cases

### Harper v. VA State Bd. Of Elections, p. 639 (1966) FUNDAMENTAL RIGHT TO VOTE

Facts: VA imposed $1.50 poll tax as precondition to voting.

- Holding: State violates EP whenever it makes the affluence of the voter an electoral standard – must have opportunity for equal participation
  - Note: wealth subject to heightened scrutiny here IN COMBINATION with right to vote

Douglas

- Once states grant right to vote to the electorate, must administer vote consistently with EP
- Vote is fundamental because part of 1st and "free and unimpaired manner is *preservative* of other basic civil and political rights"
- Voter qualification has no relation to wealth or to paying a tax (introduces irrelevant factor)
- Purpose of state was originally to disenfranchise blacks and poor whites, not to collect revenue

Black (D): rationality review. Legit state interest in collecting revenue and assuring interested voters
Harlan (D): rational basis exists, traditional part of political structure

This law is **facially neutral**. Under WA v. Davis and Rogers v. Lodge, need intent to discriminate. Since wealth is not a suspect class, would the court reach the same result today?

- Scalia and Thomas say under modern precedent, disparate impact doesn't cut it
- Analogy to 24th Am (eliminating poll tax in federal elections) may be helpful
- Voting Rights Act condemned poll tax in state elections. No rational relation, unreasonable financial hardship.

Get Robyn's notes in re: doctrinal repudiation of wealth classifications in electoral process during Burger court

## Crawford v. Marion Co. Election Bd., handout, (2008) VOTER PHOTO ID REQUIREMENT

Facts: Voter ID requirements, IN required photo id. facial challenge as a result of de facto discriminatory effect amounting to poll tax

- Holding: Applies balancing of interests (NOT strict scrutiny). Evenhanded restrictions protecting the integrity and reliability of electoral process are NOT invidious and satisfy *Harper*.

Stevens: (survives rational basis in facial challenge – leaves open whether AS-APPLIED challenge would succeed)

- State interest: protect electoral process, deter and detect voter fraud
- Rejects the alleged burden on eligible voters who lack current photo id
    - State offers free photo id cards, not a substantial burden for most people (so not FACIALLY INVALID)
        - Burden of a few → Not wholly unjustified → not a constitutional problem
    - Provisional ballots may be cast without the id.

Scalia (C): Burden is minimal and justified. Harper doesn't apply strict scrutiny even to as-applied challenges. Not invidious under 14A, especially when burdened classes aren't protected
Souter (D): burdens poor, elderly, and disabled → doesn't even survive rational basis, would apply sliding scale standard

- When competing interests, a **fundamental right to vote** outweighs state's interest
- Not really free, cost-prohibitive for the poor
- Majority misapplies *Harper* – this statute targets poor people, uses payment of fee as measure of voter qualification

Breyer (D): analogizes voter id requirement with poll tax in *Harper*

## Kramer v. Union Free School Dist. No. 15, p. 640 (1969)

Facts: NY school district residents can only vote if own or lease real property or are parents of kids. Π brings as applied challenge

- Holding: Applies strict scrutiny ("close and exacting examination") to law restricting the franchise

Warren:

- Is there a compelling state interest?
    - No presumption of const bc only can get that by assuming govt represents all. This challenges fair representation.
    - Purpose: limit election to those interested in such eletions
    - Court willing to assume state interest is satisfied
- MEANS ARE NO GOOD
    - Statute is both overinclusive (some people own property but don't care about school) and underinclusive (excludes people who DO care about school, have direct and distinct interest)

Stewart (D): no strict scrutiny. state may reasonably assume some have a greater interest than others. Classification is rationally related to a permissible legislative end

- Challenger can vote out STATE legislature, who created the law

***Cipriano v. Houma,*** p. 642 (1969) UNCONST IF ONLY PROP OWNERS CAN VOTE FOR ELECTIONS IN RE: MUNICIPAL UTILITY BONDS

***Phoenix v. Kolodziejski***, p. 642 (1970) EXTENDS CIPRIANO, CAN'T EXCLUDE NON-PROP. OWNERS

***Salyer Land Co. v. Tulare Lake Basin,*** p. 642 (1973) MINIMAL SCRUTINY FOR LTD. PURPOSE ELECTIONS

- To deny franchise based on property ownership, issue being voted on must have special limited purpose with a disproportionate effect on landowners

***Richardson v. Ramirez,*** p. 642 (1974) DISENFRANCHISEMENT OF CONVICTED FELONS

- Court found exception to usual EP standard in the recognition of ex-felons' disenfranchisement under 14A§2.
- No strict scrutiny, within state's power under 14A§2 ("or other crime")
- Framers' intent in §1 EPC could not have been to overrule §2

**Fourteenth Amendment, §2 & Voting Rights**

- Designed to enfranchise freed slaves. If blacks denied the right to vote, states got decreased congressional representation
  - Response of South was systematic DISENFRANCHISEMENT of blacks
  - 14A§2 wasn't enforced, no discriminating state lost representatives
- Does §2 authorize, as Rehnquist suggests in *Richardson v. Ramirez*, disenfranchisement for crimes?
  - May be construed as separate issue whether NOT punished for it and AUTHORIZED
- Does ex-felon-ness have any bearing on the ability to vote? Should we continue to punish someone after sentence completed?
- Racial component? The felon requirement has the effect of disenfranchising a major portion of the black male population
  - While disparate impact isn't enough under *WA v. Davis,* that case didn't implicate a FUNDAMENTAL RIGHT
  - Disparate impact makes a constitutional difference in fundamental right analysis under 15th Am.

## Access to the Courts Cases

WHAT ROLE/WEIGHT IS GIVEN TO DISCRIMINATION ON THE BASIS OF POVERTY

### CRIMINAL PROCESS

***Griffin v. IL,*** p. 651 (1956) TRIAL TRANSCRIPT FOR INDIGENT ΔS, ACCESS TO THE COURTS

Facts: IL denied trial transcript to indigent Δs on appeal despite concession that needed for effective appeal

- Holding: State must provide trial transcript to indigent CRIMINAL Δ on appeal on nonfederal grounds

Black

- Focus on the discriminatory EFFECT: DP & EP requires procedures that are not invidiously discriminatory
- **Ability to pay costs has no rational relation to guilt or innocence**
- State is not required to grant appellate review, but if it does it can't use discriminatory procedures

Harlan (D): EP does not apply here. All state does is **not alleviate economic conditions it did not create**

- Equal treatment doesn't mean giving money to some Δs but not others
- Under DPC, no arbitrary denial of appeal
  - ANALOGY: HARRIS V MCRAE – state doesn't have to pay for abortions
- Discriminatory IMPACT isn't enough when state action is neutral on face

Rehnquist (D): No constitutional right to an appeal, appeals are discretionary and CIVIL, not criminal and were NOT always a right

NOTE: TENSION WITH WASHINGTON V. DAVIS (invokes race)

### *Douglas v. CA*, p. 652 (1963) INDIGENT ENTITLED TO COUNSEL FOR FIRST CRIMINAL APPEAL

Facts: CA system required merit review before granting counsel for first appeal to indigent Δs

- Holding: DPC & EPC require counsel be provided for indigent Δs on first appeal

Douglas

- CA statute drew unconstitutional line between rich and poor
- Problem = discrimination against the indigent. No EP when type of appeal depends on wealth.
    - No obstacle to appellate review for wealthy (good or bad case for appeal)

Harlan (D): EP does not apply, only DP case. EP does not impose affirmative duty to make economic circumstances =.

