I. THEORIES OF CONSTITUTIONAL INTERPRETATIONS

A. Originalism
   1. judges should confine themselves to enforcing norms that were stated or clearly implicit in the Constitution as it was understood by those who ratified it.
   2. Hard:
      a) meaning of the Constitution should be settled by asking the framers and ratifiers particular question. (ex. Does the equal protection clause ban school segregation?)
      b) Thomas and Scalia
      c) More controversial
   3. Soft:
      a) the original understanding is important not for answers to particular questions, but in order to get a general sense of purposes and aspirations
      b) most of the justices are, at least some of the time, soft originalists
   4. Appealing b/c Originalism promotes democratic values b/c it ensures that judicial judgments can be traced to democratic judgments and also that it promotes values associated with the rule of law b/c it ensures an unchanging constitution
      a) don’t want to substitute the will of nine (people) judges for the will of the majority (who passed the law through Congressional representation)
   5. Problems w/ Originalism
      a) original understanding hard to determine – who counts?
      b) What is the relevant psychological state? Are we concerned with what the legislature expected the provision to do? What they feared it would do? What it hoped it would do?
      c) Do we look for a majority understanding or is just the understanding of a few sufficient?
      d) Are we interested in abstract, general ideas or concrete intentions?

B. Non-Originalist Approaches
   1. Natural Law
      a) Constitution put into writing some of the principles of natural rights, but it is generally accepted that written constitutions could not completely codify the higher law. Thus, in framing the original Constitution, it was widely accepted that there remained unwritten but still binding principles of higher law.
      b) Came to be accepted that judges would enforce both the written law and the unwritten natural rights as well.
      c) Critique: vague – can invoke natural law to support anything you want
   2. Moral arguments and the search for integrity
      a) values must be continually derived, enunciated, and seen in relevant application.
      b) Judges have two obligations – to fit existing legal materials and to justify them by making them sensible and good rather than senseless and bad.
      c) When there are gaps in the legal materials, judges should put them in the best light and apply morals
      d) Critique: no correct moral philosophy; lawyers and judges not the best people to tell good moral philosophy from bad
3. Tradition
   a) look to entire history and not only to intention of drafters to confer constitutional status to those values that are rooted in history
   b) critique: can be invoked in support of almost any cause; overtly backward-looking highlights it undemocratic nature
4. The Common law and consensus
   a) Judgments emerge from cases rather from text or history to reflect a social consensus
   b) Critique: Consensus is not reliably discoverable, at least by the courts; legislatures are far better suited to reflect consensus
5. Representation reinforcement
   a) Must protect minority rights from the tyranny of the majority without a flagrant contradiction of the principle of majority rule.
   b) To do so, must ensure procedural fairness and broad participation in the processes of government.
   c) Representation-reinforcing approach to judicial review that focuses on clearing the channels of political change and facilitating the representation of minorities
   d) Permissible to look outside original understanding when it promotes representation but not to recognize or create fundamental rights unrelated representation.
   e) Critique: shot full of value choices

II. EQUALITY AND THE CONSTITUTION

A. Slavery and Segregation: The Origins of Equal Protection
   1. Equality and the Constitution
      a) Fourteenth Amendment: No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.
      b) Means that all persons shall be treated equally under the law
      c) equal protection looks to group-based oppression rather than individual
      d) remedies of group harm cannot be narrow, has to be representative of the larger entity (so remedies not geared toward specific plaintiffs)
   2. Race and the Constitution
      a) Doctrine of equal protection has evolved significantly during last 200 years
      b) Constitution and slavery
         i) In early to mid-1800’s slavery was generally considered to be legitimate under the Constitution
         ii) State v. Post – court held that the Constitution’s promise of liberty is not inconsistent with slavery (NJ law for the abolition of slavery in 1804; every child born after a certain was free and a date established by which slavery had to be completely abolished; law challenged for the legality of slavery). HELD: the free and equal clause says nothing about abolishing slavery; state statute remains in effect.
         iii) Dred Scott v. Sanford: Court held that slaves are not “citizens” within the meaning of the Constitution, states cannot grant to a slave the right of
citizenship in the United States, and Congress has not authority to prohibit slavery.

c) Privileges and Immunities Clause

i) Fourteenth Amendment states: *No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States*

ii) For all intents and purposes, P & I clause was nullified 5 years after it ratification – *Slaughterhouse Cases*, in which the Supreme Court held that the Clause only speaks to privileges and immunities belonging to citizens of the United States, and not the several states, meaning that the clause is not intended to protect state citizens against state legislative decision that infringe state-guaranteed rights

- Facts: Louisiana legislature passed a law granting a monopoly for one corporation to maintain slaughterhouses in and around New Orleans. Law is challenged by out-of-work butchers as a violation of the 13th and 14th Amendments.
- 13th and 14th Amendments are to be read narrowly to apply only to former slaves and African Americans
- Court says that to read it more broadly would give the power to the Federal government to control civil rights, which are state power – do not want to erode state power.

iii) In so ruling, the Supreme Court expressed concern that any other holding would taken from the States powers expressly reserved for them, and would bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States

iv) today the clause remains limited to only a few rights of national citizenship

v) the worth of the privileges and immunities clause is not performed under the substantive due process clause

d) Post Civil War Amendments

i) Following the Civil War, three constitutional amendments were enacted, each of which, to some degree, promoted equality of the races:

- 13th Amendment abolished slavery
- 14th Amendment – equal protection
- 15th Amendment – voting rights

ii) These amendments did not completely erase race-based discrimination under the law – *Plessy v. Ferguson*, which held that while the 14th Amendment was undoubtedly enacted to enforce the absolute equality of the races, it was not intended to abolish distinctions based on color or to enforce social equality or commingling of the races. Thus, the “separate but equal” standard was born.

- *Plessy* itself does not require equality of separate facilities
- *Plessy* does not approve al statutes mandating separate treatment – only those that are “reasonable” are approved.
- Difference b/w political equality and social equality when interpreting the 14th Amendment
o Purposeful reading of the 14th amendment – purpose was to enforce the absolute equality of the races b/f the law, but it could not have been intended to abolish distinctions based upon color to enforce social equality
- From Plessy to Brown: cases like Sweatt, McLaurin – must be equal in ALL respects.

e) Attack on Jim Crow laws
  i) As the 1900s arrived, federal courts continued to act as the impetus for change in the way African Americans were treated
  ii) For example, in 1938 in the case of Missouri ex rel. Gaines v. Canada, the Supreme Court held that when a state provides facilities for the legal education of whites, it must furnish similar facilities for any black person who wants the same education, whether or not other blacks sought the same opportunity
  iii) Approximately 20 years later, the Court ruled that separate but equal facilities in public education are inherently unequal and therefore violate equal protection – Brown v. Board of Education of Topeka (Brown I).
    - this decision effectively killed the law of separate but equal
    - with respect to Brown I, the Supreme Court later held that the lower federal courts were to be given discretion to see that the court’s order in Brown I was carried out deliberately but with all possible speed – Brown v. Board of Education of Topeka (Brown II).
    - Cooper v. Aaron: interpretations of the 14th Amendment enunciated in Brown is the supreme law of the land.
  iv) Desegregation efforts under Brown took place in both the North and South.

f) Desegregation in the South
  i) met with defiance in the South and efforts to desegregate schools continued into the 1970s.
  ii) In 1971, the Supreme Court addressed desegregation problems in the South in the case of Swann v. Charlotte Mecklenburg Board of Education.
HELD: when officials were slow to cooperate w/ desegregation, affirmative action in the form of remedial altering of attendance zones is proper to achieve truly non-discriminatory assignments. This was true even when school official’s efforts seemed to be neutral
    - In preparing for the implementation of Swann, the Court held that courts have broad discretion to use sometimes drastic gerrymandering of school districts and attendance zones in order to achieve racial utility and equality
    - The Court also held that while desegregation is required, the constitutional command to desegregate schools does not mean that every school in every community must always reflect the racial composition of the school system as a whole.
    - Judicial remedy limited to scope of the violation
    - Violation = deliberate state action seeking to segregate students
g) Desegregation in the North
   i) Desegregation was imperfect in the North as well
   ii) *Keyes v. School District No. 1, Denver, Co* – dealt with the burden of proof in discrimination and segregation inspired lawsuits
      - HELD: in a segregation lawsuit, the plaintiffs bear the burden of establishing that segregated schools had been brought about or maintained by intentional state action. However, once this proof has been adduced, a prima facie case of unlawful segregative design on the part of school authorities arises, and the burden shifts to those authorities to prove that the other segregated schools within the system are not also the result of intentionally segregative actions.
      - System-wide discrimination was necessary to eradication segregation in one section of the city
      - Court adopts a remedy whose scope is larger than constitutional principles pertaining to the remedy
   iii) Court has never held that de facto defacto segregation is a constitutional violation.

