I. Federalism and the Fourteenth Amendment
   A. Initially, the Bill of Rights only applied to the federal govt.
      1. Barron v. Mayor and City Council of Baltimore, 1833 (Marshall, C.J.) (state redirected river which ruined his wharf, alleged deprivation of property w/o just compensation).
   B. The Slaughterhouse Cases (1873) (monopoly in granted to one New Orleans slaughterhouse, all others had to close), first case to interpret 14th A.
      1. 13th A. doesn’t apply, that refers only to personal servitude
      2. Privileges or Immunities Clause refers only to those national P&I that are “fundamental,” here only a state privilege is concerned, 14th A. doesn’t apply,
         a. Under Twining v. New Jersey, fed. P&I include (1) right to travel from state to state, (2) to petition Congress, (3) to vote for national offices, (4) to be protected against violence when in lawful custody of U.S. marshall, (5) right to inform U.S. authorities of violations of its laws
         b. Miller relies on Corfield v. Coryell (old) (upheld NJ law restricting access to oyster/clam bed on coast to NJ residents), interpreted Art. IV § 2 Privileges and Immunities Clause (citizens of each state are entitled to privileges and immunities of citizens in the several states), but misquotes, says “of” instead of “in,” makes it sound like the P&I belong to only the state in question,
         c. Nullified the P or I Clause forever.
      3. Due Process Clause, held: not deprived of property without due process of law, interest in performing their occupation was not part of their property, a substantive (not procedural) due process claim
         a. Bradley argued that choice of occupation was part of their “liberty,” there were deprived of this w/o due process of law.
      4. Equal Protection Clause, solely intended to strike down Black Codes in the South, reject claim that laws where treating them differently than the butchers who’d been granted the monopoly,

II. Substantive Due Process
   A. Claim involves the rights of one person.
   B. “Liberty” in DPC of 14th A. is not limited to freedom from physical restraint, also includes freedom to enjoy faculties, use them lawfully, live and work where you will, earn a livelihood. Allgeyer v. Louisiana (1897).
   C. Footnote 4 of Carolene Products case (Stone, J.)
      1. There is presumption of constitutionality in regulating economic interests.
      2. Less of a presumption of constitutionality in regulating noneconomic interests:
         a. ¶ 1, if legislation appears on face to be within a specific prohibition of the Constitution or Bill of Rights as incorporated;
         b. ¶ 2, if legislation restricts political processes that normally operate as a check; and
         c. ¶ 3, if legislation affects a “discrete and insular” minority.
   D. Economic Interests (“liberty of contract”)
      1. Are the ends permissible? If so, are the means chosen rationally related to those ends?
         Legislature does not have to spell out its rationale (total deference), Williamson v. Lee Optical (1955),
         a. Williamson v. Lee Optical (1955), ends are public health, prohibiting opticians from replacing lenses w/o prescription is rationally related.
         b. Daybrite Lightning v. Missouri, ends are getting workers to vote, making employers pay for up to 4 hours while workers leave to vote is reasonably related.
         c. Ferguson v. Skrupa (1963), ends are protecting debtors from creditors, preventing everyone except lawyers from adjusting debts is rationally related because lawyers understand the claims better,
         d. Olsen v. Nebraska (1941), ends are preventing employment agencies from gouging their clients, limiting the fees they can collect are rationally related,
e. *United States v. Carolene Products Co.* (1938), ends are public health and preventing fraud, prohibiting “filled milk” is reasonably related, it’s less healthy and it’s adulterated.

f. *West Coast Hotel v. Parrish* (1937), end is protecting women from unscrupulous business practices and protecting health, setting a minimum wage and a living wage is rationally related.

   i. Overturned *Adkins v. Children’s Hospital*.

2. Old test: Are the ends permissible? If so, are the means chosen not unreasonable, arbitrary, or capricious, and do they have a real and substantial relation to the ends? *Nebbia v. New York* (1934) (based on *Lochner v. New York*, 1905). Perhaps helpful if legislature spells out its rationale.

   a. *Nebbia v. New York* (1934), ends are keep dairy farmers in business and protect quantity and quality of milk supply, establishing Milk Control Board to set min. and max. prices is not unreasonable, arbitrary, or capricious and has real and substantial relation to the end, NY legislative committee had made findings, Court deferred to them,

   b. *Adkins v. Children’s Hospital* (1923), ends are protecting women, setting minimum wage does not have real and substantial relation, is a pretext for infringing on liberty of contract

   i. Contrary spirit to *Muller* because now women can vote.