- Thinks the line is between meritorious and bad appeals, not rich and poor
- DP examines whether state action is arbitrary, and here it isn't (allocation of resources)
- Law of general applicability may affect poor more harshly than the wealthy

### *Ross v. Moffitt*, p. 653 (1974) DECLINES TO EXTEND DOUGLAS FOR DISCRETIONARY APPEALS

- Holding: Under DP, entitled to trial but no right to atty on discretionary appeal. EP doesn't require absolute equality, just adequate opportunity. No counsel on discretionary appeal does NOT deny meaningful access

Rehnquist

- State need only ensure adequate opportunity to present claims fairly in appellate process
    - **DP emphasizes FAIRNESS between Δ and State (ignores dealings with other individuals in situation)**
    - **EP emphasizes DISPARITY of treatment between classes of individuals with [arguably] indistinguishable situations**
- Δ wants attorney as a sword to upset prior determination of guilt, not a shield to protect against encroachment of the state
- NOT a DP issue. State has a limited duty
    - Δ must not be singled out and denied meaningful access to appellate system
- EP does NOT require absolute = no equalization of economic conditions. Only requires = opportunity (access to appellate review with respect to indigency)

Douglas (D): Use DP and EP

### *Halbert v. MI*, p. 654 (2005) MI LAW UNCONST. IN REJECTING COUNSEL FOR GUILTY OR NOLO CONTENDERE PLEAS – either way, it's a first appeal – UNDER DP & EPC

## CIVIL LITIGATION

### *Boddie v. CT*, p. 655 (1971) ACCESS TO THE COURTS AND DIVORCE PROCEEDINGS

Facts: indigent welfare recipients seeking to file divorce actions in state court, can't pay fees and costs

- Holding: DP claim sustained because of the fundamentality of marriage & state's monopoly on means for legally dissolving
- Court does NOT hold that access is a right in all circumstances guaranteed by DP

### *US v. Kras*, p. P. 656 (1973) NO DP ACCESS ISSUE FOR VOLUNTARY BANKRUPTCY PROCEEDING

- Holding: Court refuses to extend *Boddie* to voluntary bankruptcy proceeding because there's no fundamental right implicated AND not within exclusive control of the state

Stewart (D): *Boddie* analysis equally applicable here

Douglas (D): concerned about invidious discrimination based on wealth

### *Ortwein v. Schwab*, p. 656 (1973) EXENDS KRAS TO JR OF ADMIN DENIAL OF WELFARE BENEFITS

- Interest in welfare payments has less constitutional significance than interest in divorce

### *Little v. Streater*, p. 656 (1981) FOLLOWS BODDIE, Δ ENTITLED TO PATERNITY TEST UNDER DP

- Unique form of exculpatory evidence and state's prominent role in the proceeding.
- Δ who faces state and has evidentiary burden to overcome does not have meaningful opportunity to be heard
- **Fundamental fairness concern under DP**

### *Lassiter*, p. 657 (1981) REJECTS INDIGENT MOM'S CLAIM OF ENTITLEMENT TO COUNSEL ON APPEAL

### *Mayer v. Chicago*, p. 658 (inset on MLB) (1971)

- Med student couldn't pay for transcript on appeal. Measured state's interest against Δ's

### MLB v. SLJ, p. 657 (1996) PARENTAL STATUS TERMINATION ENTITLED TO HEIGHTENED REVIEW

- Holding: because of the irreversibly damaging effects of parental termination, *Griffin* should be extended to cover fee waiver in access to the courts for appeals to parental termination hearings

Ginsburg:

- State may not condition appeal from parental right hearings on affected parent's ability to pay for record prep under EP & DPC
- Fee waiver as exception not the rule (*Griffin* – criminal, & *Boddie* – divorce)
    - State control and **intrusions on family relationships** consistently invoke fee waiver
    - This is certainly family and quasi-criminal
- Most cases rely on EP framework because DP provides no independent requirement of appeal
    - EP: concern in re: legitimacy of excluding appellants based solely on ability to pay
    - DP: concern in re: essential fairness of state-ordered proceedings prior to adverse state actions
- Too much at stake here: termination of rights for mom vs. financial interest of the states
    - No undue burden on the state because appeals on this kind of hearing are rare

Kennedy (C): DP is sufficient to overturn, don't need to use EP

Thomas (D): concern about slippery slope, increased financial demands on the state. Doesn't like that unclear whether relying on EP/DP

- Even-handed, facially neutral laws under WA v. Davis are NOT problematic, since wealth classifications aren't even suspect

How do we limit quasi criminal? Paternity (Streater)? Custody (Troxel)(Moore v. E. Cleveland)?

Comparison: Mayer and MLB, Lassiter and MLB

- Irreversibly destructive to family relationship (MLB) and professional reputation (Mayer)

Is Mayer the right case to compare here?

- Was Mayer even entitled to a transcript? It's at least questionable, since he faced no jailtime)

Is Lassiter distinguishable?

- There, mom didn't get counsel. Difference between having no attorney (effective representation) and having NO ACCESS TO THE COURTS at all

MAY NEED TO GET NOTES FROM ROBYN HERE, AS I DIDN'T WRITE ANYTHING FOR THE END OF THE CLASS

## Non-fundamental Rights (Food, Shelter, Education)

### *Dandridge v. Williams*, p. 662 (1970) NO FUNDAMENTAL RIGHT TO AFDC, WEALTH NOT SUSPECT

- Holding: Applies rational basis scrutiny because no fundamental right or suspect classification invoked. Socioeconomic legislation gets rational basis review.

Stewart

- Economic legislation needs only a reasonable basis under EP analysis
- Court should defer to legislature on this one, satisfies reasonable basis

Marshall (D): heightened scrutiny should apply – AFDC support necessary to sustain life and is different from business considerations in Lee Optical.

### *Lindsey v. Normet*, p. 663 (1972) NO FUNDAMENTAL RIGHT TO HOUSING

- Holding: Applied rationality review in sustaining forcible entry and detainer procedure for eviction after nonpayment of rent
- No constitutional remedy for every economic and social ill
- Legislative issue

## San Antonio Indep. Sch. Dist. V. Rodriguez, p. 664 (1973) NO FUNDAMENTAL INTEREST IN ED.

Facts: TX system of financing education relied heavily on local property taxes. Suit for poor families in districts with low prop. values

- Holding: TX property tax system subject to rationality review because no wealth suspect classification and no fundamental interest in education.

Powell

- Not an EP violation on basis of suspect class
  - No proof poor districts corresponds with poor families
  - No absolute deprivation because of poverty here – just a quality issue. EP doesn't guarantee absolute wealth equality
  - No identifiable victims of discrimination in district wealth (amorphous class lacking indicia of suspect class)
- Not a constitutional violation on basis of fundamental right
  - EPC is important but not EPC fundamental – not expressly or implicitly guaranteed by constitution
  - Rejects the alleged nexus between education and exercise of right to free speech and vote
    - NOT entitled to most effective speech or most informed electoral choice
    - No limiting principle to the nexus
- Apply rational basis, traditionally defer to legislature on local matters, ct. has no specialized knowledge for ed. Policy
  - Some inequality shown isn't enough
  - Standard doesn't require least restrictive means
    - Less freedom of choice with respect to money, but not eliminated
    - Financing scheme encourages LOCAL CONTROL
    - If the court adopts π argument in re: unconstitutionality, what about provision of FIRE, POLICE, etc.
- Caution that not just upholding status quo, or rubber stamping inequality

Stewart (C): EP confers no substantive rights and creates no substantive liberties. No infringement on fundamental right or suspect class
White (D): TX system does not give opportunity for low income districts to increase funding. Means are NOT rationally related to end
Marshall (D): Court applies a *spectrum of EP standards* depending on constitutional and societal importance

- Classification involves characteristic over which π has no control.
- Education is fundamental and should warrant higher scrutiny
- Accepts the nexus between education and fundamental rights of voting and first amendment

How does this compare with Jackson's view in Edwards v. CA?

## *Plyler v. Doe*, p. 671 (1982) AMALGAM OF ALIENAGE AND EDUCATION

Facts: TX law required illegal alien children pay tuition

- Holding: TX may not deny undocumented school age children free public education because aliens are persons under 14A.

