Proper Sources of Constitutional Interpretation
- Text, plain language
- History
- Overall structure of the Constitution
- Reading particular political views into it

THE BILL OF RIGHTS AND THE POST-CIVIL WAR AMENDMENTS:
“FUNDAMENTAL” RIGHTS AND THE “INCORPORATION” DISPUTE

Prior to Civil War, restraints on states were few. Afterwards, greater concern for protection of individual rights. 13th, 14th and 15th amendments were all adopted following the civil war and are collectively referred to as the “Civil War Amendments.” These amendments were adopted in an effort to eliminate the effects of slavery and prevent continued discrimination based on race. They didn’t expressly extend the entire Bill of Rights to the states though. Each authorized Congress to enact legislation to enforce its provisions.

I. The Pre-Civil War Situation
   Barron v. Mayor and City Counsel of Baltimore (1833, p.412)
   - Plaintiff claimed City had ruined use of his wharf by diverting flow of streams in course of street construction work
     - Claimed violation of 5th Amendment guarantee that private property shall not be taken for public use, w/o just compensation
   - Holding – BOR restricted only the national government and didn’t limit state authority
     - Counter-argument was that only 1st and 7th spoke specifically to the federal government, but others spoke only generally – could apply to both
   - This was before the enactment of CWAs

II. The Purpose and Impact of the Post-Civil War Amendments
   Immediate provocation for CWAs was concerns w/problems of slavery and emancipation. Slaughter-House narrow reading of CWAs meant temporary defeat for any claim that CWAs overturned Barron. W/i a generation, position of dissenters prevailed though – vast expansion of national power resulted.

   Language of 14th Amendment used sweeping, general terms – wasn’t limited to problems of race, color, or previous condition of servitude.
   Slaughter-House Cases (1873, p.415)
   - LA gave corporation 25-year monopoly to maintain slaughterhouses in New Orleans, competing facilities had to close, could slaughter at corporation for fixed charged
     - Claimed deprivation of right “to exercise their trade” in violation of 13th (involuntary servitude) and 14th (abridged privileges and immunities of citizens of US, denying EP and depriving them of property w/o substantive DP) Amends
   - Court’s first interpretation of the CWAs – upheld delegation as w/i state police power
   - Holding (5-4) – CWAs designed to guard against slavery, meant for negroes but would go to other races if they were enslaved – No Incorporation
     - Privileges and Immunities Clause
       - Art. IV – fundamental rights, natural rights (short list)
- 14th Amend – state created rights, few national rights, doesn’t bar state law denying state created privileges and immunities (long list)
  - Court isn’t perpetual censor on legislation of States regarding civil rights
  - Read the constitutional civil rights guarantees of DP and EP right out of constitution
  - Rejected full incorporation of BOR
    - BRADLEY Dissent – purpose of 14th Amend was to provide national security against violation by States of fundamental rights of the citizen - Incorporation
      - Right of choice is portion of liberty, occupation is their property
      - Primary cause may be blacks, but language is general and embraces all citizens (general language invites judicial interpretation)
      - Goal was centralization of protections, incorporation was intended

The Aftermath of the Slaughter-House Cases
- Right to travel, privileges and immunities of relocating state
  - Saenz v. Roe (1999, p.428)
    - CA law established lower level of welfare benefits for most recent arrivals to the state than for those who had lived there for more than 1 year – limited to what they got in other state
    - Holding (7-2) – right of newly arrived citizen to same privileges and immunities enjoyed by other citizens of same State, protected by status as state citizen and as US citizen

III. Due Process and the “Incorporation” Controversy
- Duncan v. Louisiana
- Incorporation Since Duncan
  - Eventually incorporated much of BOR
    - Need judicial protection

SUBSTANTIVE DUE PROCESS: RISE, DECLINE, REVIVAL
Today use of substantive DP to assure special protection of economic and property rights is discredited – recent haven for other fundamental values though.
Questions to ask for each case
- How does the court go about defining liberty and property?
  - Get list of interests that are or are not part of it
- What are the permissible ends of the state’s governmental legislative power?
  - Are they caught up in description of state’s general police power?
  - Or can legislature also act to promote wealth redistribution?
- Means/ends relationship
  - Health of bakers in Lochner
  - How close do courts superintend the legislature’s choice of how to promote the end
- How is that some interests are no longer constitutionally protected?
  - Double Standard
    - No protection for economic interests
    - Substantial protection for non-economic interests
I. Substantive Due Process And Economic Regulation: The Rise And Decline Of Judicial Intervention

A. Antecedents
   o Notion that there were fundamental rights that were entitled to judicial protection – natural law, vested rights
     ▪ Source of values for later giving content to guarantees like contracts clause and substantive DP
     ▪ Calder v. Bull (1798, p.453) – natural law
       – Abandoned this, went to requiring some textual basis
   o Allgeyer v. Louisiana (1897, p.457) – 1st time SC invalidated state law on substantive DP grounds
     ▪ Broad articulation of “liberty of contract”
     ▪ Direct rejection of Slaughter-House cases

B. The Lochner Era: Judicial Intervention and Economic Regulation
   Lochner v. New York (1905, p.458)
     ▪ NY law prohibited employment of bakery employees for more than 10 hours a day or 60 hours a week
     ▪ Question: Is this action w/i the police power of the state? Permissible end?
       • Not labor
         ▪ Lesser intelligence, capability, unable to assert rights or care for themselves
         ▪ Safety, morals, welfare or public
         ▪ Health of individual
       • Not health – strong/robust
         ▪ Other things (inspection, clean bathroom, etc.) are OK means to end
     ▪ Holding (5-4) – act must have more direct relation, as a means to an end, and end must be appropriate and legitimate before act that interferes w/general right of individual to be free in his person and in his power to contract his own labor will be held valid
       • Right to contract is part of liberty protected by DPC of 14th Amend
       • End isn’t permissible exercise of police power
   ▪ Dissent – courts aren’t concerned w/wisdom or policy of legislation
     • If reasonable minds could go either way, no reason for court to substitute judgment

What Was Wrong With Lochner?
   ▪ Court was replacing values of legislatures w/its own, sitting as super-legislature - Lochnerising
   ▪ Current SC has withdrawn from careful scrutiny of economic regulations, but has increased intervention as to laws infringing privacy and other noneconomic personal interests not explicitly protected by the Constitution
   ▪ Expansive reading of “liberty” – made possible protection of free speech (Gitlow) and parental autonomy (Meyer, Pierce)
     • Meyer – liberty denotes not just freedom from bodily restraint but also right to contract, work, acquire useful knowledge, marry, have home
and bring up kids, worship, enjoy privileges essential to orderly pursuit of happiness

- Minimum rationality wasn’t enough – means that SC must have thought right to contract was fundamental, because that’s only way to apply higher level of scrutiny
  - Otherwise, mere reasonableness in means-ends relationship would have been enough

Judicial Scrutiny of Economic Regulations During the Lochner Era – Some Examples

- Lasted from 1905 to mid-1930s
- Regulations of prices, labor relations (including wages and hours), and conditions for entry into business were especially vulnerable
- Actually upheld most though – some needed special protection
  - **Muller v. Oregon** (1908, p.466) – upheld law restricting hours of females in factory or laundry – health and welfare
  - **Coppage v. Kansas** (1915, p.467) – struck law forbidding foregoing joining union as condition of employment (yellow dog contracts) - contract
  - **Adkins v. Children’s Hospital** (1923, p.468) – struck law setting wages for working women (easier work, 19th Amend meant no longer needed protection) - economic

C. The Modern Era: The Decline of Judicial Scrutiny of Economic Regulation

Court became more deferential to legislature and less willing to protect down economic interests.