   c. *Bunting v. Oregon* (1917), sustained 10 hour day for factory workers

   d. *Cobble v. Kansas* (1915), ends are preventing employers from prohibiting workers from joining unions, this violates employer’s liberty of contract (maybe ends are protecting workers, means are impermissible)

   e. *Pierce v. Society of Sisters*, ends are promoting education of children, prohibiting parochial schools do not have real and substantial relation, interfered with parents’ interests in controlling child.

   f. *Meyer v. Nebraska* (1923), ends are promoting teaching of English, prohibiting teaching of all other languages interfered w/ parent’s interest in controlling child, child’s interest in learning,

   g. *Gitlow v. New York* (1925), ends are public safety, outlawing advocation criminal anarchy infringes on free speech and press,

   h. *Muller v. Oregon* (1908), ends are protecting women workers, sustained 10 hour day for them,

   i. *Lochner v. New York* (1905), end is public health, restricting max. hours for bakers is does not have real and substantial relation to this, is pretext for economic regulation, employees are not wards of state, can make own contract decisions within their liberty,

3. Takings Clause of the 5th A. and Regulatory Takings

   a. If govt. takes private property for public use, it must pay just compensation.

   i. Must be “public use” (*Hawaii Housing Authority v. Midkiff*).

   ii. Compensation must be paid.

   b. (1) “Regulations that compel the property owner to suffer a physical ‘invasion’ of his property” and (2) “regulation[s] that den[y] all economically beneficial or productive uses of land” are per se takings requiring just compensation. (*Lucas v. South Carolina Coastal Council* (1992))

   i. (1) means govt. actually takes title or “permanent physical occupation” of property

      A) *Loretto* (cable in buildings)

   ii. (2) means that regulation can’t do more than can be done under state law of private or public nuisance (Scalia),

      A) has exception if the use at issue was not part of initial bundle of property rights when land was acquired (ex. buy surface rights to land, coal mining illegal, then discover coal)

   c. In all other cases besides b., look to see if (*Dolan v. City of Tigard* (1994)):

   i. there is an “essential nexus” between (1) a legitimate state interest and (2) the permit condition exacted by the city, and

      A) preventing flooding and reducing traffic are legitimate state interests
B) there is nexus between preventing floods and limiting flood plain development and between reducing traffic congestion and providing a bike path as alternative means of transportation

ii. the degree of connection between (1) the exactions (permit conditions or regulations) and (2) the effects of the project “roughly proportional.”

A) no rough proportionality between dedicating a flood plain and increased impervious surface and increased storm water runoff because city wanted more than just no construction, wanted ownership for a recreational greenway,

B) no rough proportionality between creating bike path and increased traffic and congestion due to expansion because, although dedications for public pathways are generally reasonable exactions to relieve congestion, here city didn’t meet burden of demonstrating that additional number of bike and vehicle trips generated by development were reasonably related to bike path easement

d. Old cases: ad hoc factual determinations, whether justice and fairness require that economic injuries caused by govt. are being disproportionately concentrated on a few persons. Penn Central

i. Tests:

A) diminution of value test (evaluate ability to profit before and after)

B) invasion theory (govt. taken physical possession or title)

C) noxious use test (what you happen to be doing may be labeled noxious use by court, govt. can regulate it)

D) cause of harm test (one person’s use causes harm to another’s land, if govt. makes first person do something, only a regulation)

ii. Keystone Bituminous Coal Assoc. v. Debenedictis (1987), similar to Pennsylvania Coal, opposite result, noxious use test, company took a bad risk, only affects 2% of their coal

A) dissent argues that all of that 2% is unreachable though

iii. Goldblatt v. Hempstead (1968ish), ordinance said can’t mine beneath the water table, Goldblatt’s mine became worthless because he’d broken through decades before, Court said this completely prohibited his use but sustained anyway, an important public interest

iv. Miller v. Schoene (1928), Virginia law ordered red cedar trees cut down to prevent spread of disease to apple orchards, law sustained as regulation, apple orchards are important industry, huge state economic interest,

v. Pennsylvania Coal v. Mahon, law prohibiting mining underneath surface structures owned by another struck down, deprived mining company of the value of having the rights to the coal under the town, govt. should have to pay for surface support rights

A) Holmes for majority, uses diminution of value test

B) Brandeis for dissent, uses noxious use test

vi. Buggler, Kansas distillery put out of business by Prohibition, no compensation, only regulation by police power

vii. Hadicak (1915), zoning requirement made land be used for residential purposes, worth only $60K, would have been worth $800K if used as brick factory, zoning is only a regulation,

4. Contracts Clause of Art. I § 10, no state may pass law impairing the obligation of contracts.

a. States are limited in making civil laws only by Contracts Clause.

i. Ex Post Facto Clause applies only to criminal laws, not civil laws. Calder v. Bull.