Brennan

- Says applying rational basis review, fails
  - NO SUCH THING AS ILLEGAL ALIEN SUSPECT CLASS, but school age kids cant affect status or parents conduct
  - Legal burdens should bear some relation to conduct
- Stated purpose: protect fiscal integrity of TX schools
- Court takes into account the harm to nation and innocent children (not culpable for their condition) from denial of education
  - Education weighs too heavily against a merely financial choice
- State power is preempted by federal treatment of alienage
  - NOT inconsistent with federal policy (see, e.g., Graham v. Richardson) BUT Congress has the plenary power
  - No national policy or congressional intent supports what the state is doing here

Can public schools charge a fee for students to participate in extracurriculars after Plyler and Rodriguez? Universal and voluntary…

## Zobel v. Williams, handout (1982) DISTRIB OF BENEFITS ON BASIS OF DURATIONAL RESIDENCY REQ'T

Facts: oil dividends distributed to residents based on length of residence since 1959. EPC challenge

- Holding: Durational residency requirement violates EPC by creating permanent classes of citizens
  - Note: does not invoke the right to travel in the same way as Shapiro and Maricopa Co. (no waiting period)

Burger

- Justifications advanced by AK
    - Financial incentive to establish and maintain residence in AK
        - Court rejects means: no rational relation to encouraging people to move in, creation of classes bad
    - Encouragement of prudent management of the permanent fund
        - Court rejects means: Not served by providing greater dividends for people based on length of residency
    - Apportionment of benefits to recognize past undefined contributions
        - Court rejects end: ***state may not allocate resources on the basis of an expanding # of permanent classes***
        - Everyone is a citizen, notion inconsistent with equal treatment of similarly situated people under EPC

Brennan (C): prospective application is unconstitutional under the right to travel. Citizenship clause grants BOTH US and State citizenship

- Clause does NOT provide for **degrees of citizenship** – citizenship equated only with simple residence
- To discriminate based on residency, need valid state interest. There is none here

O'Connor (C): Court should focus on right to travel. Accepts rewarding past contribution. Must test strength of state objective against constitutional imperative. Here, balancing test weighs in favor of challengers.

Rehnquist (D): scheme is an economic regulation, should be weighed under EP deferential review. Does not impede right to travel

# State Action Cases

**With STATE ACTION cases three theories:**
**(1) Public Function (Marsh)**
**(2) Nexus -- significant nexus between private actor & state (Burton)**
**(3) Conspiracy -- between state & private individuals (Guest)**

## Criminal provisions

**18 USC §241**. *Conspiracy against rights.* If two or more persons **conspire** to injure, oppress, threaten, or intimidate any inhabitant of any State, Territory or District in the **free exercise or enjoyment** of any right or privilege secured to him by the **Constitution or laws of the US**, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured. They shall be fined not more than $10K or imprisoned not more than 10 years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life.

**18 USC §242.** *Deprivation of rights under color of law.* Whoever, **under color of any law**, statute, ordinance, regulation, or custom, willfully subjects any inhabitant of any State, Territory, or District to the **deprivation of any rights, privileges, or immunities** secured or protected by the [Constitution or laws], or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color, or race, than are prescribed for the punishment of citizens, shall be fined not more than $1,000 or imprisoned not more than one year, or both; and if bodily injury results shall [be] imprisoned not more than ten years; and if death results shall be subject to imprisonment for any term of years or for life.

## Civil provisions

**42 USC §1981.** *Equal rights under the law.* All persons within the jurisdiction of the US shall have the same right in every state and territory to make and enforce Ks, to sue, be parties, give evidence and to the full and equal benefit of all laws and

proceedings for the security of persons and property **as is enjoyed by white citizens**, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other

**42 USC §1982**. *Property rights of citizens.* All citizens if the US shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

**42 USC §1983**. *Civil action for deprivation of rights.* Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the DC, subjects, or causes to be subjected, any citizen of the US or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

**42 USC §1985(3)**. *Conspiracy to interfere with civil rights.* If two or more persons in any state or territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

## Civil Rights Cases, p. 677 (1883) CONG 14A§5 POWER AIMED AT STATE ACTION, NOT PRIVATE ACTORS

Facts: Congress passed CRA of 1875. Blacks excluded from hotels, theaters & RRs sued under Act

- Holding: Congress's 14A§5 power does not extend to private actors, only exists to limit state action under §1.

Bradley

- §5 allows Congress to enforce the 14th Am. Power to adopt appropriate legislation for correcting the effects of such prohibited **state laws and state action,** NOT private individuals
- CRA 1875 is NOT remedial or corrective of state wrong. DIRECT action
    - Other remedies available to πs, just no constitutional cause of action
- Rejects the 13A as justification (no state action requirement)
    - NOTHING to do with slavery, not a badge or incident of slavery
    - Runs the slavery argument into the ground if 13 applies to every act of discrimination
    - End special protection afforded to blacks: "rank of a mere citizen, and ceases to be the special favorite of the laws."

Harlan (D): 13A did not intend to destroy slavery and remit slaves to discretionary protection of the states. 14A is broader

- 13: These accommodations are quasi-public, Congress can decide discrimination is a badge of slavery.
    - Slavery's coexistence with discrimination against free blacks doesn't mean 13 wasn't designed to reach different dynamics
- 14: ALSO covers agents or instrumentalities of the state with duties to the public
    - **Citizenship clause**: Unlike EPC, DPC and P&I, no state action requirement on it – affirmative positive grant
    - 14A§5 allows Congress to enforce ALL of 14§1, including citizenship clause
    - **Rights secured by the citizenship clause include state citizenship (**exemption from race discrimination in respect of any CR belonging to citizens of the white race in the same State) **and national citizenship** (no discrimination by the state/individuals exercising a public function).

What issue is left open?!

## *Marsh v. AL*, p. 681 (1946) PUBLIC FUNCTION OF COMPANY TOWN → STATE ACTION

- Holding: State action finding was NOT because of the criminal process had been invoked to prosecute Marsh for trespassing
- Nature of the private activity (operation of a town) amounted to the exercise of a **public function**.
    - Does NOT look for nexus between state and private conduct
    - Focus: balancing of competing interests of the parties

**What about a private university? Is Cornell like the company town in Chickasaw?**

- "has all the characteristics of any other American town."
- Distinguishable from shopping center or mall
- Is the SC likely to call this more like Marsh than Hudgens? Likely not…

- Emphasized that the town was accessible to and freely used by general public

### *Hudgens v. NLRB*, p. 681 (1976) SHOPPING CENTER NOT STATE ACTION (Marsh is not extended)

### *Evans v. Newton*, p. 681 (1966) 14 EPC: PARK FOR WHITES ONLY OVERRULED B/C MUNICIPAL

**How far does the municipal function extend?**

Prisons? What if the state turns over prison system to private corporation? State action?

- Traditional state function/role
- State sanctions sending prisoners there
- Prisons implicate constitutional rights – BUT liberty DP interests extinguished at trial

Facts: Trust established a park for whites only, city responsible for upkeep even after turned over to private trustee

- Holding: State action implicated – nature of service rendered to the community by a park supports municipal public function
- Distinguishable from social clubs: origin is often racially oriented
  - More like police/fire services, serve everyone

### *Smith v. Allwright*, p. 682 (1944) WHITE PRIMARIES VIOLATE 15TH AM.

- Holding: Primary is close enough to an election, and to the state role in the election machinery, that it implicates an important right, triggers state action
- Political party cannot exclude blacks from voting in white primaries
- Place of primary in electoral scheme → state delegation of the power to fix qualifications = state function that makes party's actions a state function

### *Terry v. Adams*, p. 682 (1953) STATE RESPONSIBILITY IS KEY TO PREPRIMARY VIOLATING 15 AM

- Holding: Exclusion of blacks from the primary is a violation of 15 – 15A includes any election in which public officials are chosen.
  - Elections are inherently government functions and any discrimination implicates state action?
  - State's affirmative obligation under 15A to assure equality even when discrimination originates in private individuals?

### *Jackson v. Metropolitan Edison Co*, p. 683 (1974) LIMITS MARSH TO CO. TOWN/WHITE PRIMARIES

- Holding: State action extended too far, no state action in public utility service cutoff because not traditionally in exclusive prerogative of the state.