**Nebbia v. New York** (1934, p.469)
- NY established Milk Control Board to fix min and max prices to be charged by stores for consumption off the premises
- Test (5-4) – means selected have real and substantial (also says reasonable) relationship to proper legislative purpose
  - State can adopt whatever economic policy may reasonably be deemed to promote public welfare, and can enforce that policy by legislation adapted to its purpose
- Purpose was to maintain dairy industry – against what *Lochner* says about labor law
  - Here more narrow interpretation of liberty (rejects right to contract)

**West Coast Hotel v. Parrish** (1937, p.471)
- (5-4) Overruled *Adkins* – upheld state minimum wage law for women
- Regulation that’s reasonable in relation to its subject and is adopted in interests of the community is due process
  - Here put state’s protecting arm around women
- No liberty in right to contract

After the New Deal: Minimum Judicial Scrutiny or Judicial Abdication?

- **Nebia** and **West Coast** decisions marked significant shift from *Lochner* era – not preoccupied w/ impermissible ends anymore
- **Carolene Products** (1938, p.473)
  - Upheld federal prohibition of interstate shipment of “filled milk”
• Presume existence of facts supporting legislative judgment – presumption of constitutionality
• Footnote 4 – where greater judicial scrutiny might be appropriate
  o Against prohibition of Constitution
  o Adversely affects political process – more appropriate the less political processes may be trusted to even out winners and losers over time
  o Discrete and insular minorities (religious, national, racial)
    ▪ Rehnquist worried about open season here, but Stone was talking about where the political process can’t be trusted to make change
    ▪ Not just losers in political process, but those groups you can’t count on to be treated fairly
  ▪ Olsen v. Nebraska (1941, p.475)
    • Upheld law fixing max employment agency fees
    • Valid as long as rational basis – court not concerned with wisdom
    • Deferential to economic legislation
  ▪ Day-Bright v. Missouri (not in book)
    • Upheld law granting 4 hours off of work to vote
    • Won’t look to see if there are less burdensome alternatives – just means/end
Williamson v. Lee Optical (1955, p.476)
  ▪ OK law meant no optician could fit old glasses into new frames or supply a lens (new or duplicating lost/broken one) w/o prescription
  ▪ Minimum Rationality Test
    1. Are the ends of the legislature legitimate?
    2. Are the means rationally related to those ends?
  ▪ Extremely deferential – making up possible reasons for legislative action
    • Even a conceivable rational relationship to legitimate end is enough
    • Court doesn’t make legislature spell out their reasons in economic statutes, doesn’t make them think about less burdensome alternatives – Lochner was so bad, so court doesn’t give constitutional protection for economic rights under the DPC, but does a more under the takings clause
      o In other types of statutes, the court does make legislatures do that
    • Saying they’d like legislatures to spell out reasons though
    • For legislatures to balance advantages and disadvantages
  ▪ Ferguson v. Skrupa (1963, p.477)
    • Upheld KS law prohibiting anyone from engaging in business of debt adjusting
    • Broad deference to legislative judgment

II. Constitutional Safeguards Of Economic Rights: The Takings Clause; The Contracts Clause
A. The Takings Clause
One of the earliest BOR guarantees absorbed into 14th Amend DP guarantee was 5th Amend – private property shall not be taken for public use, w/o just compensation. Can take it, just have to pay for it.

The “Public Use” Requirement
- Court gives same deference to legislative determinations of what’s “public use” that it gives economic DP scrutiny
  - No means/ends consideration
- Hawaii Housing Authority v. Midkiff (1984, p.481)
  - Upheld HI’s use of eminent domain to solve problem of concentrated land ownership
  - Holding – Where exercise of eminent domain power is rationally related to conceivable public purpose,no problem
    - Purpose is legitimate (public use is like police power) and means aren’t irrational
    - SC is as disinclined to 2nd guess “public use” determinations as it is to curtail police power ends in economic DP inquiries

Regulatory “Takings”
- Inverse Condemnation – problem when government doesn’t condemn property and formally transfers, but instead just regulates its use and substantially diminishes it’s value
- While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking
- Tests
  - Diminution in value – extent of economic loss to the property owner, ability to profit
  - Invasion – has government taken physical possession of property, and title as well
  - Noxious use test – is what you’re doing considered a noxious use, it’s not property, no compensation required – harmful to other landowners or public
  - Cause of harm test – activity of one landowner causes harm to another landowner
- It’s really an ad hoc inquiry, when justice and fairness require that economic injury be compensated by the government (p. 488)
- Scope has been extended to personal property, in addition to real property in land
  - Intangible, monetary, IP

Pennsylvania Coal Co. v. Mahon (1922, p.482)
- Coal co conveyed rights to surface use, kept mining rights and right to surface support for itself, grantee took risk – law later forbid mining in way that caused subsidence of human habitation structure
- Holding – statute doesn’t give public interest sufficient to warrant so extensive a destruction of Δ’s constitutionally protected rights
  - Also, if making mining commercially impracticable, has nearly same effect for constitutional purposes as appropriating or destroying it
- Taking v. Regulation – look at broad effects and then balance
- Diminution of value – extent of taking is great
- Public interest – low here, only one person
  - Look at whether damage common or public, protection of public safety
- Balance – if goes too far will be taking
  - Dissent – wants invasion test, where look at whether restricted property remains in possession of its owner
  - Where police power is exercised to protect public (rather than benefit property owners) there’s no room for considering average reciprocity of advantage (ARA)
    - Majority said if there was ARA then no taking, no ARA taking
- Miller v. Schoene (1928, p.485) – came to opposite conclusion on takings question
  - Cedar trees could be destroyed to combat communicable plant disease harming apple trees w/o paying compensation to owners other than cost of hauling away trees
  - State doesn’t exceed constitutional power just by deciding on destruction of one class of property in order to save another that the legislature thinks is of greater value to the public
- Keystone Bituminous Coal (1987, p.486) – didn’t follow PN Coal
  - Upheld modern-day counterpart to PN Coal law (didn’t overrule, just distinguished)
  - Holding (5-4) – no taking
    - Not just balancing of private interests, but protection of public interest in health/environment/fiscal integrity
    - No similar deprivation – no showing like mining commercially impracticable
    - Adopted PN Coal dissent
  - When there are many people affected, the court is confident that competing interest is legitimate
- Goldblatt v. Hempstead (1962, p.488)
  - Completely prohibited beneficial use to which property had previously been devoted, but held it reasonable, noncompensable exercise of police power
  - Environmental protection in general – usually regulation instead of taking
- Penn Central (1978, p.488)
  - City can have comprehensive historic landmark preservation and therefore place restrictions on development of individual historic landmarks w/o taking
    - Substantially related to the promotion of the general welfare
  - Ad hoc factual inquiry – no set formula for determining when justice and fairness require it to be a taking
- Loretto (1982, p.489)
  - If govt authorizes permanent physical occupation, it’s taking regardless of public interests
- No balancing, no case specific inquiry