B. Rational Basis Review
1. Introduction
   a) In recent years, the Supreme Court has developed an approach to help courts examine race-based and non-raced-based discriminations and classifications under the law
   b) This review involves a system of tiers of review. Under this system, race-based classifications (as well as a few other types) have been subjected to a heightened level of review, *strict scrutiny* review. Other classifications are subject to a lower level of review, *rational basis review*
      i) generally, though not always, discriminatory statutes looked at with heightened scrutiny have been struck down uniformly.
      ii) In rational basis review, most laws upheld
   c) concept of equality is difficult b/c providing similar treatment to two groups will not result in equal treatment if the groups are not similarly situated. Equality principle must be modified to provide that differences in treatment can be justified only by relevant differences:
      i) relevant difference: if the difference bears an empirical relationship to the purpose of the rule. Ex. methadone users v. non-users a relevant difference w/ regards to the state's objective of a safe and efficient transit system.
      ii) relevant difference requirement becomes meaningless unless some restriction is placed on the kind of purposes the legislature may pursue.
      iii) However, over-inclusiveness and under-inclusiveness are not constitutional problems – do not create and EPC problem.
      iv) plaintiffs belonging to a “class of one” can maintain Equal Protection violation where she alleges she has been intentionally treated differently from others similarly situated and there is no rational basis for the differential treatment.
v) So must require similar and different treatment (balancing) depending on the circumstances and inequalities from the beginning.

d) The Means/Ends Nexus
i) to survive equal protection attacks, the differential treatment of two classes of persons must be justified by a relevant difference b/w them.
ii) classification is over-inclusive if it disadvantages some people who do not in fact threaten the state’s interest
iii) a classification is under-inclusive if some people are not disadvantaged even though they threaten the state’s interest
iv) must balance the interests of the state objective to be reached by the restriction against the restriction itself.

2. The Rational basis cases
a) A number of cases have defined the law of rational basis review in addressing a variety of discriminatory circumstances. The following general principles generally apply:

i) To survive rational basis review, a classification need only have a rational relation to the government purpose furthered by a regulation or statute (Railway Express Agency v. New York City; Cleburne v. Cleburne Living Center)

ii) under rational basis review, states are not required to convince the courts of the correctness of their legislative judgments. In such cases, the parties challenging legislation under the EPC cannot prevail so long as it is evident from all the considerations presented to the legislature that the question is at least debatable (Minnesota v. Clover Leaf Creamery).

- MN law banned the retail sale of milk in plastic, non-returnable, non-refillable containers but permitted such sale in non-returnable paperboard milk cartons

iii) it is unclear whether rational basis review may consider the legislatures actual purpose.

- Minnesota v. Clover Leaf Creamery: court will assume the law’s stated purpose is true, unless proven otherwise
- Nordlinger v. Hahn: court may infer actual purpose
- Federal Communications Commission v. Beach – any conceivable valid purpose is sufficient

b) In New York Transit Authority v. Beazer, the Supreme Court held that, under rational basis review, an exclusionary scheme that is not directed against any category of persons, but represents a policy choice made by a branch of government entitled to make such choices, is constitutional. In the context of the case, that rule meant that matters of personnel policy do not implicate the principles safeguarded by the Equal Protection Clause

i) Suit regarding New York Transit Authority decision to prohibit the employment of anyone who uses methadone.

ii) policy furthers the general objectives of safety and efficiency

iii) policy not directed at an individual or category of persons and does not circumscribe a group of persons characterized by some unpopular trait or
affliction. It does not create or reflect any special likelihood of bias on the part of the ruling majority.

iv) GOVERNING STANDARD: legislative classifications are valid unless they bear no rational relationship to the State’s objective.
   - Court can only intervene when the means has no rational relationship to state’s objective, the ends.
   - Hollow rule
   - Why would a state adopt a statute that has no rational relationship to its goals? Not likely, and thus, hollow.
   - Thus, rational basis review must be based on relationship with legitimate state objective.
   - Rational basis must be relevant

v) In recent years the Supreme Court has created a scheme for reviewing equal protection cases that involves various tiers of review:
   - generally, any classifications based on race or one of a few other well-defined characteristics are subject to varying degrees of heightened scrutiny – these are usually struck down
   - other classifications not based on “suspect” characteristics are subject to a less stringent standard of review, rational basis review. These classifications are usually upheld.
   - Here, not a suspect class so rational basis review. The preservation of safety was rationally related and thus the Court deferred to the TA.

c) In *Williamson v. Lee Optical*, the Court held that the legislature may reform discriminatory classifications from time to time, addressing itself to the phase of the problems which seems most acute. This meant that step-by-step reform was acceptable.
   i) an OK statute made it unlawful for any person not licensed as an optometrist or ophthalmologist to fit lenses to face or to duplicate or replace lenses in frames except on a written prescription of an ophthalmologist or optometrist. In effect, the statute prevented opticians from fitting old glasses into new frames or supplying new or duplicate lenses without a prescription.
   ii) EPC goes no further than invidious discrimination. We cannot say the point has been reached here.

d) In further defining the law of rational basis review, in *City of Cleburne v. Cleburne Living Center*, the Supreme Court held that a fear of a group of persons is not a reasonable ground for treating them differently under the law
   i) Texas city denied special use permit for the operation of a group home for the mentally retarded.
   ii) HELD: though classifications involving the mentally retarded are not entitled to a high level of scrutiny, in order to w/stand equal protection review, such classifications must be rationally related to a legitimate governmental purpose (= rational basis review test).
iii) the Court held that the fear of the mentally retarded is not a reasonable ground for excluding them from the neighborhood and struck the down the law.

e) A bare congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest for the purposes of rational basis review
   i) United States Dep’t of Agriculture v. Moreno – hippies
   ii) Romer v. Evans – homosexuals

C. Heightened Scrutiny (Strict Scrutiny) and the Problem of Race

1. Introduction

   a) Race-based classifications are reviewed with much greater scrutiny than rational basis review. In reviewing these classifications, courts employ strict scrutiny, under which a state has the burden of establishing a compelling interest sufficient to justify the discriminatory law.

   b) not all laws that disadvantage racial minorities are specifically based on race. The Supreme Court has addressed the constitutionality of both race-based and non-race-based laws.

2. Race-based classifications that directly disadvantage racial minorities

   a) in providing equal protection, the 14th Amendment gives all persons the right to protection from unfriendly race-based legislation. (Strauder v. West Virginia)
      i) in Strauder, the Supreme Court held that any law that expressly denies the right to participate as jurors in the administration of law because of their race is unconstitutional (W.V. statute limited jury service to only white males over the age of 20)
      ii) Court is presumptively likely to be hostile to race-specific statutes that burdens minorities.

   b) all legal restrictions which curtail the civil rights of a single racial group are immediately suspect and must be subjected to a high level of scrutiny (Korematsu v. United States)
      i) Appeal of the conviction of a man of Japanese descent for remaining in his home in violation of a military order excluding Japanese descendants from their West Coast homes.
      ii) held that race based distinctions are immediately suspect and therefore subject to heightened scrutiny
         - Court expands 14th Amendment from African Americans to include all other racial classifications
         - If the gov’t is likely to take race into considerations, it is likely to be misused – thus, all racial classifications included
         - Ex. using race to reward majority race at expense of minority propagating racial stereotypes
      iii) However, here Court found that military exigencies justified race-based exclusions; justices not immune from social influences

   c) strict scrutiny w/in means/ends framework
      i) Court: must look more closely at the means and ends
      ii) ends: must be a compelling government interest (ex. Korematsu – military necessity).
iii) contrast to rational basis review where only had to be a legitimate interest
iv) means: under rational basis review, must be rational; under strict scrutiny, must be narrowly tailored.