Marshall (D): State action: utilities act as state surrogate or the state provides the service itself

### *Flagg Bros Inc. v. Brooks*, p. 683 (1978) WAREHOUSEMAN NOT TRADITIONALLY STATE ACTION

- Applies same test as Jackson
- Not satisfied here because sale was NOT only means by which π could have remedied & state enactment of UCC doesn't implicate the state enough
- Rehnquist distinguishes from White Primaries because those were the only available meaningful way to participate

### Shelley v. Kraemer, p. 683 (1948) RACIALLY RESTRICTIVE COVENANTS

Facts: White homeowners signed racially restrictive covenant. Owners sued to enjoin black purchasers

- Holding: State action in denying EP by using judiciary to enforce racially restrictive covenants

Vinson

- 14A guarantees right to own and enjoy property, and §1982 gives all citizens of the US same property rights enjoyed by whites
- 14A provides NO shield against purely private conduct, but **judicial enforcement is state action**
  - Covenant alone would not violate 14 as long as everyone adhered
- If the effect of judicial enforcement is to deny 14A rights, then violation of 1982
- **Origin of the discrimination is not constitutionally relevant. NOT dispositive that it began as private action**

Maclin suggests that the citizenship clause and 13 badge/incident of slavery might invalidate the covenants altogether (don't require state action)

## *Evans v. Abney*, p. 685 (1970) OK TO REVERT PARK BACK TO HEIRS

- Holding: Reverter is not state action, just following wishes of owner.
- Termination of park is a loss shared by all (similar to *Palmer v. Thompson*, swimming pool in MS)

**What's the real difference between Evans and Shelley? Aren't they both affirmative enforcement of private discrimination?**

## *PA v. Bd. Of Directors of Trusts*, p. 686 (1957) DISCRIM FOR CITY AS TRUSTEE TO OPERATE SCHOOL FOR POOR WHITE MALES

## *Burton v. Wilmington Parking Auth*, p. 686 (1961) NEXUS THEORY

Facts: coffee shop lessee in state owned parking building would not serve blacks.

- Holding: Exclusion of blacks is discriminatory action, concerned with degree of state participation

Clark

- Need some ***significant extent of state involvement in private conduct*** to subject it to 14A
- **State cannot abdicate its responsibility by ignoring it – TOLERANCE OR ACQUIESCENCE is enough**
    - State INACTION here: didn't require nondiscrimination as part of the lease, placed power, property and prestige of state behind the discrimination
    - Lease plays vital role in operation of state parking facility, dedicated to public use
- DOES NOT ANNOUNCE A PER SE RULE OF WHEN STATE IS SUFFICIENTLY INVOLVED
    - Applies a kind of balancing test, case-by-case evaluation of state involvement

Stewart (C): fits easily under 14, state court held state law authorized discrimination. Invoking state statute → state action
Harlan (D): Wants remand for clarification of Stewart's point

**Is Burton a retreat from Shelley**?

- Shelley: any connection with the state is good enough. "Exertions of state power in all forms"
- Burton: State's involvement must be *significant*

## *Moose Lodge No. 107 v. Irvis*, p. 688 (1972) LIQUOR LICENSE NOT ENOUGH STATE INVOLVEMENT

Facts: private club had state liquor license, refused to serve member's black guest

- Holding: operation of state liquor regulation scheme did not sufficiently implicate the state to make it state action

Rehnquist

- Cites to Shelley, concedes that ORIGIN need not be state
- NOT true that if private actor receives ANY benefit or service at all from the state or subject to any state reg, state implicated
    - Taken literally, would destroy distinction between state and private actions
    - Alleged "monopoly" status is not enough
- Under Burton, state must be significantly involved with invidious discrimination (***symbiotic relationship***)

Douglas (D): special circumstance here to call this state action
Brennan (D): pervasive regulatory schemes by state → supervision and control → state action

***Is this consistent with Burton?***

- Burton says significant involvement and tolerance/acquiescence is enough
- Burton would require the state to have an affirmative duty to make sure that the club was not discriminating
- Under Burton, no need for the state to actively support or promote discrimination

## *Reitman v. Mulkey*, p. 689 (1967) STATE ENCOURAGEMENT OF PRIVATE DISCRIM

Facts: State repeals fair housing laws barring racial discrimination, in effect encouraging discriminatory

- Holding: Mere repeal of antidiscrimination law does not establish unconstitutional state action, but Prop 14 intended to implicitly authorize private racial discrimination

White: Although statute was racially neutral on its face, CASC Prop 14 involves state in private racial discrimination

- Constitutionalizes racial discrimination

Harlan (D): no more a violation of 14 than failure to pass protection in the first place would be.

*Analogies to Title VII and Romer?*

**Could Congress repeal Title VII without being unconstitutional? Yes. Why can't California do the same thing?**

- Discrim provision embodied in state constitution. CA took affirmative step to make private discrimination permissible
- Greater impact than mere repeal, no other purpose for adopting Prop 14 other than enshrining right to discriminate in the state's constitution (making it immune from regulation)
- Private citizens derive a state constitutional mandate for discrimination

**Does CO law repealing former law protecting gays and lesbians violate of Reitman? Does analysis of Reitman survive WA v. Davis?**

- Reitman relies on purposeful discrimination(?) instead of disparate impact
- If Reitman survives WA v. Davis, then CO law is unconstitutional
  - Only conceivable purpose as purposeful discrimination?
- What about a state referendum to protect gays and lesbians that fails to pass? Does this encourage discrimination and constitute state action under Moose Lodge?
  - Impact on gay and lesbian individuals in WA is the same as in ME

## Jackson v. Metropolitan Edison Co., p. 690 (1974) APPLIES BURTON STANDARD OF REVIEW

Facts: electric service terminated without notice. PDP claim under §1983

- Holding: Inquiry must focus on if sufficiently close nexus between state and challenged action of the private entity, so that the private actor's actions can be fairly treated as state action.

Rehnquist

- No State action because the state did not specifically authorize and approve the termination practice – never conducted hearings on the practice or made a determination
  - Relationship too abstract, permission/compulsion distinction

Marshall (D): here, state-sanctioned monopoly, extensive pattern of cooperation between state and entity and a uniquely public service

- To suggest state has to put weight behind practice departs from *Burton* (state can't abdicate responsibility)

Jackson (D): state authorized and approved termination proceedings

## *Flagg Bros Inc. v. Brooks*, p. 692 (1978) DENIAL OF JUDICIAL RELIEF IS NOT ENOUGH FOR STATE ACTION

Facts: warehouseman

- Holding: Proves too much if the mere denial of judicial relief is state action

Rehnquist:

- Court has never held that mere acquiescence alone converts action into state action. Unless state itself acts, no discrimination
- Every private dispute should not be a constitutional claim, the state or the court is NOT responsible for the actions of the private parties – blurs the line between private and public action

Stevens (D): criticizes permission/compulsion distinction. Enactment of UCC is enough to authorize private individual → state action

***Impact of Jackson and Flagg Bros = Narrowing of Burton***

- Burton held state can't abdicate responsibilities to ensure EP by failing to act. Mere acquiescence by state was not enough to immunize state from constitutional challenge
  - Note: *Burton* has NOT been overruled – parts of it are still good law
- After these cases, discrimination only problematic from private action is state action COMPELLED or encouraged behavior
  - Limits Burton to factual situation (lessor/lessee relationship)
- If no joint participation or state compelling private individual → NO VIOLATION

## *Blum v. Yaretsky*, p. 693 (1982) CONTINUED JACKSON AND FLAGG BROS

- Holding: Rejects claim that state Medicare regulations mandated nursing home transfer. Medical decisions mandated.
- Standard of review: normally the state can be held responsible only if coercive or encouragement (overt or covert)

- Approval or acquiescence isn't enough

### *Rendell-Baker v. Kohn*, p. 694 (1982) PRIVATE SCH. FIRING TEACHER IS NOT STATE ACTION

- Doesn't matter that money comes from the state, doesn't mean the state acted or told the school to fire the teacher
- State did not in any way compel the school to fire her
    - HOWEVER, but for the state, the school wouldn't exist. Isn't this significant involvement under *Burton*?
    - Rehnquist has narrowed Burton approach

### *DeShaney v. Winnebago Co.*, p. 694 (1989) STATE FAIL TO PROTECT CONST INTEREST BY INACTION

Facts; after divorce, dad gets custody. City social workers hear reports of physical abuse but don't remove child. Dad beats boy

- Holding: Nothing in DPC requires state to protect life, liberty, and property of citizens from invasion by private actors

Rehnquist

- Clause is limit on state's power to act, not a minimum guarantee of safety
    - No special duty to act here, state didn't limit individual's freedom to act on his own
- Framers' intent = limit states not private actors.