- **Lucas** (1992, p.490)
  - Ocean-front property, regulation that can’t develop
  - Generally ad hoc factual inquiry
    - Penn Coal, Miller v. Schoene, Goldblatt, Penn Central
  - 2 discrete categories of regulatory action as compensable w/o ad hoc
    - Regulations that compel the property owner to suffer physical invasion of property - Loretto
    - Regulation denies all economically beneficial or productive use of land
      - Govt can only intervene to extent of common law nuisance
  - Dissent – no judicial activism, should be able to find new nuisances

- **Nollan** (1987, p.494) – conditions on development permits as takings
  - Govt conditioned permit to build bigger house on allowing public to pass across party’s beachfront land
  - Would have been permanent physical occupation if govt had directly imposed easement, so taking
  - Holding – unless permit serves same governmental purpose as the development ban, building restriction isn’t valid regulation of land use
    - Applied a kind of heightened scrutiny of means-end relationship between development condition and state’s regulatory purpose – said more rigorous than deferential approach associated w/minimum rationality in DP or EP

- **Dolan** (1994, p.495) – clarified degree of scrutiny applicable to conditional development
  - Govt required ID to dedicate some land to flood control/make bike path/etc. In exchange for permit to increase size of store
  - Steps
    - Essential nexus between legitimate state interests and permit condition
      - If exists, then decide required degree of connection between exactions and projected impact of proposed development
        - Standard – rough proportionality, not DP or EP rational basis or reasonable relationship
        - Don’t want means/ends here
        - Has to be tight fit, not reach beyond ends
  - Holding – Rough Proportionality Standard – no mathematical calculation, but city must make some sort of individualized determination that required dedication is related both in nature and extent to impact of proposed development

B. The Contracts Clause (CC states, DP federal)

Art. I, § 10 – no state shall pass any law impairing the obligation of contracts (no similar limitation on federal government). Fell into disfavor when court started invalidating economic regulations on substantive DP grounds. It’s explicit constitutional guarantee though, unlike most
of fundamental Lochner values. Applied to federal through reverse incorporation of 5th Amend. Private – all but abandoned. Public K – very seldom used for invalidating state action

- Major purpose was to restrain state laws affecting private contracts – aimed mainly at debtor relief laws, purpose to protect creditors
- Loopholes
  - **Dartmouth College v. Woodward** (1819, p.498)
    - Legislature can’t impair original contract/charter granted unless they reserve the right to do so in the original grant
    - If you want to change terms, reserve power to do so
  - **Ogden v. Saunders** (1827, p.499)
    - State insolvency laws could be validly applied to contracts made after the law was enacted (but not before, **Sturges**)
  - State can change remedies available
  - Narrow judicial construction of publicly granted privileges/charters
  - State can’t give away police power – can’t bind itself today from doing tomorrow what’s necessary to protect the public interest/safety/health/etc.
    - **Stone v. Mississippi** (1880, p.499) – granted charter for lottery, later banned lottery
  - State can interfere w/private contracts when it’s exercising its police powers
    - **Affidavit Structural Steel**
    - **United States Trust v. NJ**

**Home Building & Loan Ass’n v. Blaisdell** (1934, p.500) – private K

- During Depression, courts could give relief from mortgage foreclosures, no action for deficiency judgment could be brought during court-extended period of redemption
- Emergency doesn’t create power, but may cause need to exercise it
  - State can use police power to prevent immediate and literal enforcement of contractual obligations by temporary and conditional restraint, where vital public interests would otherwise suffer
- Factors
  - Emergency – Broad, generalized economic or social problem
  - Public Interest/Need - protect broad societal interest rather than narrow class
  - Relief Tailored to Emergency – operate in area already subject to state regulation
  - Reasonable Conditions
  - Temporary Measure - temporary alteration of contractual relationships rather than severe, permanent, immediate change in relationships – irrevocably and retroactively
- Holding (5-4) – law here is temporary, limited to problem, integrity not impaired, interest still runs, rights maintained if default
  - Not every modification of a contractual promise violates CC – justified here because of strong public interest
  - Applied balancing test
Governmental Interest – significant, stability of land title

Private Interest – insubstantial modification, only minimal burden on private party

- **United States Trust Co. v. NJ (1977, p.502)** – public K
  - Law impairing state’s own obligations was entitled to less deference than legislation interfering w/private contracts
  - Where state interferes w/private contracts, courts defer to legislative judgment as to necessity and reasonableness
  - **Heightened Standard of Review** – law impairing state obligation must be reasonable (unforeseen developments after K made) and necessary (no less drastic alternatives) to serve an important public purpose
    - Here complete deference to legislative assessment of reasonableness and necessity isn’t appropriate – self-interest
    - No balancing test between public benefit and detriment to other party
    - Test from Simmons (?)
  - Analogy to El Paso rather than Blaisdell
  - Dissent – defer to legislative choices, no heightened scrutiny

- **Allied Structural Steel (1978, p.505)** – continued process of reinvigorating CC
  - Private K
  - Test
    - Minimal alteration v. Severe impairment
    - If severe, examine nature and purpose of state legislation (Blaisdell)
      - Declaration of emergency – none here
      - Protect basic societal interests – too narrow, only large employers
      - Spell out end/purpose of legislature
        - **If you need to make argument, especially in case of economic interests, that legislature should spell out its ends or that courts shouldn’t be speculating by running up the end for him, use this case**
        - Relief appropriately tailored to emergency – not here because no emergency in 1st place
          - Conditions weren’t regulated in the past
        - Permanent rather than sunset provision

- **Kansas Power and Light (1983, p.506)** – deferential, private K
  - 3 step inquiry
    - Whether state law has operated as substantial impairment of contractual relationship
    - If yes, then must have significant and legitimate public purpose – like broad and general social or economic problem, police power
Determine whether adjustment of rights/responsibilities is based on reasonable conditions and is of character appropriate to public purpose justifying legislature’s adoption
  - Weigh public good against private interest
    - Deferece unless state is party to the contract
      - Distinguishable from United States Trust and Allied Steel because sole effect wasn’t to alter contractual duties – here just has effect of impairing contractual rights

III. The Revival Of Substantive Due Process, For Noneconomic Liberties: Reproduction; Family; Sex; Death

Unlike economic interests, SC is willing to extend protection to non-economic interests and invalidate laws as violations of substantive DP. The question is whether DP authorizes SC to infer from DPC fundamental values not traceable directly to constitutional text or history or structure.