3. Non-race-based classifications that disadvantage racial minorities
   a) when examining non-race based classifications that in their effect
disadvantage racial minorities, the Supreme Court has noted that an otherwise
neutral official action is not unconstitutional merely because it has a
disproportionate racial impact – laws that have a disparate impact on minorities
do not automatically violate equal protection
   i) Washington v. Davis: disparate racial impact alone will not violate
equal protection.
      - Facts: Black applicants to the DC Police Force who had failed the
civil service exam brought and EPC challenge b/c a higher
percentage of blacks failed the exam than whites.
      - Court allowed discriminatory intent to be inferred from the totality
of the circumstances, including disparate circumstances.
      - However, here the Court found that the law did not violate the EPC
b/c it did not purposefully discriminate against blacks – not
invidious.
      - Disparate impact is not irrelevant but it is not the sole touchstone
of an invidious racial discrimination forbidden by the Constitution.
      - Arlington Heights v. Metropolitan Housing Corp.: sometimes the
effect of a seeming neutral law on one race could be so
overwhelming that there could be no reasonable explanation other
than racially discriminatory intent, such as in Yick Wo v. Hopkins,
and Gomillion v. Lightfoot.
      - Case does not speak to how big a role disparate racial impact
should play in the court’s determination of discriminatory intent.
   ii) McClesky v. Kemp: A defendant who alleges an equal protection
violation has the burden of proving the existence of purposeful
discrimination (A black man sentenced to die for murdering a white
person brought suit regarding the allegedly discriminatory manner in
which Georgia’s capital sentencing scheme was administered).
      - The equal protection clause prohibits the gov’t from engaging in
action deliberately undertaken to injure racial minorities
      - This includes using a person’s race to determine whether to arrest,
prosecute, or execute a particular person.
      - Because the Court found no such intent in this case, it upheld the
statute.
      - Legislation not facially aimed at racial minorities will not be held
to as high a standard of scrutiny as legislation directly aimed at
racial minorities.
      - Under such a scheme of giving deference to the legislature,
statistical proof alone is not generally enough to prove the
unconstitutional selective enforcement of a law that is facially neutral, at least in the case of the death penalty.
- Additionally, statistical evidence is insufficient to show that the law was unfairly applied to a particular plaintiff. Court does not care about general probabilities. The Court wants evidence of discrimination w/ respect to this specific case.
  o While systematic evidence of discrimination is evidence of discrimination here, not an irresistible conclusion.

b) in determining whether invidious discriminatory purpose was the motivating factor in passing an apparently non-race-based law, the Court has held that inquiry should be made into both circumstantial and direct evidence of intent as available. (*Village of Arlington Heights v. Metropolitan Housing Development Corp.*)
  i) evidence may include the effect or impact of the state action, the historical background of a decision, any departures from normal procedures, any substantive departures, and the legislative history
  ii) need direct evidence of discriminatory intent or purpose, including history or background of legislation, historically segregated neighborhood.
  iii) If history and background show irresistible conclusion of invidious purpose than law can be invalidated.

c) a defendant that alleges an equal protection violation has the burden of proving the existence of purposeful discrimination (McClesky v. Kemp)
d) TEST: Court confronted with classification that disadvantages a racial minority must first determine whether it is race-specific. If it is, either b/c it explicitly draws racial lines or b/c it is motivated by a racial purpose, the court will use strict scrutiny and probably invalidate it. If the classification is not race-specific, the court will use rational basis review despite its disproportionate impact on a minority group.

4. Facially Neutral Race-Based Classifications
a) some laws that discriminate against a particular group are facially-neutral in that a look into the text of the law alone will give a reader no hint of discrimination. When these laws have a discriminatory intent, however, they are unconstitutional
b) equal application of statutes that contain race-based classifications is not enough to save the statutes from strict scrutiny under equal protection (*Loving v. Virginia* – Interracial couple convicted in VA state court for violation of state miscegenation laws).
  i) Laws that classify on the basis of race are reviewed under equal protection with strict scrutiny and will not be upheld unless they are necessary to accomplish some permissible state objective
  ii) The statute involves a racial classification (which triggers a presumption of unconstitutionality).
  iii) additionally, fails rational basis review too because the legislative purpose behind the statute was to preserve the white race and in the 1960s, this was no longer accepted as a legitimate state purpose.
iv) decision shows the flexibility that the Constitution gives to the law and it gives legitimacy to the proposition that the law can and should be able to change over time as the values and morals of society change.

c) In *Washington v. Seattle School District No. 1*, the Court held that a facially-neutral law that makes it more difficult for certain racial and religious minorities to achieve legislation that is in their interests is unconstitutional (Suit by local school district regarding the constitutionality of a state initiative affecting school reassignments).

i) This decision stands for the proposition that states cannot limit the use of busing as a desegregation tool

ii) Also stands for the proposition that the fact that a statute is facially neutral does not mean that it can withstand heightened scrutiny, or that it is any more acceptable than a non-neutral statute.

iii) here, the statute allocates State power in a non-neutral fashion and is thus unconstitutional.

iv) the initiative went beyond merely repealing the practice, but restructured the political process to make it more difficult for minorities to get equal protection.

- Restructuring → strict scrutiny

v) *Crawford*: Ct. upheld a CA amendment prohibiting state courts from mandatory pupil assignments unless a federal court would do so.

- Here, repealed a rule at the same level, whereas in *Seattle*, local policy trumped state

d) States, in drawing voting districts, may increase racial minorities’ voting power by creating districts which combine minority neighborhoods. While race may be a factor in drawing the districts, such gerrymandered districts are unconstitutional if motivated predominately by race (*Shaw v. Reno*), even if the resulting district is not bizarrely shaped (*Miller v. Johnson*)

i) *Miller*: when the justice dept. pressures Georgia to create a new congressional district by linking black neighborhoods, a citizen challenges the district as racially gerrymandered, even though not bizarrely shaped.

- while race be taken into account when drawing districts, it cannot be the sole or predominant factor in drawing the district

- states must also take into account some traditional factors in districting such as maintaining political subdivisions, political horse-trading, etc.

5. Race-Based Classifications that Favor Racial Minorities

a) some race-based laws actually favor racial minorities. These laws are not necessarily constitutional

b) This has been visited in the construction context (*City of Richmond v. J.A. Croson Co, Adarand Constructors, Inc. v. Pena*)

i) *J.A. Croson*: Legislative actions based explicitly on race (regardless of what race is burdened or benefited) are unconstitutional unless it can be demonstrated that they are necessary to achieve a compelling government interest. (Here, program requiring prime contractors on city projects to subcontract a certain amount of the contract to minority businesses).
In order to create set-aside programs that do not violate EPC, legislatures must make very precise findings based on clear evidence that there has been past discrimination. It must be more than past societal discrimination; it must be specific to the industry which the set-aside program reaches. Additionally, the means chosen to meet the requisite compelling gov’t interest must be narrowly tailored.

Here, the means chosen was a rigid quota, which the Court found invalid.

Court hinted that in order to meet the narrowly-tailored test, a legislature must first try to remedy past or current wrongs through race-neutral means.

ii) this means that strict scrutiny is employed in a judicial examination of race-conscious affirmative action programs

iii) Adarand: all racial classifications must be narrowly tailored to further a compelling gov’t interest. (Here, a subcontractor’s low bid in a federal project was rejected b/c of a federal racial classification)

- expands Croson to apply to actions of the federal government
- All race-based classifications of federal agencies will also need to be reviewed under strict scrutiny, regardless of the level of gov’t c) Affirmative action – Grutter v. Bollinger, Gratz v. Bollinger:

i) How do we know if diversity is a compelling gov’t objective?

- Court says you look at benefits of diversity (better citizens, diverse leadership roles, leaders w/ legitimacy) to show compelling gov’t objective
- Court finds that it is

ii) Points allocations system struck down but unidentified plus system upheld as narrowly tailored.

iii) Post-Grutter, affirmative action programs subject to strict scrutiny; TX percentage plan also subject to strict scrutiny

D. Intermediate Scrutiny and the Problem of Gender

1. The Early Cases

a) until the 1970’s, the Supreme Court viewed gender based classifications as worthy of only a minimal degree of scrutiny.
b) this begun to change in 1971.

2. Moving toward intermediate scrutiny

a) in 1971, in Reed v. Reed (law dictating who can administer an estate of a person who dies intestate – if 2 or more people at same level, preference to the male; court rules unconstitutional b/c not rationally related to gov’t objective and arbitrary), Supreme Court decided that when determining the constitutionality of gender-based classification, courts should look at whether a difference in the sex of competing applicants bears a rational relationship to a state objective that is sought to be advanced by the operation of the statute.

i) rational basis review applied

b) In 1973, in Frontiero v. Richardson, Justice Brennan concluded that gender-based classifications should be looked at with strict scrutiny. While other justices
disagreed that heightened scrutiny should apply, they did agree w/ Brennan’s
collection ad *Frontiero* became the first case in which more than rational
scrutiny was proposed.
c) in 1976, *Craig v. Boren* (statute prohibited the sale of 3.2% beer to males under
the age of 21 and to females under the age of 18) applied what is arguably
intermediate scrutiny to a gender-based classification
   i) Held: statutes that discriminate based upon one’s sex violate equal
   protection if they create a gender-based classification that is not
   substantially related to an important gov’t objective.
   ii) Court examines the actual purpose that the legislature had when it
   enacted the challenged statute – not merely some hypothetical purpose that
   the legislature might have had.
   iii) Here, the Court questioned whether Oklahoma actually intended to
   increase traffic safety – the law did not prohibit the consumption of
   alcohol and would seemingly have no effect on whether young men drank
   and drove. Instead the Court found that the legislation was based on
   stereotypical notions about the behavior of young men and women.
d) *United States v. Virginia*, the Court held that gender-based distinction must
demonstrate an exceedingly persuasive justification, meaning that the state must
show at least that the classification meets intermediate scrutiny (important
governmental objectives, which uses means employed which are substantially
related to achieving those objectives)
   i) Us challenges a state military college’s male-only policy as violating the
   equal protection clause, the state proposes to create a separate women-
   only program
   ii) held that state military school offering boot-camp style training may not
   exclude women, even if they offer women-only programs, unless they
   demonstrate an exceedingly persuasive justification – not done here.
   iii) seemingly higher standard
   iv) Court policy that, even if there is a rational or legitimate basis for the
   distinction, the policy must have actually been implemented on that basis,
   and not on other considerations.
   v) Court’s harsh condemnation of VMI’s proffered rationale suggests J.
   Ginsburg believes it to be pretextual and takes personal offense
3. Broad Generalizations and Real Gender Differences
   a) not all gender-discriminatory statutes are per se unconstitutional, as the EPC
does not require that all statutes treat all persons equally all of the time
   i) gender-based distinctions founded on “stereotypes” or “generalizations”
   are impermissible unless the stereotype is proven to be true
   ii) *J.E.B. v. Alabama ex rel. T.B.* – in paternity trials, gender-based
   preemptory challenges are unconstitutional
   iii) statutes that do not discriminate against gender invidiously, but rather
   realistically reflect the fact that the sexes are not similarly situated in some
   circumstances, are not per se unconstitutional
b) this means that when men and women are truly not similarly situated for a particular purpose or context, the Constitution allows different treatment of each gender – *Rostker v. Goldberg*