Brennan (D): state actively intervened in child's life here, acquired knowledge of danger. Inaction is just as abusive of power as action.

### *Lugar v. Edmonson Oil*, p. 695 (1982)

- Creditor acting pursuant to state law attached property in ex parte proceeding. DP denial for state action?
    - Joint venture with the state, state action

### *Edmonson v. Leesville Concrete Co.*, p. 696 (1991)

- Peremptory challenges to exclude jurors on basis of race is violation of 14 EPC, overt significant participation of state
    - Jury selection is selection of a quasi-governmental body

### *Brentwood Academy v. TN Sec. Sch. Athl. Ass'n*, p. 697 (2001)

- Private and public school → public entwinement → state actor

## Congressional Power under the Civil War Am. to Reach Private Action

Congress could reach private actions against 14A rights either by relying on court's interpretation of state action or by invoking Congress's power under 14A§5

Considerations:

1. Identifying the source of the covered rights in the statute (676)
   Generally under the state action cases we've seen. Private action is covered under 14 when stats is responsible for, significantly involved with. Can Congress go beyond this and reach additional private actors?
2. Lack of specificity in criminal provisions (§241 private conspiracies) – what does "secured" mean?
3. Statutory construction – in construing these laws, which constitutional rights can be read into such phrases as rights, P&I secured by or protected by the constitution?
4. Should a state action requirement should be incorporated into the statute?

### US v. Guest, handout, (1966), 18 USC §241 incorporates only 14th Am. EPC itself

Facts: Black officer going from DC to GA was shot. 6 Δs charged with criminal conspiracy violating **§241**, one charge for violating his right to equal use of GA's public facilities without discrimination on the basis of race

- Holding: To prosecute EP violation here, Congress must target the state or those acting under color of its authority

Stewart

- Court **declines to answer if** Congress's §5 power can reach private conspiracies (LEAVES OPEN)

- Significantly, π asserted state involvement (arrests via false police report). Involvement enough state action
- ALSO, interference with right to travel (fundamental right)
    - Not all interferences with right to travel fall under §241
    - **Must show <u>specific intent</u> to interfere with a federal right, whether or not motivated by racial discrimination**

Clark (C): Specific language of §5 allows Congress to enact laws punishing all conspiracies, *whether or not state action*

Brennan (C): right to use state facilities without discrimination on the basis of race arising under and secured by 14A

- §241 reaches private conspiracies as exercise of 14A§5, prohibits ALL conspiracies to interfere w/ rights secured by constitution
    - Concerned about limiting scope too much
    - Argues "secured' means "arising under" and "dependent on" the 14th Am, not necessarily protected by
        - Rejects "bare terms" analysis of EPC
    - Analogizes to 15A§2, saying interpretation is often the same, and 15A§2 is often interpreted in this way
- Congress can decide under §5 what is reasonably necessary to protect right emanating from 14
- ***Tacitly overruling the Civil Rights Cases?***
    - "I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right … *it is also appropriate to punish other indiv.s [private] who engage in the same brutal conduct for the same misguided purpose."* P. 911
- Structural basis, like in *McCulloch v. MD*

Harlan (D): §241 does NOT reach private interference with right to travel

If you add up Brennan & Clark's opinions → enough votes to overrule Civil Rights Cases

## *US v. Price*, p. 700 (1966) §§ 241 & 242

Facts: 3 civil rights workers murdered near MS. Δs were 2 local law enforcement officers and 15 private individuals. Conspiracy interfered with right to not be punished without DP

- Holding: §242 color of law does NOT bar reaching private individuals → **joint enterprise**. If charged under §241 → private conspiracy applied to 14A rights

## *Screws v. US*, p. 701 (1945) STRICT SCIENTER REQUIREMENT INTO CRIMINAL PROVISIONS

- Douglas: statute might be unconstitutional if it were interpreted to mean guilty of 242 if some court later holds violates DPC (post hoc scrutiny). Concerned about law enforcement officers with no MOTIVE to violate constitutional right
    - Douglas remedies by interpreting **"willfully"** to mean <u>purpose or specific intent</u> to violate federal law

## *Griffin v. Breckenridge*, p. 702 (1971) §1985(c) APPLICABLE TO SOME PRIVATE CONSPIRACIES

Facts: whites conspired to detain, assault and beat them to prevent EP, P&I of citizens.

- Holding: 1985(C) applies to private conspiracies *with invidiously discriminatory motivation* under Congress's 13A§2 power.

Stewart

- Racial discrimination/animus behind the conspirators' action to deprive of rights of all free men
    - Additional basis for Congressional action: right to travel
    - Doesn't reach the 14A§5 question
    - Leaves open question of other class-based discrimination

Does Stewart's approach turn 1985 into a federal tort law?

- Stewart says no, because requires as an element of a cause of action showing of RACE-BASED ANIMUS
- Why this requirement?
  - Because this applies to private individuals, race or class based animus necessary to avoid tort law
  - Statute makes no such facial requirement – did Stewart amend the statute without Congress's permission?

## *United Brotherhood of Carpenters v. Scott*, p. 703 (1983) NO 1985(3) CLAIM FOR 1ST AM RIGHTS

- Holding: No 1985 claim for union's violent interference with nonunion workers' 1A rights unless state is involved in the conspiracy or the conspiracy aims to influence the state.
- DOES NOT COVER ECONOMIC OR COMMERCIAL ANIMUS

Blackmun(D): thinks majority reads 1985 too narrowly

## *Bray v. Alexandria Women's Health Clinic*, p. 703 (1993) NO ANIMUS UNDER 1985 V. ABORTION CLINICS

- Holding: animus towards abortion is NOT class-based animus towards women.

Scalia:

- ***Scope of 1985 class does NOT include common desire to engage in conduct that the §1985 Δ disfavors***
- Record does not indicate purposeful animus against women

Stevens(D): Scalia's construction is too parsimonious. Conduct is designed to prevent every woman clinic access, so CLASS based

ISSUE LEFT OPEN: What type of class-based animus other than racial would fall outside the reach of 1985?

- Scalia: Meaning of class must be something more than the group of individuals who desire to engage in conduct that 1985 Δ disfavors
  - Necessary to avoid 1985 becoming federal tort law
- Assuming animus toward women in general DOES qualify as a class, Scalia ***leaves open*** whether animus against women seeking an abortion qualifies?
  - Opposition to abortion does NOT necessarily reflect gender-based intent. NOT because of their sex
  - NOT an irrational surrogate for hostility toward women, other reasons for disfavoring abortion
  - Similar to *Geduldig* – both men and women are anti-abortion, though only women can get abortions
  - *Feeney* – intent requirement is part of π's showing. Δ must have selected or undertook a decision at least in part BECAUSE OF AND NOT SPITE OF animus.

## Jones v. Alfred H. Mayer Co., p. 704 (1968) 1982 BARS ALL RACIAL DISCRIM, VALID EXERCISE OF 13§2

Facts:Δ wouldn't sell petitioner home because of race

- Holding: §1982 bars ALL racial discrimination, private and public, in sale or rental of property. 1982 is a valid exercise of Congress's power to enforce 13A.

Stewart

- §1982 gives all citizens the same property rights as whites
- Plain language says includes all discrimination, not limited to just state actors, intended to reach private actors
  - Legislative intent: focus shifted to private action (i.e. KKK)
- Adopted under 13A§2: enabling clause empowered Congress to pass all laws *necessary and proper for abolishing all badges and incidents of slavery*
  - Text of 13, unlike 14 & 15, says scope goes beyond prohibiting state acts
  - Construed similarly to N&P clause in *McCulloch v. MD*
  - **Congress has the power under 13 to determine what the badges and incidents and slavery are**
    - Congress has made a rational determination, so stands
    - Consistent with *Madison v. Marbury*? "province of the judiciary" to determine what the constitution means
    - Should Congress's 13A§2 power exceed its §1 powers?
      - **Court leaves open** whether §1 did MORE than abolish slavery

- **Enabling clause exceeds abolition under §1 (§2 > §1)**
    - Badges and incidents of slavery include restraints upon fundamental rights (incl. purchasing property like whites)

Harlan(D): 1982 does not apply to purely private action. Thinks "right" in 1982 refers to only state sanctioned discrimination (usually only have rights against the government). Concerned about new scope of 13

**If Jones is rightly decided, where's the limit of Congress's 13A§2 authority?**

Is there any action of racial discrimination that Congress may not consider a remedy for the badges and incidents of slavery?