A. Antecedents
  - Meyer v. Nebraska (1923, p.508)
    - Broad reading of liberty
      - Freedom from bodily restraint, contract, work, learn, marry, have home and bring up kids, worship, enjoy privileges long recognized at common law as essential to orderly pursuit of happiness by free men
  - Pierce (1925, p.509)
    - Struck down law requiring children to attend public schools
    - Interfered w/liberty of parents to direct upbringing and education of their children
    - Marriage and procreation are fundamental

B. Contraception
  - Griswold v. Connecticut (1965, p.510)
    - CT contraception law, couldn’t use anything to prevent conception or assist/counsel
    - Specific guarantees of BOR have penumbras/shadows, formed by emanations from those guarantees that help give them life and substance – various guarantees create zone of privacy
      - Not just confined to those expressly stated in BOR
      - Not using Lochner though
    - Governmental purpose to control/prevent activities can’t be achieved by means which sweep unnecessarily broadly and invade area of protected freedoms
    - Concurrence (Goldberg) – 9th Amend isn’t source of constitutional rights, just reminder – look to traditions and collective conscience of our people to determine whether principle is so rooted there as to be ranked as fundamental
      - Where fundamental liberties are involved, the state has to show a subordinating interest that’s compelling
Rational basis not enough, have to use strict scrutiny
  - **Compelling** interest
  - Law has to be **necessary**, not just rationally related
  - Court can’t hypothesize, state has to give ends
- Here legitimate subject of state concern (discouraging extra-marital relations), but can be served by more discriminately tailored statute (sweeps too broad)
  - Doing SS on means, rather than ends

**Summary**
- Everyone agrees that SS because fundamental right
- Everyone thinks that interest is protected by DPC of 14th Amend
  - Douglas decides on other grounds though (?)
- Everyone recognizes regulation of sexual morality is legitimate exercise of state police power
- Everyone looks at means/ends relationship
  - Ends – compelling (Douglass), substantial (White)

**Dissent – court is Lochnerising**
- Formula based on natural justice is no less dangerous when used to enforce SC’s views about personal rights than those about economic rights
- Can’t find it in constitution, so no guaranteed right of privacy
- Leave it to the political process

**Penumbras, Liberty and Privacy**
- **Eisenstadt** (1972, p.520)
  - Liberty interest includes decision whether to have children
- **Carey** (1977, p.520) – post-Roe
  - Struck NY statute restricting sale of contraceptives
  - Upheld right to contraceptives as being fundamental
  - Means/ends aren’t narrowly drawn to effectuate legitimate state interest

**C. Abortion**
  - TX abortion law made it a crime to get an abortion except to save life of mother
  - Right of privacy only includes those that are fundamental or implicit in concept of ordered liberty (SC thinks found in 14th Amend)
    - Marriage (Loving), procreation (Skinner), contraception (Eisenstadt), family relationships (Pierce), and child rearing and education (Pierce, Meyer)
  - Right of privacy is broad enough to encompass woman’s decision whether or not to terminate her pregnancy – not absolute though
    - Medical harm, distressful life and future, psychological harm, mental and physical health, distress associated w/unwanted child, stigma of unwed motherhood
  - State can sometimes regulate in areas of privacy though
• Important interests in safeguarding health, maintaining medical standards, and in protecting potential life
  o Mother – compelling after end of 1st trimester, afterwards more dangerous to have abortion than to go through childbirth so state can regulate as long as relates to preservation and protection of maternal health (qualifications, facilities, etc.)
  o Potential life – compelling point is viability, capability of life outside womb
• At some point in pregnancy they become sufficiently compelling to sustain abortion regulation
  ▪ Analysis
    • Fundamental right – yes
    • Strict Scrutiny
      o Compelling state interest
      o Legislative enactments
        ▪ Must be narrowly drawn to express only legitimate state interests at stake
        ▪ Must be necessary to achievement of end
  ▪ Dissent – no fundamental right
  Roe v. Wade and Constitutional Values
    ▪ Roots privacy right in liberty clause of 14th Amend DPC – looking at penumbras drops out
Abortion Regulation From Roe to Casey
• PN law required informed consent, provided certain info 24 hours before, informed consent of parents if minor (judicial bypass though), notification of husband, reporting requirements relating to abortion
• Reasons for Reaffirming
  • Thinks Roe was rightly decided
  • Stare Decisis – reasons for overturning
    o Unworkable
    o Reliance that would lend special hardship
    o Related principles of law have developed and changed
    o Facts have changed or come to be seen differently
  • Don’t want to overrule under fire
    o Wants to preserve integrity
• Undue Burden Analysis – means that state regulation has purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion
  • Can’t be considered permissible means of serving legitimate ends
  • Rigid trimester framework of Roe overruled, Viability is affirmed
  • No strict scrutiny – seems they’re not treating abortion as fundamental right
• Unless state measure has undue burden effect on right of choice, law designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal
• 24-hour waiting period – practical effect is to delay much more than 1 day, requiring 2 trips, have to explain whereabouts – troubling, but not undue burden
  o Looks at precise group affected/burdened
• Spousal notification requirement – will impose substantial obstacle for many women because of spousal abuse/marital relationship troubles – undue burden
  o Looks at group for whom law is restriction, not to group for whom law is irrelevant – looks at all women
• Parental consent – not undue burden as long as judicial bypass
• Reporting requirements – relates to health, patient anonymous, no undue burden
• Concurrence – materials and 24-hour waiting period are unduly burdensome

Implications of Casey
D. Family Relationships
  • **Zablocki v. Redhail** (1978, p.559)
    o Struck law barring someone who had child who didn’t live with them from getting married w/o court approval, court would look at outstanding child support among other things
    o Vindicated right to marry via EP route (rich v. poor)
    o Reasonable regulations that don’t significantly interfere w/decision to get married aren’t a problem
    o Has to have important state interests and be closely tailored to effectuate only those interests
      o Here interests were legitimate but means unnecessarily impinged on right to marry – other ways to do same thing
  • **Moore v. East Cleveland** (1977, p.561)
    o Invalidated zoning ordinance limiting occupancy of dwelling to members of single “family,” cousins lived w/grandma, relationship wasn’t close enough
    o Part of liberty to choose who you live with (Meyer, Pierce, history) but didn’t say fundamental
    o Stricter scrutiny than deferential rationality review was appropriate when city intrusively regulates family – seems like middle level of review, something less than compelling seems OK
      o Legitimate interests, but relationship was too tenuous
    o Dissent – not fundamental right, extends too far – rational basis not SS
  • **Parham v. J.R.** (not in book)
    o GA statute permitted child under 18 to be admitted to mental hospital if showed signs of mental illness and was suitable for treatment
    o Fundamental right to bring up children

E. Sexuality
  • **Bowers v. Hardwick** (1986, p.568)
    o GA law prohibiting sodomy, II violated by committing act w/another adult male in his own bedroom
- No fundamental right to engage in homosexual sodomy – no right in constitution or history, so can’t have judicial activism and say its protected
  - Good list of case progression
- Illegal conduct isn’t always immunized when conducted in the home
  - Decisional privacy (affects others), spatial privacy (w/i privacy of home)
- Rational basis – law is based on notions of morality
  - Part of liberty, but not fundamental, and state interest overrides
  - Didn’t even do means/ends here since no interest was recognized (?)
- Dissent – not about right to engage in homosexual sodomy, about right to be left alone, right to privacy
  - Individual decisions by married persons concerning intimacies of their physical relationship are a form of liberty protected by DP
    - Can’t prohibit married people from engaging in it, shouldn’t be able to prohibit homosexuals then either under EP, and no rationale for different treatment

Implications of Hardwick
- Court declined to extend substantive DP claims to sexual conduct, also to some parts of personal autonomy (policeman’s hair)
- Rationality review will suffice