4. Benign Gender-Based Classifications and Discrimination Against Men
   a) a benign classification scheme is one that favors one group over another, but with harmless and non-biased intent. Many legislative actions have created benign classification schemes while trying to make up for past discrimination against a particular group
   b) remedying past discrimination through benign classifications
      i) not all laws enacted to remedy past discrimination are constitutional
      ii) *Califano v. Goldfarb* – laws that discriminate in favor of a certain class b/c of gender will be struck down if they do not reasonably compensate the favored group for past discrimination (Here, a widower brought suit seeking to have a portion of a federal at which discriminated based on gender held unconstitutional).
         - Court will uphold any law that appears to the Court to be a reasonable means of compensating women, as a class, for past discrimination in the economic arena.
         - Reasonable means test determines whether a potentially discriminatory gender-based law will be upheld
         - Based on outmoded stereotypes.
      iii) statutes that do operate to directly compensate women for past economic discrimination, however, are constitutional, even if they discriminate against men in the process – *Califano v. Webster* (SSA provision bases monthly payments on earnings over lifetime; women allowed to extract longer low-earning period than men).
         - specifically designed to compensate for past discrimination (law not enacted based on archaic stereotypes)

E. Sexual Orientation
   1. Only recently have courts begun to address the constitutionality of sexual-orientation-based classifications under the EPC.
   2. *Romers v. Evans* – under rational basis review, states cannot categorically ban future laws protecting homosexuals from discrimination
      a) Colorado amended its constitution to prohibit and nullify all laws that protect homosexuals from discrimination based on their sexual orientation.
      b) a law that nullifies all other laws which protect homosexuals could not possible been adopted for nay purpose except the bare desire to discriminate against homosexuals, and thus does not pass a rational basis review

F. Other Candidates for Heightened Scrutiny
   1. Alienage-Based Classifications
      a) Court has held that the EPC protects not only citizens of the US but aliens as well
      b) *Sugarman v. Dougall* – held that classifications based on alienage are subject to heightened scrutiny (Alien brought suit seeking to have NY statute which excluded aliens from some governmental positions deemed unconstitutional.
i) Here, the classification was not related to a legitimate political end as the statute only granted an arbitrary economic preference to citizens and thus the statute was struck down.
ii) COURT DID NOT HOLD that an alien may not be refused, or discharged from, public employment, even on the basis of non-citizenship, if the refusal to hire or discharge rests on legitimate state interests that relate to the qualifications of a particular position or to the characteristics of the employee.

2. Wealth-Based Classifications
   a) laws discriminating expressly against indigents are suspect (**Griffin v. Illinois**)
   b) Laws which disadvantage indigents by charging fees for government services are not subject to heightened scrutiny (**San Antonio School District v. Rodriguez**)

3. Other disadvantaged groups
   a) the mentally retarded have also sought protection under the EPC, though they were not given the level of protection they desired
   b) classifications discriminating against the mentally retarded are not reviewed with heightened scrutiny; the fact that mental retardation may be an immutable characteristic does not require even intermediate scrutiny (**City of Cleburne v. Cleburne Living Center**)

4. What qualifies as a suspect class?

G. The Fundamental Interests Prong of Equal Protection Analysis
   1. Introduction
      a) a fundamental right is a right or interest that derives from natural law and that the government cannot take away w/o a high burden of proof of necessity
      b) to meet this high burden, a court must find that a state has a **compelling** interest and that the means employed by state are necessary to meet the desired objective
      c) Origins – **Skinner v. Oklahoma**, which held that there exist some fundamental interests that the gov’t cannot take away w/o meeting a very significant burden
         i) appeal of a state court order mandating the sterilization of a convicted criminal
         ii) When the law lays an unequal hand on those who have committed intrinsically the same equality offense and puts punishment on one and not the other, it has made invidious discrimination.
      d) Bracey: Fundamental Interest v. Fundamental Right
         i) right has to be either implicitly or explicitly in the Constitution (right to vote)
         ii) interest is just of utmost importance (procreation)

   2. The Right to Vote
      a) generally considered a fundamental right. Thus, any restrictions upon an individual’s right to vote must be the strict test placed upon limitations on fundamental rights
      b) Denial of an individual’s right vote
         i) denial’s of an individual’s right to vote are presumptively unconstitutional.
         ii) **Harper v. Virginia State Board of Education** – Supreme Court held that voter wealth or the payment of a fee cannot be made a precondition for
voting and restrictions on the right to vote must be closely scrutinized and carefully confined (VA charged votes a $1.50 poll tax as a condition on the right to vote).

- based on both fundamental rights and suspect classifications analyses
- the fundamental rights analysis has been the one followed by the Court in its subsequent decisions on voting rights and restrictions on the franchise.

iii) the court has also held that it is a violation of equal protection to restrict the voting in school district elections to property owners and lessors within the district (*Kramer v. Union Free School District*)
- does not fulfill compelling interest w/ enough precision

c) Diluting the right to vote
i) until 1962, the Supreme Court had held that controversies surrounding legislative districting were non-justiciable
ii) *Baker v. Karr* – Court changed its view, holding that any debasement of votes results in justiciable cause of action. Now states have an obligation not to dilute any party’s right to vote
iii) in one respect, this means that all votes should have equal participation in elections of their representatives. Further, states must structure their state legislatures so that citizens of the state are equally represented according to population. (*Reynolds v. Sims*)
- Here, the Supreme Court struck down Alabama’s districting scheme because it did not apportion its districts according to population which resulted in smaller districts (in population) having more representation in the state legislature than larger districts
  - Represent people, not land
- *Lucas v. Forty-fourth General Assembly*: the Court struck down Colorado’s districting scheme even though it had been approved by Colorado citizens by referendum. The scheme allowed for only one of Colorado’s house to be apportioned by population. The Court held that the peoples’ constitutional rights of equal protection could not be infringed just b/c a majority of the people of a state choose that the right could be infringed.
- Since *Reynolds*, exactly what is an allowable deviation from the one-person-one-vote standard has changed as the Court has changed. (see p. 134 of High Courts)

iv) Though every person has a right to vote, specific candidates and political parties do not have a right to win. The EPC does not require proportionate representation of the various political parties as an imperative of political organization (*City of Mobile v. Bolden*)
- Bolden brought suit of Mobile’s at-large city commission voting method, arguing that it discriminated against blacks
- plurality opinion
clarifies the law of vote dilution: a person’s right to vote cannot be
diluted, however, that law is different when applied to groups of
persons. While a person’s vote cannot be diluted, this opinion
makes it clear that there is nothing wrong with group vote dilution
when it occurs under a non-discriminatory scheme.

Here, each of the citizens of Mobile shared the same power to elect
city commissioners. As a group, however, black voters, as a result
of their fewer numbers, did not, as compared to white voters, have
an equal say in who represented them. B/c white voters constituted
the majority, they had significant say in who represented the city.

The Court held that such an outcome was not unconstitutional so
long as it was not the result of invidious discrimination.

d) Davis v. Bandemer (Justice White held, for the Court, that the political
gerrymandering issue was properly b/f the court, but seven justices voted to
reverse the District Court’s finding that Indiana’s new reapportionment law was
unconstitutional. Only four Justices believed that it was unconstitutional b/c the
District Court used too low a standard in finding that the pl. constitutional rights
were violated). Held: (1) Courts will review political gerrymandering
controversies. (2) In order to prove-up violation of equal protection both
intentional discrimination against an identifiable political group and an actual
discriminatory effect on that group must be proved.