- Consistent with text? Consistent with the framers' intent?
- Does Congress have plenary power under §2? "Congress shall have power to enforce this article by appropriate legislation."
- §1 Slavery or badges and incidents of slavery as a justification for Congressional remedying of **ALL** racial discrimination

## *Sullivan v. Little Hunting Park*, p. 706 (1969) 1982 PROHIBITS EXCLUSION FOR RACE IN LEASING

## Runyon v. McCrary, handout (1976) §1981 BANS RACE-BASED DENIAL OF ADMISSION

Facts: private nonreligious schools denied admission to kids based on race after circulating ads to general public

- Holding: §1981 prohibits race-based exclusion under Congress's 13A§2 authority.

Stewart:

- Relies on *Jones* interpretation of 1982 as analogous
- No violation of right to free association, privacy, or parent's right to direct education of kids (under *Meyer* and *Pierce*)
    - Parents can choose to send kid to school promoting idea of segregation, but can't exclude black kids
    - ACTUAL segregation is a badge/incident of slavery

Powell (C): concerned this is not a purely private K and that court's interpretation lends itself to a broad construction

- Unwilling to say that 1981 provides a remedy for every refusal to K
    - Certain Ks are too personal (tutor, babysitter, housekeeper) that there's a purpose of exclusiveness
    - Implicates associational rights of individuals
- These schools advertised to general public, not small class for limited number of pre-identified students (not purely private)

White (D): Maj reading of 1981 too broad. If 1981 gives blacks same rights to K as whites, whites can't enter into K with unwilling party

- Every refusal to K is not a badge and incident of slavery

Court LEAVES OPEN whether §1 did more than abolish slavery

## *SC v. Katzenbach*, p. 707 (1966) CONG MUST GO FURTHER TO COMBAT DEFIANCE OF CONST. – NEEDS MORE SERIOUS ENFORCEMENT MECHANISMS

**Substantive vs. remedial legislation**

If only remedial powers, when is Congress free to invoke those powers? Must it wait for the SC to declare a constitutional issue/violation BEFORE it can act?

- Ex: Casey – facial challenge to PA abortion law with 24 hour waiting period. Say Congress looks at the way the 24 hour waiting period has been enforced, or the way it has worked in some states.
    - Can Congress declare this unconstitutional if they see the way the waiting period affects real women (cuts # of abortions in half) – use §5 powers in remedial action
    - What is the basis for the remedy? What right are they enforcing?

Does giving Congress the authority to create substantive rights undercut the judiciary's traditional role in delineating the content of substantive constitutional rights?

- If Congress does or should have the right to create substantive rights, should or must the court defer to Congress's judgment here?
    - Ex: Can Congress say gays and lesbians are a suspect class for purposes of EPC? Goes beyond the Court's rulings, forces strict scrutiny analysis for gays and lesbians. OK?

Congress didn't have to create the lower courts at all, have the power to create FRCP to decide what goes on in the courts. Problem?

- Is this appropriate legislation within the meaning of §5

## ***Lassiter v. Northampton Co. Election Bd.***, p. 709 (1959) COURT UPHELD LITERACY TESTS IN NC

- Holding: Literacy tests have some relation to standards designed to promote intelligent use of the ballot, racially neutral.

## ***SC v. Katzenbach***, p. 709 (1966) SUSTAINS VRA §5 UNDER CONGRESS'S 15A§2 POWERS

Facts: §5 of VRA of 1965 largely directed at racial discrim in the South, suspended literacy tests and covered some states and counties with history of voting discriminatory practices

- Holding: Congress may use any rational means to enforce constitutional prohibition of racial discrim in voting under 15A§2

Warren

- Historical experience → two conclusions of Congress
    - Invidious and pervasive defiance of constitution
    - Unsuccessful past remedies must be replaced with sterner measures to satisfy 15A
- REJECTS idea that COURT must remedy.
    - **Scope of Congress's power under 15A§2 is AS BROAD AS Art. I §8 N&P clause**
    - Congress found case-by-case litigation inadequate

*How can Congress ban literacy tests under 15A§2 powers if inconsistent with Lassiter court's finding that literacy tests are constitutional?*

- Congress's power under §2 includes the power to prohibit state action that does not ON ITS FACE violate 15A§1
- Court rejects claim that judiciary has sole responsibility for fashioning remedies
- **Ultimate justification:** Do NOT overrule *Lassiter*. Congress held hearings; learned use of literacy tests was broadly violating 15A. Literacy tests enacted FOR THE PURPOSE of disenfranchising blacks, had been applied in discriminatory manner

## **Katzenbach v. Morgan**, p. 711 (1966) §4(e) OF VRA UNDER CONGRESS'S 14A§5 POWERS

Facts: §4(e) banned denying right to vote to people who finished 6th grade in PR school. NY voters challenged, arguing 4(e) is unconstitutional without a judicial determination of constitutional violation (in the literacy tests)

- Holding: Section 4(e) is proper exercise of Congress's 14A§5 powers, without judicial striking down of literacy tests

Brennan

- §5 gives same broad power as N&P clause under *McCulloch*
    - Inquiry: Is 4(e) enactment to enforce EP "plainly adapted to that end" and consistent with the letter and spirit of the constitution?
    - Cong can weigh different considerations and make this judgment as long as court can see ***rational basis*** for resolving in this way
        - This is EXTREMELY deferential
        - Expands the rights of the Puerto Ricans against the interest of the NY votes, whose vote is being diluted
    - Reform can come one step at a time (Lee Optical) – need not allow in all people excluded from voting at once

- Congress doesn't have to wait for judicial determination
    - Language and history of §5 don't support judicial requirement
        - Is this true? Framers rejected language in 14 to allow Congress to do this. *Marbury*?
    - Harlan's construction of §5 makes legislative power beholden to SC, too narrow
    - §5 is positive grant of legislative power (plenary) enabling Congress to implement 14

Harlan (D): Court should uphold validity of literacy test. CANNOT be substantive only remedial

- Survives EP standard because it serves legitimate state interest (informed voters)
- No constitutional infringement to bring §5 powers into the mix – ONLY remedial, not substantive, is ok
    - Requires a JUDICIAL DETERMINATION of constitutional violation
- Congress attempting to dilute the standard of EP

Brennan makes McCulloch the standard. Compare language of N&P and §5, reveal obvious similarity and difference.
Repeats the requirement of propriety (appropriate) but OMITS the requirement of necessity.

**Is Brennan's argument coherent under Marbury v. Madison?**

- Harlan argues if Brennan's logic is correct, Congress is free to qualify the Court's constitutional decisions on ANY constitutional issue or provision under N&P clause (art. I. §8, cl. 18)
- There's no real review on Congress's action here, just want it to be within the realm of reasonableness
- Is the Court abdicating its responsibilities here?

p. 712 fn. 1 "**Ratchet footnote" Congress may enforce the guarantees of 14§5 but may NOT restrict, abrogate, or dilute guarantees**

- If Congress has the power to expand rights, why can't they dilute?
- Harlan response: Why not? It's all about value judgments, and once Congress can substantively decide the meaning of the constitution, there's no constitutional line between expanding and diluting rights
    - If Congress can substantively define what powers it has AND has enforcement powers, consolidation of too much power (especially given the N&P clause)

## **Oregon v. Mitchell**, handout (1970)§302 UPHELD IN FED ELECTIONS AND UNCONST IN STATE ONES

Facts: §201 applied literacy test ban nationwide (upheld), §202 prohibited state durational residency requirements (upheld 8-1)
§302 grants the right to vote for 18-20 year olds. Original jurisdiction case challenging

- Holding: §302 focus, testing the scope of Morgan power. Congress may require 18-20 voting in federal elections, but not in state elections (BLACK split the vote)