F. Death
- **Cruzan** (1990, p.575) – right to refuse unwanted medical treatment
  - Upheld MO law requiring a surrogate to have clear and convincing evidence of what an incompetent person would have wanted
  - Competent person has constitutionally protected liberty interest in refusing unwanted medical treatment, but that doesn’t mean constitutional right has been violated
  - Rational basis review – never says fundamental right so no SS, balances parties’ interests (?)
  - Dissent – fundamental right to be free of unwanted nutrition and hydration, which isn’t outweighed by state interests
    - Generalized interest in life has to give way to particularized and intense interest in self-determination of medical treatment
    - Thinks problem w/ends not means – rare
  - Left open question of whether there was liberty right sufficient to invalidate a law that altogether barred a physician from assisting & what level of scrutiny

**Washington v. Glucksberg** (1997, p.578) – right to die
- WA law prohibited causing or aiding a suicide
- Rational Basis – State interests are unquestionably legit and important
  - Preservation of human life
  - Protecting the integrity and ethics of the medical profession
  - Protecting vulnerable groups from abuse/neglect/mistakes (poor, elderly, disabled, etc.)
  - Keeping process from becoming voluntary and involuntary euthanasia
No strict scrutiny because this isn’t a fundamental right (Palko, Moore, history, etc.)
- Leave it to the political process
- Π’s interest now has to be stated in narrow and specific terms – here right to commit suicide w/another’s assistance
- Concurrence (5) – some situations it might be enough
- Vacco v. Quill (1997, p.588)
  - No EP violation for prohibiting assisted suicide while allowing patients to refuse lifesaving medical treatment
    - 2 groups aren’t really the same, so can treat them differently
  - Right to be free from unwanted touching, but not right to hasten death

**EQUAL PROTECTION** – no state shall deny to any person w/i its jurisdiction the EP of the laws

I. An Overview

Literally only applies to state action, but judicial interpretation has made it applicable to the federal government as well, as an aspect of 5th Amend DP. EP imposes variation of “rationality” requirement of DP – classification must be reasonably related to the purpose of the legislation.

Warren Court created 2-tier approach: deferential approach or strict scrutiny. Areas appropriate for SS had 2 characteristics: (1) presence of suspect classification, or (2) impact on fundamental rights or interests. Later added new “heightened scrutiny” to sex, alienage, and illegitimacy. This was more intensive than conventional rationality review, but less demanding than SS.

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Questions to Ask:
- What is the rule?
- What is the classification?
II. Scrutiny Of Means In Economic Regulations: The Rationality Requirement

“Underinclusive” and “Overinclusive” Classifications

- Under traditional/old EP, minimal fit or congruence has to exist between classifying means and the legislative ends, but doesn’t have to be perfect – leaves considerable flexibility to the legislature

- Measure of reasonableness – treat similarly those similarly situated
  - Look beyond classification to the purpose of the law – reasonable classification is one which includes all persons who are similarly situated with respect to the purpose of the law
  - Purpose can either be elimination of public mischief or achievement of some positive public good

- Dual End – state can survive review by showing that while groups may be similarly situated w/respect to one way, they’re not similarly situated w/respect to another aim of the statute

- Categories
  - Under-inclusive – all who are included in the class are tainted w/the mischief, but there are others also tainted whom the classification doesn’t include
    - Prima facia violation since classification doesn’t include all who are similarly situated w/respect to purpose of the law
    - Court has refused to strike them all down though – legislature can attack piecemeal
  - Over-inclusive – burden on wider range of individuals than are included in the class of those tainted with the mischief at which the law aims
  - Both – has to establish sufficient emergency to justify imposition of burden on larger class than is believed tainted and also fair reasons for failure to extend law to wider class of potential saboteurs

- Court won’t ever require individualized determinations – too expensive

- For classifications, look at purpose, but also at safety and cost
  - Argue that groups aren’t same w/respect to legislative purpose
  - Argue that groups aren’t same w/respect to low cost objective

- Court comes up with lots of purposes, so legislatures don’t necessarily have to spell it out
  - Legislatures are presumed to have acted constitutionally

Railway Express Agency v. New York (1949, p.609) – rational basis

- NY law prohibited vehicles from displaying ads unless they were related to the business of the owner

- Classification
  - Vehicle-owner ads – permitted
  - Non-vehicle-owner ads – not permitted

- Purpose – traffic safety, lessens distracted drivers and pedestrians

- Reasoning – under-inclusive, but don’t have to invalidate
• Legislature may have thought groups weren’t the same
• Gives flexibility to change things slowly, rather than regulating everyone possible at the same time
  ▪ No bite to under-inclusive state economic EP review
  ▪ Concurrence – better to invalidate under EP than DP because under EP can fix it by more properly tailoring classification, but DP leaves it ungovernable
    • Other purposes – promote businesses, won’t put ugly stuff on own trucks, etc.
    • Might also be to aid one industry over another

• Hypo
  • All trucks made after 2/20/03 must have airbrakes (assume air brakes are much more expensive)
  • End – highway safety
  • Classifications – new trucks and old trucks
    o Old trucks – left alone, can have any type of brake system regardless of how much they weigh or what’s in them
    o New trucks – have to have air brakes, no matter weight or contents
  • Rationale – retrofitting is more expensive
    o If similarly situated w/respect to dual end of safety at reasonable cost, government can’t treat them differently
    o If not similarly situated, then government can treat them differently
      ▪ This is the case – new are cheap to fit, old trucks are really expensive to fit

Deferential Rationality Review
  ▪ Moreno (1973, p.613) – EP w/bite
    • Struck down law that gave food stamps only to households limited to groups of related people
    • Bare congressional desire to harm a politically unpopular group can’t constitute a legitimate governmental interest
      o Purpose here was to prevent hippie communes from participating
    • Insistence of actual purpose and had to spell it out
    • Substantial relationship to end (rather than just rational relationship)
    • No one could be in food vendor business unless had been in business for 8 years, and that was only 1 vendor in effect
    • Overruled Morey v. Doud, which was only decision between ‘30s and ‘70s where SC struck down economic regulation on EP grounds
    • 2-tiered level of rationality analysis
      o If involves economics, defer to legislature’s judgment
      o If not, then rationality w/bite (???)
  ▪ Murgia (1976, p.614) – deferential review
    • Age wasn’t suspect class
  ▪ Vance v. Bradley (1979, p.615)
    • Very deferential review
  ▪ Beazer (1979, p.615)
• Deferential stance not as clear as Vance had indicated


- Certain people could no longer get both RR benefits and SS benefits
- As long as plausible purpose, doesn’t matter if that attributed purpose was relied on by the legislature
  - Reluctant to imagine purposes, but will look at ones mentioned by legislature
- Purpose – solvency of the retirement system by reducing windfall benefits
- Classification
  - Group that receives both
  - Group that receives only one
- Dissent – challenged classification may be sustained only if it’s rationally related to achievement of an actual governmental purpose
  - Legislature has to spell it out – looks like wants EP w/bite

**Schweiker v. Wilson** (1981, p.620) - deferential

- Upheld denial of federal comfort allowances to needy aged, blind, and disabled persons in public institutions unless the institutions receive federal Medicaid funds
- Disregard other possibilities if classification advances reasonable and identifiable governmental objective
- Dissent – skeptical about post hoc hypotheses about legislative purpose
  - If that’s it, then SC should require that classification bear fair and substantial relation to asserted purpose
    - Rationality w/bite