3. The Right to Travel

a) all citizens of the United States are free to travel throughout the length and
breadth of out land uninhibited by statutes, rules, or regulations which
unreasonably burden or restrict this movement

b) Shapiro v. Thompson

i) the right to travel amongst the states is a fundamental right

ii) Under Equal Protection, a state may not grant or deny welfare benefits to
its residents based upon the amount of time the residents have lived w/in
its borders.

iii) Here, various states required their residents to live w/in the state for
one year before they were eligible to receive state welfare benefits. The
Supreme Court struck down the law as a violation of equal protection.

iv) Issue is when states create classifications which serve to penalize the
exercise of a fundamental right, strict scrutiny is the proper standard of
review

v) Fundamental right to travel from “the nature of our federal union and
our constitutional concepts of personal liberty,” which unite to
requirements that all citizens be free to travel (made up?).

c) Memorial Hospital v. Maricopa County: the Court struck down an AZ law
which had a one-year residency requirement b/f an indigent resident could receive
non-emergency medical care.

d) not all residency requirements are unconstitutional – can require a time period
of residency b/f allowing residents to pay lower college tuition.

e) Subsequent to Shapiro, Court upheld an Iowa law that required a one-year
residency before a party could bring a divorce action against a non-resident.
i) states have long had jurisdiction over domestic matters
ii) states had an interest in avoiding meddling in matters in which another state has paramount interest

f) Saenz v. Roe – no penalty on right to travel across state lines b/c first year get welfare benefits that you got from previous state; infringement different from Shapiro, but still unconstitutional.
   i) Court recognizes a new aspect of right to travel \( \rightarrow \) to be treated in the same way as old residents of the state.
   ii) from P & I clause

g) some restrictions
   i) Saenz type cases: P & I and basic right to move from state to state w/o being discriminated – can treat long term residents differently than new residents
   ii) waiting periods – some struck down, others upheld (divorce, tuition)
   iii) court tends to find that when more important interests are at stake, waiting period no good
   iv) But when not as important interests involved, permissible b/c gov’t interests outweigh

4. Welfare
   a) the right to receive welfare assistance is not a fundamental right
      i) Court does not constitutionalize right maybe b/c not in Constitution?
      ii) no logical stopping point to positive right – how much welfare?; adverse impacts on other gov’t spending; should cts be in the business of telling states how to spend their money?
   b) This means a statute does not violate the EPC merely b/c the administration of public welfare assistance is imperfect – Dandridge v. Williams
      i) max allocation of $350/family regardless of size or need; need-based but capped so large families potentially harmed.
      ii) Court says no strict scrutiny; economic right is not fundamental
      iii) reviewed under rational basis review (w/o bite)
   c) the Court held that rational basis scrutiny applies to welfare-related legislative decisions
      i) If strict scrutiny applied, bulk of welfare laws were presumptively be invalid

5. Education
   a) education is not a fundamental right for EPC purposes  The Constitution doesn’t grant an explicit or implicit right to education. (San Antonio Independent School District v. Rodriguez)
      i) School districts with low property tax base spent less on education per pupil than those districts with a higher property tax base.
      ii) HELD: eve though the system of financing education by collecting taxes on property in the school district leads to some disparity in spending per pupil across districts, it is not an irrational way for a state to fund education.
iii) not the importance of the right that makes it fundamental. Rather, a right is fundamental if it is guaranteed by the Constitution, either implicitly or explicitly.

- education is not explicitly guaranteed in the constitution
- The Court does not explicitly say what qualifies an interest as implicitly guaranteed by the Constitution, but suggests that there is an implied guarantee if the right bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution.
- Not closely related enough to the 1st Amendment here.

iv) additionally, no deprivation of education, only spending.
v) Bracey: majority more conservative and court odes not want to be embroiled in state decision making like this so retrenchment.

b) Pyler v. Does. However, w/ respect to access to education, the Supreme Court has held that a state must have a substantial justification to enact a classification that deprives education to all of the members of a certain group (here, illegal aliens). Any such classification must further some substantial state interest.

i) here, children of illegal immigrants, who were themselves illegally in the United States were denied the opportunity to attend public schools for free.
ii) applied heightened scrutiny, even though no fundamental interest involved
iii) aliens not a suspect class
iv) reasoning turns on (1) fact that the disadvantaged class are innocent children who are also illegal aliens and (2) the special status of education.
v) additionally, total deprivation of education
vi) obviously, invidious discrimination.

III. MODERN SUBSTANTIVE DUE PROCESS

A. Introduction

1. The Supreme Court has made it clear that the individual has fundamental rights which must be respected.
   a) Myer v. Nebraska, Pierce (p. 810-11): right to education, right to speech, right to bring up children?
   b) As such, the liberty guaranteed by the Due Process Clause of the 14th Amendment may not be interfered w/ by legislative action that is arbitrary or w/o reasonable relation to some legitimate gov’t purpose

2. Some of these guaranteed liberties include the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized as essential to the orderly pursuit of happiness by free men (Meyer).

B. Privacy and Procreation
1. The right to privacy is protected by the 14th Amendment. In addressing this right, the Supreme Court has stated that a broad Constitutional right of privacy protects intimate aspects of personal life from gov’t intrusion.
   a) *Griswold v. Connecticut:* A right of personal privacy emanates from the penumbras of the Bill of Rights, and it cannot be invaded absent a showing that the legislation is necessary to accomplish a compelling state interest.
      i) Here, director of Planned Parenthood was arrested for providing advice to married couples in violation of a non-contraception statute and argued that the statute violated the 14th Amendment.
      ii) majority forced to rely upon constitutional “penumbras,” a nebulous concept that can be criticized as being inherently subjective and unworkable.
      iii) concurring judges searched for alternative bases for the right of privacy.
      iv) no matter what the justification for the right to privacy, all of the Justices agree that the right can be regulated under certain circumstances, leading to a double standard, with some laws that impinge on special rights requiring strict scrutiny and other laws needing only a rational relationship to an important government purpose.

2. The right of privacy was extended to the realm of abortion in *Roe v. Wade,* which held that the right to privacy encompasses a woman’s decision whether or not to terminate her pregnancy
   a) the Texas law prohibited abortion unless the woman’s life was in danger.
   b) while *Roe v. Wade* did acknowledge a woman’s right to chose, it did make clear that the right was not absolute, holding that the 14th Amendment also enables state regulation of abortion at various stages of the pregnancy
   c) opinion appears to be the Court imposing its own set of morals on individuals and states.
   d) The holding can also be criticized as a modern example of *Lochner*izing, of extensive judicial intervention into state legislative schemes,
   e) In the years since *Roe v. Wade,* the Court has utilized the same judicial intervention to protect a selected number of fundamental values.
   f) *Maher v. Roe:* upholds state regulation granting Medicaid for childbirth but not for abortion
   g) *Harris v. McRae:* prohibits use of federal Medicaid funds for abortion, except where health of the mother is at stake.
   h) trimester framework of *Roe v. Wade* reaffirmed in *Akron v. Akron Center for Reproductive Health,* which also reaffirmed the central liberty in *Roe
   j) *Planned Parenthood of Southeastern Pa. v. Casey:* The essential holding of *Roe v. Wade* remains valid, although the trimester framework and strict scrutiny approach are replaced by an undue burden test.
      i) Planned Parenthood challenged a state law which required doctors to dispense of information to, obtain the informed consent of, and retain information about pregnant women seeking abortion.
      ii) UNDUE BURDEN TEST: only state regulations that impose an undue burden on a woman’s right to choose are unconstitutional. An undue
burden exists if the law’s purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability. As long as it does not create an undue burden, a State may take measures to ensure that the woman’s choice is informed, and it may enact regulations to further the health and safety of the woman seeking the abortion.

- Still, a state may not prohibit any woman from deciding to terminate her pregnancy before viability
- Subsequent to viability, the State may proscribe abortion except when necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.
- 24 hour waiting period and informed consent requirement is not an undue burden on the right to decide to terminate a pregnancy b/c it facilitate the wise exercise of that right.
- the husband notification requirement is an undue burden – it’s a substantial obstacle to a woman’s choice and repugnant to the present understanding of marriage.
- A state may require a minor to obtain the informed consent of her parents, although the State must also provide an adequate judicial bypass procedure.
- Facility reporting requirements upheld b/c they relate to health and do not impose a substantial obstacle to a woman’s choice.

iii) joint opinion’s stare decisis argument is open to criticism. The opinion seems to state that, even if the holding in Roe was incorrect and based on an erroneous constitutional interpretation, the Court would not overrule Roe because of the intensively divisive nature of the case and the danger of causing public loss of confidence in the Court’s legitimacy.

iv) new, undue burden standard, is arguably less clear and may lead to less consistency than the prior framework.

3. The Court has held that a law banning partial birth abortions creates an undue burden on a woman’s right to obtain an abortion and is therefore unconstitutional (Stenberg v. Carhart – doctor challenged a Nebraska law criminalizing the performance of partial birth abortions).

a) application of the undue burden standard adopted in Casey.
b) Justices apply the test in different ways, keeping with their general views about the constitutionality of laws banning abortion

4. Abortion and Minors

a) parental consent permissible

C. Family and Other Privacy Interests

1. The right of privacy also extends to family-related interests

a) Moore v. City of East Cleveland – the Supreme Court stated “This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the 14th Amendment.

i) City law laying forth which members of the family can live together
ii) something special about family
b) As such, the Court held that when a city undertakes intrusive regulation of the family, the usual judicial deference to the legislature is inappropriate.