Black:

- State can set qualifications for voters in congressional elections under Art. I §2, but power is subject to Congress's power to alter regulations under Art. I §4.
    - Black reads this to mean that supervisory power over CONGRESSIONAL/FEDERAL elections, but not state
- Black thinks §302 must be connected to racial discrimination to invoke civil war amendments
    - ODD, since 14A doesn't refer specifically or exclusively to race

Brennan (C/D): thinks Congress has the power in ALL elections, CONGRESS subject to RATIONAL BASIS REVIEW

- Statute denying vote to 18-20 year olds *probably* violates EP – applies strict scrutiny to state law because implicates fundamental right to vote
    - States don't treat 18-20 year olds any differently in other contexts (military, marriage, work, crim) + fundamental right to vote (under citizenship clause)
    - Does NOT decide whether EP violation, not before the court
- SC must respect state determinations without finding of arbitrary or irrational. CONGRESS is NOT subject to this limit
    - If Congress reviews state legislation under §5, can make its own determination (under *Katzenbach v. Morgan*)
    - Federal findings of fact control if discrepancy between state and federal
        - BUT 14A§2 explicitly states 21 year olds

Stewart (C/D): thinks Congress has the power in NO elections

- *Morgan* does NOT apply because it found state law involved invidious discrimination under EP
    - State law does NOT discriminate against D&I minority (BUT 18-20 DOES lack political power if can't vote)

- §302 is valid only if Congress has power to determine substantive instead of remedial → goes too far

Harlan (D): history of 14 shows Congress may not alter voter qualifications in this way

- Political process involved here – if want to change elections, should pass an amendment
- Federalism issue – congressional determinations are NOT automatically > state findings

**Is Brennan's ratchet footnote from Morgan more defensible in Oregon?** Here he's talking more about *legislative fact-finding*. If Congress is a more appropriate forum than the court for determining issues of legislative fact, then why does a Congressional determination of sufficient factual basis for discrimination by the state not entitled to any judiciary weight?

- Ratchet released if new evidence unearthed by Congress
- How would this apply in the real world? Can Congress have hearings and find that life begins at conception? Can they find that fetuses are persons entitled to DPC protection? Can Congress reverse Plyler under this fn?
- Fundamental problem with old and new ratchet footnote – unearthing new evidence allowing Congress to overturn SC decisions seems to be problematic

## US v. Rome, handout, (1980) CHANGE TO AT-LARGE VOTING SCHEME UNDER VRA (purpose vs. effect)

Facts: Rome, GA covered under VRA, despite lack of discrim in voting for last 17 years. Wanted to switch to at large voting system, but AG wouldn't approve under VRA because would approve only if no purpose and effect. EFFECT of abridging right to vote on blacks

- **Holding: Congress's 15A§2 powers allow it to prohibit electoral changes that are discriminatory in EFFECT, even if 15A§1 only covers voting practices that have discriminatory purpose.**

Marshall

- Act provides a bailout – jurisdiction can prove no discriminatory practice. City of Rome argues:
  - Covered jurisdiction and can exempt itself – Court REJECTS, covered jurisdiction is GEORGIA, not city
- Statute only covers discriminatory PURPOSE – Court REJECTS, **15A§2 not limited to scope of 15A§1**
  - Characterizes VRA as REMEDIAL
  - Congress can prohibit legislation perpetuating the effects of past discrimination
  - 15A§2 power is as broad as necessary and proper clause (*SC v. Katzenbach*)
- Cong may use 14A§5 powers as **prophylactic** to prevent discriminatory impact in the name of preventing purposeful discrim
  - CONTEXT – usually π must show more than disparate impact (under WA v. Davis)

Powell (D): Under 15A, Congress can only act REMEDIALLY

- No finding that Rome denied black voting rights, so 15A§2 does not cover
- Court has unduly limited the bailout option, should not be required to bailout entire jurisdiction

Rehnquist (D): Court is abdicating *Marbury* authority

- Three possible sources of Congress's 15A authority
  - Where changes violate constitution (NOT APPLICABLE)
  - Remedial legislation to enforce *judicially* established substantive prohibitions of Am (NOT APPLICABLE)
  - Prohibition of changes that have a disparate impact (UNDULY expands Congress's power)
    - This makes Congress > SC in interpreting amendments
- Says there's no precedent indicating appropriate for Congress to use this prophylactic when it's been PROVEN there's no risk
  - NOT REMEDIAL – Rome proved there was no problem to remedy

**Are Rome and Oregon consistent under the dissent's approach?** Court believes they're consistent and distinguishable.

- Oregon upheld literacy test ban as a matter of STATUTORY law. Justices agreed that Congress had the legitimate power to do what they did there.
  - Oregon did NOT hold that discriminatory impact was a proxy for purpose
  - Oregon was purposeful discrimination, remedied prior constitutional violations
- HERE, presumptive prohibition on vote dilution is not an appropriate means because unlike literacy tests, where disparate impact is attributable to GOVERNMENT, here it's private actors in racial bloc voting.
  - Legitimate reasons exist for at-large voting schemes
  - Unconstitutionality/discrimination depends on premise that white candidate can't represent black interests

## *Mobile v. Bolden*, MUST SHOW PURPOSEFUL DISCRIMINATION

- EXISTING at large scheme is constitutional.
- Didn't make any changes, so it can't be challenged under VRA

**Are Rome and Mobile consistent?** Why is it constitutional for Mobile to MAINTAIN a discriminatory impact, but not for Rome to change to one (when PROVEN no discriminatory purpose)?

### *Civil War Amendments & their effects on federalism*

- Antebellum notions of federalism were thrown out as a result of the Civil War and Congress's §5 powers
- Civil War Amendments were DESIGNED to intrude upon state sovereignty.
- *Fitzpatrick* – stands for the proposition that principles of federalism were overridden by Congress's power to enforce Civil War Amendments by appropriate legislation

## City of Boerne v. Flores, p. 719 (1997) CONGRUENCE AND PROPORTIONALITY TEST

Facts: RFRA – Congress passed act in response to Court decision in *Smith*, which held neutrally, generally applicable laws ccan apply to religious practices without a compelling government interest. RFRA was passed under 14A§5

- Holding: RFRA exceeds Congress's power because upsets separation of powers AND federalism.
    - Congress's 14A§5 powers to enforce rights under DP does NOT allow substantive determinations
    - DP & EP do NOT have different purposes for judicial and legislative enforcement

Kennedy:

- §5 is a positive grant of power, but is NOT unlimited
    - REMEDIAL, NOT SUBSTANTIVE
- Congress has the power to make substantive rights effective against the states, but cannot determine what they are
    - Civil Rights Cases support the remedial requirement
    - "Any suggestion that Cong has a substantive, non-remedial power under the 14A is not supported by our case law"
        - OH REALLY? What about Guest? Did they overrule Civil Rights Cases?
- **Congress may enact prophylactic legislation in reaction to widespread constitutional violation. SC will uphold if sufficient likelihood that majority of state laws would be found unconstitutional *by the judiciary& CONGRUENCE/PROPORTIONALITY***
    - Supports holding in *Rome*, just adds the judiciary piece (as determined by the Court)
    - Congruence and proportionality ensures REMEDIAL instead of SUBSTANTIVE

Does RFRA alter the constitution? Or does it just alter US statutory law?