**Logan v. Zimmerman** (1982, p.622) – rationality w/bite

- Invalidated law that stated fact-finding conference must be held w/i 120 days of filing claim, otherwise dismissed
- Rationality w/bite still alive – apply it to legislation not based on economic, fundamental right, or suspect classification (?)
- Purpose – eliminate employment discrimination and protect from frivolous suits
- Classification – irrational as to purpose
  - Claims heard w/i 120 days
  - Claims heard after 120 days
- Standard – rationality w/bite

**FCC v. Beach Communications** (1993, p.624) – minimum rationality, rejects bite

- In areas of social and economic policy, classification that neither proceeds along suspect lines nor infringes fundamental rights must be upheld against EP challenge if there’s any reasonably conceivable set of facts that could provide rational basis for the classification
  - Extremely deferential stance
  - Don’t have to articulate purposes
- Burden on Π to show complete absence of reasonable relationship between means and ends
Last word on what EP requires – end of road on analyzing EP claims for economic or social discrimination that don’t involve fundamental interest or suspect classification
  o Back to highly deferential standard of review

III. Suspect Classifications And Forbidden Discrimination

Where classification is suspect, apply SS. Burden is shifted to government to demonstrate **compelling state interest** and that only **necessary means** are utilized to achieve those ends. Even though may purport to have benevolent or non-discriminatory motive, court is concerned about sinister and insidious motive. Also based on Carolene Products FN.4 – discrete and insular minorities that have inability to seek remedy through political process.

A. Race

Race is subject to SS based on fact that race is obvious, immutable, and distinguishing characteristic and as such there’s presumption of possible underlying discriminative motive.

1. Strict Scrutiny of Disadvantaging Racial and Ethnic Classifications

   - **Strauder v. West Virginia** (1880, p.629)
     - Law prohibited blacks from serving on juries
     - SS – based on belief that exclusion of particular group that’s regularly treated as inferior can create stigma or caste of implied inferiority
     - 1\textsuperscript{st} racial discrimination invalidation under 14\textsuperscript{th} Amend

   - **Korematsu** (1944, p.631) – race as “suspect class”
     - Upheld law excluding all persons of Japanese ancestry from designated West Coast areas
     - Overt racial classification, subject to SS, but survived – last time court upheld overt racial classification
     - Classification
       - Over-inclusive – many Japanese were loyal
       - Under-inclusive – didn’t impose on Germans, etc.
     - Purpose – protection of Coast, security

   - **Loving v. Virginia** (1967, p.633)
     - VA law prohibited and punished marriages on basis of racial classifications
     - Purpose – only bad one, to maintain white supremacy
     - Equal application of statute containing racial classifications isn’t enough to remove it from 14\textsuperscript{th} Amend ban
     - Under SS, presumption of bad or invidious purpose
       - Burden shifts to decisionmaker to show that decision was made for a permissible purpose
       - Have to show overwhelming, compelling purpose that can only be achieved by black/white classification
     - Also DP violation – fundamental right to marry

2. The Unconstitutionality of Racial Segregation

   - **Plessy v. Ferguson** (1896, p.637) – separate but equal
• Sustained law that required separate but equal accommodations for white and colored RR passengers
• Said 14\textsuperscript{th} Amend wasn’t intended to enforce social equality or force commingling of the races
• Separation laws don’t necessarily imply inferiority of either race to the other
• Dissent – impermissible end

\textbf{Brown v. Board of Education (Brown I) (1954, p.639)}
\begin{itemize}
  \item Was separate education treating them similarly w/respect to purpose of the law
  \item Segregation
    \begin{itemize}
      \item De facto – naturally happens
      \item De jure - by law
    \end{itemize}
  \item Have to look not just at tangible factors being equalized, but to effect of segregation itself on public education
    \begin{itemize}
      \item Generate feeling of inferiority that may have permanent effect
      \item Affects motivation to learn
      \item Retards educational and mental development and deprives them of benefits they would receive at integrated school
    \end{itemize}
  \item In field of public education, separate but equal doctrine has no place
\end{itemize}

\textbf{Segregation and the Meaning of Brown}
\textbf{Brown v. Board of Education (Brown II) (1955, p.645)}
\begin{itemize}
  \item Have to make prompt and reasonable start toward full compliance w/Brown I – have to make policies eliminating desegregation
\end{itemize}

\section*{B. Sex}
\begin{itemize}
  \item \textbf{Goesaert v. Cleary} (1948, p.649) – rational basis
    \begin{itemize}
      \item Upheld MI law that said no woman could get bartender’s license unless she was wife/daughter of male owner
      \item Classification
        \begin{itemize}
          \item People who can be licensed – men and women who are wife/daughter of male owner
          \item People who can’t be licensed – women who aren’t wife/daughter of male owner
        \end{itemize}
      \item Not similarly situated – first group is likely to have male protector there, which goes toward end of safety
      \item Never overruled, but specifically disapproved
    \end{itemize}
  \item \textbf{Reed v. Reed} (1971, p.649) – rationality w/bite, looking at ends in means/ends
    \begin{itemize}
      \item Invalidated law preferring men over women as executors of estates
        \begin{itemize}
          \item Arbitrary legislative choice
          \item Administrative convenience isn’t enough to justify overt sex-based discrimination
          \item Can’t use gender as inaccurate proxy for other, more germane bases of classification
            \begin{itemize}
              \item Sex doesn’t represent legitimate and accurate proxy
            \end{itemize}
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\end{itemize}
• Reinforced stereotypes
  ▪ Didn’t find sex to be suspect class
  o Frontiero v. Richardson (1973, p.649) – plurality SS
    ▪ Invalidated law giving male members of armed forces automatic dependency allowance for their wives, but requiring servicewomen to prove that their husbands were dependent
    ▪ Purpose – administrative convenience and cost savings
      ▪ Rejected administrative ease and convenience as sufficiently important objectives to justify gender-based classifications
    ▪ SS failed on means – no evidence that differential treatment saves the government any money
      ▪ Sex like race – immutable characteristic, has nothing to do with contribution to society
      ▪ Didn’t get votes for SS though, and thereafter analyzed under intermediate scrutiny
    ▪ Concurrence – sex not suspect classification
  o Craig v. Boren (1976, p.652) – intermediate scrutiny
    ▪ OK law prohibited sale of non-intoxicating 3.2% beer to males under 21 and to females under 18
    ▪ Purpose – traffic safety
    o Intermediate scrutiny – important government objectives, substantially related to the objectives
      ▪ Gender isn’t good proxy – many males aren’t risky, law doesn’t prohibit drinking it once someone else has bought it
    o Dissent – rational basis scrutiny
      ▪ Reliance on previous cases is unfounded because none of those invalidated discrimination harmful to males
      ▪ Heightened scrutiny for women shouldn’t be used to protect men
  o Mississippi University for Women v. Hogan (1982, p.656) – remedial law
    ▪ Sustained male applicant’s challenge to State’s policy of excluding men from MUW School of Nursing
    ▪ Craig Test + exceedingly persuasive justification
      ▪ Important governmental objective
        ▪ If statutory objective is to protect or exclude members of one gender because they are presumed to suffer from inherent handicap or to be innately inferior, the objective is illegitimate
        ▪ Purpose not enough here – to compensate for discrimination against women
        ▪ Burden to present exceedingly persuasive justification of the classification (ends scrutiny)
      ▪ If so, then requisite direct, substantial relationship between objective and means
        ▪ Don’t just want stereotypes
      ▪ Doesn’t matter if men or women – apply same standard either way
      ▪ Reasons for rejecting benign classification
• No historical discriminative treatment
• Furthers stereotypes
• Actual purpose = compensatory
  ▪ Dissent – no heightened standard of review