2. Right to marry
   a) Zablocki v. Redhail, Supreme Court wrote that “the right to marry is of fundamental importance for all individuals; the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, childrearing, and family relationships.
      i) Wisc. statute providing that any resident w/ minor children not in his custody and which he is under an obligation to support by court order may not marry w/o a prior judicial determination that the support obligation has been met and the children are not then and are not likely thereafter to become public charges.
   b) However, the Court qualified that statement, as it later stated that “reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

3. The Court has also addressed the interplay b/w the right to privacy and sex.
   a) Bowers v. Hardwick – the Court ruled that homosexual sodomy is not a fundamental right protected by the Due Process Clause, and that states may prohibit it (A homosexual male, who had been charged with but not prosecuted for private sexual acts, challenged the constitutionality of a law prohibiting sodomy).
      i) decision rests on Judeo-Christian tradition and the presumed belief of Georgia citizens that homosexuality is immoral. However, Constitution not limited to Judeo-Christian beliefs.
      ii) law applies to all homosexual sodomy, whether b/w homosexuals or heterosexual married persons.
      iii) tradition – no right to engage in homosexual sodomy
t     iv) redefines the right (as right to engage in homosexual sodomy) so that the can define as narrowly as possible to put outside the tradition.
   b) Lawrence v. Texas – overruled Bowers v. Hardwick
      i) reframed the issue from whether there is a right to engage in homosexual sodomy to whether people can engage in sexual intimacy in the privacy of their own home
      ii) thus, tradition changes – liberty to enter into relationships in the privacy of your home; encapsulates the right to engage in sexual intimacy in privacy of their own home
      iii) Tradition
         - gays not targeted until recently
         - prohibition on sodomy in past was against men and men and men and women.
         - Laws were to protect sodomy against minors and to cover where rape laws did not
         - “Hooking up” was not meant to be covered by the old laws – prosecutors chose not to pursue those cases
         - not a tradition to prosecute homosexual sodomy b/w two consenting adults

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iv) does not grant a fundamental right to engage in homosexual sodomy; it only says right to keep state from policing the bedroom

D. The Right to Die

1. *Cruzan v. Director, Missouri Dept. of Health*: The due process clause protects an interest in life as well as an interest in refusing life-sustaining medical treatment, and a state may legitimately seek to safeguard the personal element of this choice for incompetent persons through the imposition of heightened evidentiary standards.

   a) Supreme Court did not directly address whether the right to refuse life-sustaining medical treatment is fundamental right protected by the Due Process Clause. However, the Court assumed it was a fundamental right for the purpose of deciding whether a state could demand high evidentiary standards before withdrawing such treatment.

   b) Nancy Cruzan had been a coma for 17 years. Suit regarded Missouri’s right to refuse to cease life-sustaining nutrition unless it was shown by clear and convincing evidence that death was her wish.

2. *Washington v. Glucksberg*: The Supreme Court held that a law prohibiting assisted suicide does not violate the 14th Amendment.

   a) terminally ill patients challenged the constitutionality of a Washington law making it a crime to assist another to commit suicide.

   b) The right to commit suicide is not a fundamental right.

   c) In *Cruzan*, a mentally competent adult has the right to refuse lifesaving medical treatment. Court refused to extend that ruling here to allow a mentally competent adult to have the right to take affirmative steps to die.

   d) Rehnquist applies the standard substantive due process and equal protection analysis that the Court has used since the end of the *Lochner* era.

      i) first considers whether the ability to commit suicide is a fundamental right.

      ii) If it is, the Court must determine whether it serves a compelling state interest and that the statute is narrowly tailored to serve that interest. If not, the statute is presumed constitutional. A person challenging the law would then have to show that there was no conceivable state of facts under which the statute would be rationally related to any legitimate government interest.

   e) Court talks about tradition

      i) no tradition supporting practice of suicide

      ii) under common law, suicide was illegal

      iii) defines right in the narrowest terms – right to assisted suicide and then fails to find tradition supporting that right.

   f) *Vacco v. Quill*: Supreme Court upholds NY law banning assisted suicide.

      i) physicians argued that the statute violated the EPC b/c it allowed terminally ill patients to die by allowing them to refuse life support, but did not allow them to die by a lethal dose of medicine.

      ii) the Court held that there was no fundamental right to commit suicide, and therefore, the distinction b/w allowing individuals to refuse life support and prohibiting assisted suicide was subject to only a rational basis review and the distinction b/w the statutes was rationally related to
the state’s interest in individual’s health and welfare and the ethics of the profession.

iii) no EPC claim b/c NY patients were treated equally – they could refuse life-saving medical treatment but they could not obtain a lethal dose of medicine.

IV. PROCEDURAL DUE PROCESS

A. Introduction

1. Procedural Due Process ensures that the government action that deprives a person of life, liberty, or property is implemented in a constitutionally adequate manner.
2. When important interests are at stake, constitutional principles demand that procedural safeguards be met.
3. questions to consider
   a) what’s the nature of the history/property interests?
   b) which interests are so important that constitution demands procedural safeguards?
   c) what are those safeguards?

B. Liberty and Property Interests

1. The requirements of procedural due process apply only to the deprivation of interests encompassed by the 14th Amendment’s protection of liberty and property. That range of interests is not infinite.
2. To determine whether due process requirements apply, one must look, not to the weight, but to the nature of the interest at stake.
3. With respect to benefits (ex. welfare, disability), the Supreme Court has stated that “to have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.”
   a) ex. a professor without tenure did not have a property interest in continued employment and could be terminated without due process – Board of Regents of State Colleges v. Roth; Perry v. Sinderman
   b) Roth: alleges that failure to hold hearing related to his not being rehired violates due process
   c) Goldberg v. Kelly: when have an entitlement (not “property”) that the state is going to deprive an individual of, have the right to hearing and have to have certain procedural safeguards under Due Process.
   d) Perry – companion case to Roth, but in this case, existence of a faculty guide; Court found entitlement to job security
   e) looks to the perspective of the employment guides, not the individual
   f) Bracey: if you create entitlements and accord full procedural safeguards, legislature may then not guarantee entitlements b/c of hassle of establishing procedural safeguards
4. The right to due process is conferred not by legislative grace, but by constitutional guarantee, and while the legislature may elect not to confer a particular property interest, such as a job, upon someone, it may not constitutionally authorize the deprivation of such
an interest once conferred, without appropriate procedural safeguards – *Cleveland Board of Education v. Loudermill.*

a) suit brought by a dismissed employee against the Cleveland school board regarding the fairness of the procedures surrounding his dismissal
b) when a legislature creates a statutory entitlement to a right protected from deprivation by the Due Process Clause, it cannot attempt to define the procedures for deprivation (or the constitutionality of those procedures).
c) In brief, the legislature can grant to someone a right protected by the Due Process Clause, but once it does, it relinquishes any power to control the retention or deprivation of that right.
d) also stands for the proposition that property (as protected by the Due Process Clause, cannot be defined by the procedures provided for its deprivation (contrary to what the school board argued). Thus, it is not the scheme which allows the deprivation of a right that determines whether something is property but the actual right itself.

**C. What Process is Due**

1. **Definition:** Due process is the requirement that a person in jeopardy of a serious loss be given notice of the case against him and an opportunity to meet it.
2. Generally requires consideration of 3 distinct factors:
   a) the private interest that will be affected by the official action;
   b) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
   c) the Government’s interest, including the function involved and the fiscal and administrative burdens that the add’l or substitute procedural requirements would entail. *Matthews v. Eldridge.*
   i) Suit by disability recipient regarding the state’s decision to stop providing him w/ disability benefits.
   ii) sets forth the three factors above – almost all post-1976 procedural due process cases employ this test.
   iii) the essence of due process is the requirement that a person in jeopardy of a serious loss be given notice of the case against him and an opportunity to meet it.
   iv) Here, Court determined that the private interest at stake – losing disability payments – was not of great significance b/c the payments were not likely to be a person’s sole source of income. No risk of erroneous deprivation w/o a formal hearing here b/c of the nature of the evidence used to determine the discontinuance of disability payments and the hearing would involve significant fiscal and administrative burdens. Thus, gov’t’s interests supported the sufficiency of the procedures already in place.

**D. Irrebuttable Presumption Doctrine**

a) for a while the Supreme Court applied the Irrebuttable Presumption Doctrine. Under this doctrine, now disfavored, a procedure that irrebuttable presumes certain facts, such as that a woman is not physically capable to of teaching during the law few months of pregnancy, is unconstitutional (*Cleveland Board of Education v. Lafleur*).
E. No Due process required
   a) Legislative acts, such as those that reduce welfare benefits or increase taxes, do not require due process (*Bi-metallic Investment Co. v. State Board of Equalization*).
   b) This is justified b/c a representation on the legislative body is a sufficient substitute for a hearing and it would be impracticable to require a hearing for determinations that affect large numbers of people.