A) Thomas wants to revisit this. Apfel.

ii. Originally designed to limit debtor-relief laws affecting private contracts. Not envisioned to be applied to state contracts.
iii. 6 general rules:
A) If govt. wants to change conditions of contracts/grants after they are made, it need only reserve the power,
   1) *Dartmouth College v. Woodward* (1819), law attempting to change method of trustee appointments struck down
   2) *Fletcher v. Peck* (1810), Georgia legis. makes land grant, bribery scheme unveiled, new legis. repeals the land grant, struck down
B) In general, states can’t enact retroactive insolvency laws, but can make prospective insolvency laws.
   1) *Sturges v. Crowninshield*, law led debtors discharge debts upon surrender of property, struck down,
   2) *Ogden v. Sounders*, statute said it applied only to debts incurred after law passed
C) States can change remedies available, clause doesn’t prohibit this, ex. extension of time for repayment, as long as change doesn’t substantially obstruct payment.
D) Publicly granted privileges are construed narrowly.
   1) *Charles River Bridge v. Warren Bridge* (1837), Mass. charters toll bridge, soon thereafter builds free bridge next to it, Court says this is OK
E) Doctrine that state cannot alienate its police power, state can’t bind itself today what is necessary tomorrow to protect health, safety, and welfare.
   1) *Stone v. Mississippi* (1889), Miss. grants charter to operate lottery, then outlaws lottery, upheld
   2) After *Slaughterhouse Cases*, new state constitution eliminated monopoly, upheld
F) State can alter private contractual obligations when it needs to exercise police power to promote public health, morals, and general welfare.

b. If a state law interferes with a state’s own contractual obligations:
   i. is there an impairment?
   ii. if so, is the law impairing the state obligation “reasonable and necessary to serve an important public purpose? (apply balancing test)
   iii. *The Port Authority Case (United States Trust Co. v. New Jersey)* (1977), 1962 covenant issuing bonds said they wouldn’t be used to promote mass transit, 1974 law repealed the provision, Blackmun applies higher level of scrutiny than in private contracts because state has its own interests at stake and is likely to be more arbitrary, uses balancing test to weigh ends (mass transportation, energy conservation, environmental protection) against means (interfering with contract), finds that there are less drastic ways to achieve ends,
      A) Brennan in dissent applies a rational means test based on *Lee Optical*, if end is legitimate and means chosen are not plainly unreasonable or arbitrary, then means should be upheld.
   iv. *El Paso v. Simmons* (1965), under 1910 law you can buy land for small down payment, then just keep up interest, if fall in arrears, it forfeits but unless a third party intervenes, you can offer up full interest and reclaim title at any time, 1941 the time for reclaiming is limited to 5 years, Simmons’s payments fall in arrears in 1947, he shows up 5 years 2 days later to pay in full, too late, state sells land, Court upholds 1941 law, it does impair contract, but stability of land title is important govt. interest, not a substantial modification.

c. If a state law interferes with private contractual obligations (2 tests, do both!):
   i. *Allied Structural Steel v. Spannaus* (1978) test:
      A) is the impairment a minimal alteration or a severe impairment?
      1) If minimal, inquiry ends, statute upheld.
B) if severe, look to nature and purpose of the legislation and analyze in terms of 5 factors:
   1) existence of an emergency
   2) protects basic societal interest
   3) relief appropriately tailored to emergency
   4) conditions imposed by law are reasonable
   5) temporary measure

ii. Energy Reserves Group v. Kansas Power & Light (KPL) test:
   A) does the state law operate as a substantial impairment of a contractual relationship?
   B) is there a significant and legitimate public purpose like remediying a broad and general social or economic problem? and
   C) is the adjustment of rights and responsibilities of the contracting parties based upon reasonable conditions and of a character appropriate to the public purpose justifying the legislation’s adoption?