  o VMI is open only to men, adversative method of training, parallel program for women VWIL but different in academics methods and finances
  o Purposes – promote diversity, adversative method
    ▪ Rule was based on stereotypes and faulty generalizations
    ▪ Required genuine end (???)
  o Remedial decree must closely fit the constitutional violation – must be shaped to place those denied opportunities in the position they would have occupied in the absence of discrimination
    ▪ State hasn’t shown substantial equality in the separate educational opportunities here
  o Concurrence – it’s no the exclusion of women that violated EP, but the exclusion of them w/o providing a comparable institution for women

“Real” Differences?
  o Geduldig v. Aiello (1974, p.671)
    ▪ Upheld exclusion of disability that comes from normal pregnancy and childbirth from CA’s disability insurance system
      • Not invidious discrimination because one class is just female but other class has both females and males
    ▪ Purpose – minimal employee contributions, fiscal integrity
      • Paying for some things and not others is rationally related to the purpose
    ▪ Challenged class wasn’t based on gender – very deferential
      • Not a problem as long as pregnancy wasn’t just pretext
      • Wasn’t overt male/female classification/discrimination here
  o Michael M. v. Superior Court (1981, p.672)
    ▪ Upheld CA’s statutory rape law which punished male, but not female, participant in sex when female was <18 and not his wife
    ▪ Purpose – preventing illegitimate pregnancy (under-inclusive), preserve young women’s chastity (archaic stereotype)
      • Even if preservation is bad purpose, preventing illegitimate pregnancy is good purpose and can sustain
    ▪ Upheld Military Service Act which said President could require registration of males but not females for the draft
      • Because of restrictions on combat, women weren’t similarly situated for purpose of draft or registering for draft
    ▪ Important governmental interest – Interest in raising and supporting armies
      • Not accidental by-product of traditional way of thinking about women – had been national issue, hotly debated
      ▪ Sufficiently and closely related to purpose in authorizing registration
Caban v. Mohammed (1979, p.677)
- Invalidated NY law granting mother but not father of an illegitimate child the right to block the child’s adoption by withholding consent
- Purpose – promoting adoption of illegitimate children
  - No substantial relationship here
  - State is using sex to say mother has closer relationship w/the child

- Upheld GA law denying father but not mother the right to sue for his nonmarital child’s wrongful death
  - Not similarly situated because only fathers can by voluntary unilateral action make an illegitimate child legitimate
  - Can’t tell who father is, but can tell who mother is
- Prevent fraudulent claims of paternity in order to get tort judgment

Preferential Treatment of Women: Permissible Compensation or Archaic Stereotype? – benign classifications
  - Upheld state property tax exemption for widows but not for widowers
  - Decided before Craig – no intermediate scrutiny yet, so deferential rational basis
  - Purpose – cushion financial impact of spousal loss for which loss imposes disproportionately high burden
    - Making up for past discrimination against women
  - Dissent – SS
    - More narrowly tailored means available
- Orr v. Orr (1979, p.682) – alimony after divorce
  - Invalidated law that authorized AL courts to impose alimony obligations on husbands but not on wives
  - Purpose – helping needy spouses and compensating women for past discrimination during marriage (ends OK)
  - Craig Test – fails means because hearings already occurred, so can determine who was discriminated against and who has assets
    - Have to be narrowly tailored, because risk of reinforcing stereotypes about proper place of women and need for special protection
- Weinberger v. Wiesenfeld (1975, p.682)
  - Invalidated SS provision that said where deceased was wife/mother, benefits were payable only to minor children and not widower
  - Discriminated against women by providing less protection for their survivors
  - Rejected benign purpose argument because there was no evidence of intent
- Califano v. Goldfarb (1977, p.683)
  - Invalidated law that said benefits paid to widow, but only to widower if he was getting at least 50% of support from wife
C. Other Classifications Arguably Warranting Heightened Scrutiny

1. Alienage – SS, but RR if Dougall exception applies
   - **Graham v. Richardson** (1971, p.685) - SS
     - States couldn’t deny welfare benefits to aliens
       - Inherently suspect and subject to close judicial scrutiny – discrete and insular minority
       - Ends weren’t compelling
     - Make federalism argument too – congress’s job to regulate
   - **In re Griffiths** (1973, p.686) - SS
     - Invalidated CT’s exclusion of resident aliens from law practice
     - No asserted state interest was sufficiently substantial (high professional standards, protecting client’s interests, serving as officers of the court)
     - Classification wasn’t necessary – ends need to be narrowly tailored
   - **Sugarman v. Dougall** (1973, p.686) – SS
     - Invalidated NY law providing that only American citizens could hold permanent positions in competitive classified civil service
       - Underinclusive (didn’t apply to all high-level positions), overinclusive (don’t need undivided loyalty of janitors)
   - **Dougall Exception** – governmental function
     - Standard won’t be as demanding when dealing w/matters w/i state’s constitutional prerogatives though
     - Look for overinclusive/underinclusive
     - Only applies to those that go to heart of government
   - **Foley v. Connelie** (1978, p.687) – deferential, not SS
     - Upheld NY law barring employment of aliens as state troopers
     - Rational relationship – here citizenship bears RR to special demands of the particular position
       - Discretionary role – want citizens governing citizens
   - **Ambach v. Norwick** (1979, p.687) – rational basis
     - Upheld state refusal to employ as teachers aliens who are eligible for citizenship but who refuse to seek naturalization
   - **Bernal v. Fainter** (1984, p.687) – drew the line, applied SS
     - Limit to Dougall exception – couldn’t justify TX barrier to aliens becoming notaries public
       - Duties were essentially clerical and ministerial
       - Policymaking responsibilities or broad discretion are required for exception to apply

2. Nonmarital Children
   - Not suspect class, but has given heightened scrutiny in most cases
     - Not immutable, clearly identifiable, discrete/insular minority
   - **Craig** intermediate scrutiny

3. Disability, Age, Poverty
   - Not suspect classes – no SS
Cleburne v. Cleburne Living Center, Inc. (1985, p.693) – rational basis
  o TX city denied special use permit for operation of group home for mentally retarded, municipal zoning ordinance required permits for such homes
  o No SS
    ▪ Government needs flexibility, can take care of themselves in political process, avoid judicial 2nd guessing, beginning of slippery slope
  o No rational basis for believing that the home would pose any special threat to the city’s legitimate interests

4. Sexual Orientation
  o CO law prohibited all action at any level of state or local government designed to protect homosexuals
  o No rational relationship to state interests
    ▪ Broad and undifferentiated disability on single named group
      • Can’t seek protection from political process that everyone else can
    ▪ Impermissible End – so broad can only be explained by animus toward the class