V. STATE ACTION AND PROBLEMS OF PRIVATE POWER

A. State Action, Federalism, and Individual Autonomy
   1. State Action and Federalism
      a) to assert a right protected by the first eight amendments or the Fourteenth Amendment, one must show state action.
         i) the first eight amendments originally governed the conduct of the federal government and the Fourteenth Amendment originally governed the conduct of state governments.
         ii) the State action requirement did not become an issue requiring the Supreme Court’s attention until after the Civil War, when Congress began to pass Reconstruction Legislation.
      b) in analyzing Reconstruction legislation, the Supreme Court had to decide how much the Thirteenth and Fourteenth Amendments changed the balance of power b/w the federal gov’t ad the states.
         i) did it give the federal government the authority directly to protect individual rights from the conduct of private actors as well as public actors? Or did the amendments require federal intervention only when the states could not perform their obligation to act in accordance with the rights of their citizens.
         ii) The civil Rights Act of 1875 provided that all persons shall be entitled to full and equal enjoyment of the accommodations and advantages of inns, public means of transportation, and public recreational facilities. It imposed civil and criminal penalties upon private persons that violated the act.
         iii) In 1833, the Supreme Court in the *Civil Rights cases* found the Act to be unconstitutional because it authorized the federal government to regulate the conduct of private parties. The 14th Amendment prohibits racial discrimination on the part of the state governments, not private individuals.

- The Court also held in the *Civil Rights Cases* that the Civil Rights Act of 1875 could not be considered constitutional under the Thirteenth Amendment, as the denial of equal accommodations in inns, public transportation, and public recreation facilities by private persons was a private injury and not a badge or incident of slavery.
- Exclusion from public places is not indicative of second-class citizenship; asking for special treatment to promote social equality
infringes on the rights of others. They have already been freed from bondage and given citizenship like everyone else – cannot get special treatment.

c) What counts as a state invasion of individual rights
   i) the Civil Rights Cases might stand for the proposition that the states are the intended guarantors of their citizens’ rights and the federal gov’t may only intervene to protect those rights through legislation, when the states are failing in their obligation.
   ii) this view has been severely limited by United States v. Morrison, where the Court held that Congress acted outside its authority in passing the Violence Against Women Act b/c the VAWA granted individual victims of violent crime a private cause of action in federal court against their attackers, and the 14th Amendment allows Congress only to pass legislation that creates private rights of action against the government.

2. State Action and Individual Autonomy
   a) Another justification for the State Action Doctrine, besides limiting the federal gov’t’s ability to usurp state gov’t’s role as the primary guarantor of individual rights is the idea the b/c the Constitution was designed primarily to protect individual freedom, without a state action doctrine, the federal gov’t would have more power to regulate the conduct of individuals.
      i) this would subject individuals to the same limitations on their autonomy as the government, and would subject individuals to judicial interference in their conduct instead of protecting them from legislative interference.
   b) a broadcaster’s refusal to air political advertisements is not a state action and therefore does not violate the First Amendment. Columbia Broadcasting System v. Democratic National Committee
   c) Although the Constitution does not regulate the conduct of private persons and corporations, their conduct can be regulated by civil rights legislation. For example, an individual may not sue a privately owned shopping center for violating his First Amendment right to picket on the shopping center’s grounds, but he can sue the shopping center for violating a state civil rights law.

B. Pure Inaction and the Theory of Government Neutrality
   1. The State Action analysis falls into two rubrics
      a) The Court may find that b/c the state gov’t has delegated a traditional state fxn to a private entity, the private entity, is subject to the same constitutional requirements as the state.
      b) Alternatively, the Court may find that a private actor is subject to the same constitutional requirements as the state either b/c the state has become entangled w/ the private entity, or because the state has approved, encouraged, or facilitated the private conduct at issue.
      c) rarely appears in a vacuum – underlying state action that leads to expectations, rights and privileges
   2. Pure Inaction
      a) A county department of social services was not liable to a child and his mother where the child was severely beaten by his father and country social workers, who
had received a prior report of abuse, did not remove the child from his father’s custody – *DeShaney v. Winnebago County Department of Social Services*

i) the Due Process Clause is a limitation on the state’s power to act, rather than guaranteeing safety and security.

b) There is no state action where a state enacts a law that authorizes a warehouseman’s lien sales w/o prior judicial hearing b/c in the absence of any overt official involvement, it cannot be said that a state deprives and individual of an interest protected by the Fourteenth Amendment by enacting a law that permits a warehouseman to sell the individual’s property. *Flagg Brothers v. Brooks.*

i) enacting and authorizing state law, w/o more, does not constitute state action subject to due process protection.

ii) no action by any government official

c) In order for conduct depriving one of a constitutional right to be attributed to the state, the deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state by a person for whom the state is responsible – *Lugar v. Edmonson Oil, Co.*

i) here, the state acted jointly w/ the creditor in obtaining property – therefore, state action.

ii) Must act if: exercise of some right or privilege of the state and either employed by the state or action w/ significant aid of the state


d) The Problem of the Passive State

i) state inaction as a form of action: *DeShaney, Flagg Brothers* seem to suggest that the Constitution permits the government to acquiesce in an existing state of affairs, even when that state of affairs impinges an individual’s right to equal protection or due process

ii) In *DeShaney,* the Court ignores the most significant way in which state action positively contributed to the child’s injury: the set of statutes and common law rules granting custody of minor children to their biological parents.

- the state action doctrine may contain unarticulated baselines that protect natural law assumptions about the rightness of certain decisions.

- In this regard, the state action doctrine may depend more on some right path and less on the narrow inquiry of whether there has been state action.

iii) Compare *Reitman v. Mulkey,* decided years prior to *Flagg Brothers,* where a state proposition to amend the state constitution in such a way as to repeal state anti-discrimination laws, was held to violate the equal protection clause.

iv) a more recent case held that the National Collegiate Athletic Association was not converted into a state actor through a public university’s compliance with NCAA pressure to remove one of its coaches. *National Collegiate Athletic Association v. Tarkanian*

v) The private use of private remedies and judicial procedures does not constitute state action and a state’s involvement in the sunning of a statute of limitations does not implicate due process. However, when state
officials overtly and significantly assist a private party in the sue of state procedure, state action may be found.

- Thus, a probate court’s pervasive and substantial involvement with probate proceedings was sufficient to constitute state action in a case where a creditor was not given statutory notice of commencement of probate proceedings and consequently missed the cutoff date to file a claim against the estate.

v) However, such a test may be inconsistent with the Lugar holding.

C. Judicial Action and the Theory of Government Neutrality

1. Judicial enforcement of a discriminatory restrictive covenant is sufficient state action.
   a) Thus, state action existed where a state Court enforced a racially restrictive covenant by enjoining African American from buying house from white homeowners. Shelly v. Kraemer.
   b) Shelly is one of the most controversial decisions in all of constitutional law b/c of the court’s devoting the entire opinion to showing that judicial action is state action.
      i) If state courts cannot enforce discriminatory private agreements, then this is the same as saying that private individuals cannot engage in racial discrimination. After all, an agreement that is unenforceable is the functional equivalent of no agreement at all.
      ii) Later Court cases suggest that there is some limit to what is state action under Shelly

   a) Shelly illustrates that it is always possible to find some state actor implicated in a constitutional violation.
      i) instead of focusing the inquiry on whether there was state action, should courts focus on whether the governmental action is constitutional?
      ii) Asking such a question makes the controversy in Shelly clearer. The issue in that becomes: is the Missouri law regarding restrictive covenants neutral on its face and therefore not subject to heightened scrutiny b/c of its discriminatory impact?
      iii) When the Court finds that there is no state action, is it really finding that state action is facially neutral and therefore not subject to heightened scrutiny?
   b) State enforcement of discriminatory and inter vivos dispositions of property: A school board is an agency of the state and its refusal to admit nonwhites is discrimination by the state where an individual leaves money in his will for the foundation of a school for poor white male orphans and names the city as a trustee of the school and entrusts the administration of the school to a state agency. Pennsylvania v. Board of Directors of City Trusts

D. State Subsidization of Private Conduct, State Approval, and Encouragement.

1. State subsidization of Private Conduct
   a) when, based upon the totality of the circumstances, it can be said that the state is significantly involved w/ a private party’s discriminatory conduct, the state becomes a join participant in the action and such state action violates the 14th Amendment. Burton v. Wilmington Parking Authority.
i) there was state action where a restaurant owner leased space from a state agency and operated a restaurant from inside a state-owned and operated public parking ramp, and then refused to serve food to African Americans.
ii) a “symbiotic relationship” exists when both the government and private enterprise benefit from some relationship b/w the two.
   - State allowed the discrimination by not requiring non-discrimination in its lease and benefited from it by the customers in the restaurant (more people came b/c white-only).