Statute

- Provides a statutory right NOT a constitutional right.
- Not inconsistent with separation of power for Congress to protect by statute rights not protected by the Constitution (Title VII of federal employment act, Title III of the federal accommodation laws, etc.)
- How does it violate separation of powers if judicial review is still available? Court remains the final arbiter of the Court

Constitution

- Allowing congress to expand the meaning of the free exercise clause
- Congress overrules the court's interpretation of the free exercise clause by changing the standard of review (balancing test)
- P. 724 – when the court has interpreted the constitution it ahs acted within the province of the judicial branch, which embraces the duty to say what the law is (Marbury) – improper for Congress to disagree with the Court
    - What about Dred Scott and Lincoln disagreeing?
    - Congress is a co-equal branch of government, do they have to toe the line on the Court's opinion?
        - Response: Congress DOES have recourse – can amend the Constitution with the approval of the state

****Can Congress use §5 to invalidate state laws banning same sex marriage?****

## *FL Prepaid*, p. 725 (1999) CONG MAY NOT ABROGATE STATE SOVEREIGN IMMUNITY IN RE: PATENT

**DETERMINES SCOPE OF BOERNE → BROAD**

- Holding: Cong may not abrogate state's sovereign immunity under 14A§5 powers because must be appropriate under Boerne

Rehnquist

- Appropriate legislation can abrogate sovereign immunity, but appropriate means (1) MUST identify conduct violating 14A substantive provisions and (2) tailor legislative scheme to remedying or preventing such conduct
- Congress must demonstrate sufficient basis when using 14A§5, even if *not* overturning SC precedent
    - Here, Congress failed to ID pattern of violations OR show state action is 14A violation
    - LACK OF PROPORTIONALITY
    - Statute was overly broad, applied to all states without showing of violations in many of the jurisdictions
        - Suggesting overly broad because THE COURT would not have found a violation of the constitution
- Congress doesn't HAVE to build a record (it is neither necessary nor sufficient) BUT it plays a role in the SC's review
    - *Lopez, Garrett* – court also questioned sufficiency of legislative record
- Rehnquist reclaims as SC's role, despite that §5 is a positive grant of power to CONGRESS, not the Court

Stevens (D): federal uniformity interest makes this appropriate legislation under Boerne. Preventive measure to protect DP

- Concerned that majority threatening Congress's prophylactic power

Distinguishes VRA cases: There, undisputed record of constitutional violations with widespread and persistent constitutional violations by state officers. HERE, Congress responds to a handful of patent infringements

## *College Savings Bank v. FL Prepaid*, p. 727 (1999) TRADEMARK NOT THE KIND OF RIGHTS PROTECTED AS PROPERTY RIGHTS UNDER DPC → NOT §5 POWERS

## US v. Morrison, p. 727 (2000) 13981 EXCEEDS CONGRESS'S §5 REMEDIAL POWERS

Facts: VAWA, π said pervasive bias in various state justice systems against victims of gender-motivated violence (BIG cong. Record)

- Holding:

Rehnquist:

- Applied intermediate scrutiny to state sponsored discrim against women – must serve important governmental objective and means must be substantially related to the achievement of those objectives.
- Framers intent to balance national and state governments
- Π argued CRC were distinguishable:
    - Unlike the situation in CRC, Congress had HUGE RECORD of gender-based discrimination by STATE actors
    - Guest – CRC were overruled by six members of the SC, and Congress CAN use §5 powers to reach private action
- Rehnquist response:
    - CRA of 1871 & 1875 had similar purposes to this one and were overruled by CRC
    - EVEN IF distinguishable from CRC, 13981 no good because Guest did not overrule CRC (Clark didn't justify/explain position that §5 reaches private actors)
- 13981 lacks proportionality AND congruence
    - Does NOT target state action, only private individuals
    - Has no impact on any state official who investigates or prosecutes gender-motivated violence

## *Kimel v. FL Bd. Of Regents*, p. 730 (2000) ANSWERS QUESTION LEFT OPEN IN EEOC V. WY

- Holding. ADEA exceeds Congress's 14A§5 powers
- Under Boerne framework, provisions of ADEA far exceeded the requirements of age discrimination under EPC
- State may make age classifications under *Murgia*, so long as those classifications have a rational basis
- Congress may not use 14A§5 powers to elevate scrutiny for age (inconsistent with Court precedent)
    - No identified discrimination, no evidence of widespread and unconstitutional age discrimination by states
- Substantive and not remedial

## *Univ. of AL v. Garrett*, p. 731 (2001) ADA TITLE I EXCEEDS 14A§5

- Holding: Court not Congress determines substance of the constitution. Money damages against state employers failing to meet ADA exceed Congress's remedial powers.

Rehnquist:

- Under *Cleburne*, state can discriminate against disability with rational basis
- ADA Title I fails the Boerne congruence and proportionality standard
    - Accommodation requirement exceeds what is constitutionally required of the state. Makes unlawful things that can survive rational basis scrutiny but don't meet ADA requirements
    - Extends the burden of proof beyond the constitutional baseline
    - ADA's disparate impact test exceeds what is constitutionally required of the states

Kennedy: likes the result, but not proper under §5. Not enough history of discrimination

Breyer: criticizes majority reading – Congress's §5 action doesn't threaten to take away any rights.

- Reject's court's willingness to apply rational basis review to BURDENING disabled individuals and applies heightened scrutiny to Congress when it attempts to EXTEND statutory rights to the same individuals
- Under *Katzenbach v. Morgan*, the majority's result saps §5 of independent force

## *TN v. Lane*, p. 733 (2004) AS APPLIED IN RE: ACCESS TO THE COURTS UNDER ADA TITLE II

- Holding: Title II is a permissible exercise of Congress's §5 power as applied to cases involving access to the courts (NARROW)

Stevens

- Title II enforces basic constitutional guarantees → strict scrutiny
    - Whether Title II protects these other rights is a question of historical experience – shows there were many laws enacted with the sole purpose of discrimination against handicapped individuals
    - §5 authorizes prophylactic remedial legislation
        - Appropriateness of the remedy depends on the gravity of the harm it seeks to prevent
- Against a record of people with disabilities being prevented from accessing state court proceedings in many states, Title II is appropriate prophylactic remedy under Δ5
    - Reasonably tailored to the ends trying to be achieved.

Rehnquist (D): nothing in record shows congress was responding to specific violations of disabled persons' DP rights

- Some of the information would be relevant in a facial challenge, but this is as-applied
    - Mere existence of a non-accessible courthouse is not a violation of DP/EP
        - State's financial considerations provide a rational basis for declining to alter structures
    - Congress is manipulating wording to change the congruence and proportionality test, artificially constricting the scope of the statute

## *US v. GA*, p. 735 (2006) OK CONG ENFORCE 14A W/ PRIVATE REMEDIES VS. STATE IF ACTUAL VIOLATION

## *NC Dept. of HR v. Hibbs*, p. 736 (2003) FMLA CONST UNDER CONGRUENCE & PROPORTIONALITY

Facts: FMLA allows unpaid leave for up to 12 weeks. Provides private right of action to seek equitable relief or money damages against private or state employers.

- Holding: Congress acted within its §5 powers -- Congress's powers include the authority to remedy and deter by remedying a broader swath of conduct that is not forbidden by the amendment's text

Rehnquist

- It falls to the Court not Congress to determine the substance of constitutional guarantees
- How do we distinguish proper prophylactic laws from substantive laws in this context?
    - Determines appropriateness by applying congruence and proportionality test of Boerne
- Purpose of the statute: protect the right to be free from gender-based discrim in workplace
    - Congress had finding about effect of social roles
- Distinguishes Garrett and Kimel (targeted discrim by state officials by age or disability, but those aren't measured by heightened scrutiny, there Congress had not identified persistent and widespread irrational discrimination)
    - HERE gender discrimination triggers heightened intermediate scrutiny.

    - More difficult standard to meet than rational basis test, it's easier for Congress to show a pattern of state constitutional violations.

Kennedy (D): FMLA is NOT congruent or proportional remedy to any demonstrated discrimination by the states

- Need SPECIFIC evidence of pattern of discrimination
- Congress already abrogated sovereign immunity under Title VII – don't NEED FMLA after Title VII
    - Rehnquist's response to Title VII argument – Congress found evidence that Title VII hadn't done enough, administration of leave was affected by persistence of gender-based discrim

**Why should the level of constitutional scrutiny that a group classification would receive under the court's cases determine the type of evidence on which Congress must base its legislation? See p. 739**

- Easier to show pattern of constitutional violations if it's easier to violate the constitution under heightened scrutiny
- Congruence and proportionality standard requires that Congress DOES produce evidence, not that they could

Is the result in Hibbs like the result in Lane, showing that the court is going to give Congress more leeway to enact legislation under §5 provided that the legislation parallels the court's precedents?

- Like Boerne, is Hibbs making the court the sole expositor of what the constitution means
- Is this consistent with Marbury? Broad reading?