D. Discriminatory Purpose and Effect
  Government action isn’t unconstitutional solely because it has a racially disproportionate impact. You can use data regarding the administration of the law to show discrimination.
  There are 2 types of discrimination, plus overt discrimination: (1) De Jure – law enacted w/purpose or motive to discriminate, and (2) De Facto – racially neutral in its language, administration and purpose but which has a disadvantaging impact or effect.
  1. Types of Discrimination
    o Yick Wo v. Hopkins (1886, p.713) – discrimination in admin
      ▪ Ordinance prohibited operating laundry in wooden building w/o permit – granted to all but 1 of non-Chinese applicants, but to none of 200 Chinese applicants
        • Facially neutral law may impose purposeful discrimination because of the manner of its administration
        • Can be inferred from data regarding administration of facially neutral law – discriminatory pattern
      ▪ Impermissible purpose – hostility to the race
      ▪ Closed pool after ordered to desegregate
      ▪ Difficult or impossible for court to determine sole or dominant motivation behind choices of group of legislators
        • Reluctant to ascribe bad motive when there are other competing possibilities
      ▪ Disproportionate impact on racial minority is statutory violation
• This isn’t enough for constitutional violation though – have to show discriminatory motive or intent
  o Jefferson v. Hackney (1972, p.717)
2. Proving Purposeful Discrimination
  Washington v. Davis (1976, p.717)
  o Exam for job was given throughout federal system, higher % of blacks than whites failed it and it hadn’t been validated to establish its reliability for measuring subsequent job performance
  o Standard is racially discriminatory purpose or intent
  o Discriminatory impact may demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds
    ▪ Not enough by itself though!
  o Arlington Heights (1977, p.721)
    ▪ Reaffirmed Washington v. Davis that official action won’t be held unconstitutional just because it results in racially disproportionate impact
    ▪ Enough to show that discriminatory purpose has been a motivating factor in the decision – doesn’t have to be sole basis
      • Impact, clear pattern, historical background, specific sequence of events, departures from normal procedural sequence, substantive departures, legislative or administrative history, testimony of decisionmaker
        ▪ Then burden shifts to Δ to show same decision would have been made even if race hadn’t been a factor
        ▪ Hard to show!!!
  o Feeney (1979, p.723)
    ▪ Upheld MA law granting absolute lifetime preference to veterans for state civil service positions (advantage to males)
    ▪ 2-fold inquiry
      • Whether statutory classification is indeed neutral in the sense that it’s not gender based
        ▪ If yes, then keep going
        ▪ If not overt, then can’t apply Craig, MUW, etc.
      • Whether adverse effect reflects invidious gender-based discrimination
        ▪ Impact is starting point
        ▪ Purposeful discrimination
    ▪ Discriminatory purpose requires more than awareness of consequences, it implies the decisionmaker made choice at least in part because of, not in spite of, adverse effect on identifiable group
  Rogers v. Lodge (1982, p.726)
  o At large system of voting, 53.6% black, no black has ever been elected
Multi-member districts violate 14th Amend if conceived or operated as purposeful devices to further racial discrimination
  - Fact that none has ever been elected is important evidence of purposeful exclusion, but need other evidence too
    - Disproportionate adverse effect won’t prove discrimination
  - Purpose/intent to maintain - past discrimination in political process, education, Democratic party – state didn’t take action to fix it
    - History

Test
  - No overt race-based classification
    - Still concerned that race was involved though
  - Not really discriminatory intent, but designed to maintain racial discrimination
    - Washington v. Davis, Arlington, Feeney

Hunter v. Underwood (1985, p.732)
  - Disenfranchised persons convicted of crimes of moral turpitude
  - Have to show racially discriminatory intent or purpose
    - Even though racially neutral on its face, had racially discriminatory impact – evidence of bad purpose
      - 10X more blacks than whites
    - Burden shifts to decisionmaker to show same one anyway

E. The “Benign” Use of Racial Criteria: Affirmative Action and Race Preferences
  - Will likely apply SS and will require demonstration of specific past discrimination to be remedied, rather than society as a whole. Means must be narrowly tailored.
  - Problems
    - Not always clear it’s benign
    - May reinforce stereotypes
    - Pub burden on those not responsible for discrimination

Swann (1971, p.751) – can be color-conscious at school
  - Struck law mandating color-blindness in student assignments
  - Government can take race into account when remedying race-based discrimination

Regents of Univ. of California v. Bakke (1978, p.752) – some consideration to race may be given in the admissions program
  - Admissions program reserved specified number of seats (16/100) for students from certain minority groups (blacks, chicanos, Asians, American indians), II denied admission twice even though scores were above minority scores
  - Special admissions program – overt race-based - SS
    - Purpose or interest is permissible and substantial – compelling
      - Reducing historic deficit of minorities in medical school - No
      - Countering effects of societal discrimination – has to be findings of constitutional or statutory violations
      - Increasing # of physicians in underserved areas - No
• Diversity in education - Yes
  ▪ Classification is necessary to accomplishment of purpose
  ▪ Assignment of fixed number of seats to minority group isn’t necessary means toward end of diversity in education
    o Concurrence – intermediate scrutiny under Craig
      ▪ Not enough to have just conceivable basis that might sustain, need important and articulated purpose

Race Preferences in Public Employment and Contracting Since the 1980s
Benevolent classifications in the field of employment may often take the form of ‘set aside’ provision that provide a certain number of contracts or jobs will be given to a minority. In the modern test, these will be subject to strict scrutiny and probably will have to be adopted with a specific remedial purpose.

**Remedy ‘Societal Discrimination’ Not Compelling End - Wygant v. Jackson Bd. of Ed.-** (scheme where must lay-off while keeping minority ratio invalidated- had effect of laying off more senior whites before less senior minorities). The court applied *strict scrutiny* to the plan and found that the state end of remedying societal discrimination was not a compelling end.

  a) *No History of Discrimination by Actor-* the court found that there was not history of discrimination in the hiring practices of the school district—essentially the policy was not enacted to remedy past discrimination by the employer.

  b) *Societal Discrimination Remedy = Not a Compelling End-* the court held that societal discrimination without more, is too amorphous a basis for imposing a racially classified remedy.

**Congressional Set-Aside Allowed—(Fullilove v. Klutznick)** (court upheld 10% min set aside for minority grants for minority owned businesses) the court upheld the program on a deference to congressional findings of past discrimination.

  • If city wants to use past discrimination, it has to make determination that city itself has discriminated against minorities in the past – has to ID w/specificity and particularity
    o Necessary to define both scope of inquiry and extent of remedy necessary to cure effects
    o None of evidence points to identified discrimination in Richmond
  • SS – want to make sure they had good purpose, doesn’t matter who’s discriminated against

**Adarand Constructions, Inc. v. Pena** (1995, p.786)
  • Additional compensation for hiring subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals
  • Compelling governmental interest – identified discrimination is only compelling governmental interest that’s sufficient – have to say when you discriminated in the past
• Propositions
  o Skepticism – any preference based on race receives most searching examination (Wygant)
  o Consistency – standard not dependent on race of those burdened or benefited (Croson)
  o Congruence – SS
    ▪ Use Croson, Metro Broadcasting dissent for SS – not Baake