b) State subsidization
i) *Burton* might stand for the proposition that state subsidization of discriminatory conduct it unconstitutional.
   - But this theory is problematic because it is not unconstitutional, for example, for a state to supply fire and police services to establishments that discriminate.
   - The theory is also problematic b/c while it makes subsidies of discriminatory conduct unconstitutional but does not require the gov’t to impose penalties on discriminatory private conduct, and as a result, rests on our ability to make a difficult distinction b/w the government’s withholding of a benefit and its imposing a penalty.

ii) A state may not grant tangible financial aid if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. Thus, a state statute that provided for the state to purchase textbooks and lend them to students in both public and private schools was unconstitutional as applied to schools with discriminatory policies (Norwood v. Harrison).

iii) It was proper to bar a city from allowing exclusive use of city-owned recreational facilities by any private school that had a discriminatory policy. However, the Court upheld the lower Court’s reversal of the injunction w/ respect to non-inclusive use by school groups and the use by non-school groups b/c of an insufficient record. *Gilmore v. City of Montgomery*.

iv) a symbiotic relationship did not exist b/w the state and private school where the state had delegate to the private school the duty to educate children w/ special needs. *Rendell-Baker v. Kohn*.

v) The United States Olympic Committee’s selection of groups permitted to sue the term “Olympic” did not constitute state action, even though the USOC had been granted a corporate charter by Congress and had obtained federal trademark protection for the word “Olympic” because there was no governmental decision w/ respect to how the USOC would license use of the word “Olympic.” The mere failure of the gov’t to supervise the committee’s use of its rights is not enough to make the committee’s actions those of the government. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*.

c) State action as coercion
i) A state can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must be deemed that of the state.
Mere approval or acquiescence in the initiative of a private party is not sufficient to justify holding the state responsible for that initiative. *Blum v. Yaretsky*.

ii) *Rendell-Baker* and public actors
- The Court in *Rendell-Baker* begins its analysis with the assumption that the New Perspectives School is private, even though the school received almost all of its funding from public sources. It is the fact that the State exercised less control of the New Perspectives School than it would have over a public school that made the New Perspectives School private.
- *Rendell-Baker* may be compared to *Ex parte Viriginia*, an 1880 case where a judge violated state law by discriminating against African Americans in jury selection. The Court held that despite the fact that the judge was action outside of state law, he was still a state actor. Virginia was liable for his conduct.
- Note that in *West v. Atkins*, the Court distinguished *Rendell-Baker* and *Blum* and held that the actions of a doctor under contract with the state to provide medical services for prison inmates were attributable to the state, even though he was exercising independent medical judgment b/c whereas the private entities in *Rendell-Baker* and *Blum* simply received money from the state and were subject to state regulation, the doctor in this case was employed by the state to fulfill the state’s constitutional obligations.

iii) Because Amtrak was established and organized under federal law for the purpose of pursuing federal governmental objectives, it is a state actor and its decision to prohibit and individual from posting an advertisement in one of its states violates the first amendment. *Lebron v. National Railroad Passengers Corp.*

E. State Licensing and Authorization

1. State action may exist where a state regulatory agency affirmatively approves the practice of a private entity, after full consideration. However, state regulation by itself is not enough, even if extensive and detailed. *Public Utilities Commission v. Pollak*.

2. A State’s mere issuance of a liquor license to a private club does not convert the conduct of the club into state action b/c the liquor agency does not approve or endorse a private club’s discriminatory practice when it grants a license. A close nexus b/w the state and the challenged action is required. *Moose Lodge No. 107 v. Irvis*.
   a) Black man sued private group and state agency for being denied service based on race and asserted state action due to issuance of a state liquor license to the group.
   b) Differs from *Pollak* b/c in *Pollak*, the state agency had affirmatively approved the practice of the entity after full investigation, whereas the liquor control agency in this case had neither approved nor endorsed D’s discriminatory practices.

3. A state’s authorization and approval of a challenged practice are not enough to establish state action b/c in order to convert private conduct into state action, there must
be evidence that the state ordered the action, thereby putting its own weight on the side of
the private actor’s conduct (*Jackson v. Metropolitan Edison Co.*).

a) here, utility customer argued due process violation when the utility company
terminated service, the procedures for which were approved by the state.

b) Mere state regulation by itself is not enough, even if extensive and detailed
(*Pollak*), and a close nexus b/w the state and the challenged action is required
(*Moose Lodge*), which may require a detailed inquiry (*Burton*).

c) Court held that the state would need to expressly order the practice, and merely
approving and authorizing it when part of a general tariff was not enough.

4. Compare *Pollack* with *Colombia Broadcasting System v. Democratic Nat’l Committee*

   a) in *Columbia Broadcasting System*, Justice Burger distinguished *Pollak* by
making the points that Congress had not established a regulatory scheme for
broadcast licenses that was as pervasive as that for public transportation and,
more importantly, Congress indicated in the Communications Act that certain
decisions are to be left up to the licensee whereas in *Pollak*, there was no
suggestion that Congress intended to protect a carrier’s discretion to choose the
content of communications forced on passengers.

F. The Public Function Doctrine

1. The public function doctrine is used to determine the existence of state action
   a) it provides that when the private entity’s primary purpose benefits the public, it
   is acting like a state and thus is subject to constitutional constraint. *Marsh v.
   Alabama*.

   i) Jehovah’s Witness criminally charged with trespass on the streets of
privately owned town and claimed the town was subject to the provisions
of the Constitution.

   ii) Court view on the public function test requires that the function be
traditionally an exclusive state function. If not, it will not be subjected to
the Constitution.

2. The Reach of the Public Function Doctrine
   a) the white primary cases: the Court holds that discriminatory policies of private
political organizations, which had the effect of excluding African Americans from
the state’s election, could be attributed to the state.

   i) The 14th Amendment is violated when African Americans are denied
ballots in primary elections in compliance with provisions of a state
statute. *Nixon v. Herndon*

   ii) A state statute that gives the executive committee of a political party
the power to prescribe voting qualifications, which has the effect of
denying and African American person the right to vote, is

   iii) There is not state action and thus no constitutional violation when a
racial exclusion policy is adopted at a political party’s convention w/o
specific authorization. *Grovey v. Townend*.

   iv) *Grovey* was overruled by *Smith v. Allwright*. The Court held that
because the state required membership in a political party in order to vote
in the primary elections and the political party’s policy excluded African
Americans, the action of the party became state action and was unconstitutional
v) The exclusion of African Americans from a political organization’s pre-primaries, where voters relied upon the recommendations, was not unconstitutional b/c the state did not control the private conduct that effectively deprived African Americans from political power. *Terry v. Adams*

vi) A state statute that prohibits nonparty members from participating in party primaries is unconstitutional. *Tashijan v. Republican Party.*

b) private property and public function – the public function doctrine may explain decisions in cases where constitutional limits are placed on the owners of private property open to the public.

i) the exclusion of African Americans from a private park is unconstitutional where the service rendered by the park is municipal in nature. The Court ultimately held that the state court, in aiding the private parties in performing the public function of mass recreation on a segregated basis implicated the state in conduct proscribed by the fourteenth amendment. *Evans v. Newtown.*

c) Retreat from the public function doctrine: in recent years, the Court has limited its application of the public function doctrine so that very few functions are public for the purposes of state action doctrine.

i) The Court has held that the function must be traditionally and exclusive state function in order to be subject to constitutional constraint.

ii) In *Jackson v. Metropolitan Edison Co.* the Court rejected the argument that state action existed b/c the utility performed a public fxn in supplying electricity, an essential public service required under state law to be provided continuously. The Court determined that the supplying of utility services is not traditionally the exclusive prerogative of the state and declined to extend the definition of public function to include all businesses affected w/ the public interest.

iii) owners of shopping malls are not bound by the First Amendment. *Hudgens v.NLRB.*

iv) Providing dispute resolution services b/w debtors and creditors is not a public function. *Flagg Brothers v. Brooks.*

v) A private school for maladjusted students does not perform a public function, even though its students are selected by the state and it receives most of its funding from the state. *Rendell-Baker v. Kohn.*

vi) nursing homes that receive federal Medicaid payments do not perform public functions in deciding the level of patient care b/c those decisions are not traditionally and exclusively made by the state. *Blum v. Yaretsky.*

vii) The coordination of amateur sports has not been a traditional gov’t function. *San Francisco Arts & Athletics v. U.S. Olympic Committee.* Peremptory challenges in civil cases b/w private litigants are traditional gov’t fxns. *Edmondson v. Leesville Concrete.*

3. Conclusions (?)
a) some commentators have questioned the need for a state action doctrine and have suggested that litigation be structured instead against the individual gov’t actor and the constitutionality of his conduct.
b) However, the State action doctrine may be an important tool used to protect private actors from the constraints of the constitution, thereby guaranteeing private actors more freedom of conduct than the government has.