iii. Allied Structural Steel v. Spannhaus (1978) they had had a pension plan, voluntary, in 1975 Minn. passes law requiring certain things, Allied couldn’t pay, had charge imposed, Court struck down law, this was severe impairment, identified 5 factors from Blaisdell, no emergency here, no basic societal interest here (just a favored group, retirees), no emergency to tailor relief to, regulatory conditions are not reasonable (invasion of new area), a permanent measure

iv. Home Building & Loan Assoc. v. Blaisdell (1934), appellant foreclosed on home in May 1932, Blaisdell had until May 1933 to pay in full, but in April 1933 new law extended this by another 2 years if he made some reasonable payments, Court upheld law, reasons for doing so later enunciated in Allied,

E. Noneconomic Interests
   1. Right to Control of Your Child’s Education
      a. Pierce v. Society of Sisters, ends are promoting education of children, prohibiting parochial schools do not have real and substantial relation, interfered with parents’ interests in controlling child
   2. Right to Teach Child a Second Language
      a. Meyers v. Nebraska (1923), ends are promoting teaching of English, prohibiting teaching of all other languages interfered with parent’s interest in controlling child, child’s interest in learning
   3. Privacy and Use of Contraceptives in the Context of Marital Relationship
      a. Griswald v. Connecticut (1965), 4 opinions plus dissent
         i. Majority agrees that regulating sexual morality is a legitimate state end (Douglas is silent) and all agree that end must go through some form of heightened scrutiny (substantial interest? compelling? other?)
            A) Douglas /w Clark, there are protected interests not explicit in the Bill of Rights that are found in the penumbras of the enumerated rights that give life and substance to specific guarantees (1st A. right to assemble, 3rd A. right not to quarter soldiers, 4th A. right against unreasonable searches and seizures, 5th A. right against self-incrimination, 9th A. Reserved Rights Clause), incorporated by the DPC of the 14th A., includes right to privacy in the marital relationship
            B) Goldberg /w Warren, Brennan, 9th A. Reserved Rights Clause is more than a truism, includes right to marital privacy, knows this by looking at “traditions and collective conscience of our people,” (ignores fact that legislature should reflect these things, state practice), this is a fundamental interest, so Lee Optical test doesn’t apply, state must have a “compelling” interest and regulatory means chosen must be “necessary, not merely rationally related to a permissible state policy,” doesn’t say whether interest in preventing adultery is compelling, says there are narrower means to prohibit extramarital
affairs, does say that state can regulate matters of sexuality (adultery, homosexuality, abortion)

C) Harlan relies solely on 14th A. “liberty,” statute violates basic values “implicit in concept of ordered liberty,” intimacy of husband and wife is essential and accepted feature of institution of marriage among traditions of English-speaking people, need “closer scrutiny and stronger justification,” rejects Lee Optical,

D) White, intimacy of marital relationship is interest that is part of “liberty,” applies “strict scrutiny,” statutes regulating sensitive areas of liberty must be “reasonably necessary” for effectuation of legitimate and substantial state interest, can’t be arbitrary or capricious, look for less drastic means to end, end of prohibiting promiscuous or illicit sexual relationships is legitimate, but means aren’t narrow enough,

ii. Dissent

A) Dissent by Black w/ Stewart, right to marital privacy isn’t stated in Bill of Rights, therefore not incorporated in “liberty” of DPC, 9th A. is a truism, not source of rights, only reinforces notion that fed. govt. is of limited enumerated powers,

B) Dissent by Stewart w/ Black, constitutional way to change this is to lobby Conn. legis., agrees it’s bad law.

iii. In Griswald, doctor was convicted under Conn. law, alleged violation of liberty interest of his patients, allowed b/c this was criminal case, unlike Tileston.

iv. Poe v. Ullman (1961), challenge to same law, but dismissed for lack of ripeness b/c there had only been 1 prosecution between 1879 enactment and the present, also contraceptives could be bought legally for other purposes,

A) Epperson v. Arkansas (1968), challenge to law prohibiting teaching of evolution was ripe despite 0 prosecutions since 1928 enactment.

v. Tileston v. Ullman (1943), challenge to same law, but dismissed because of lack of standing, doctor was suing because law infringed his patients’ liberty interests in protecting their lives, can’t litigate rights of third parties

4. Abortion


i. Majority (O’Connor)

A) Under Roe, (1) woman has right to obtain abortion before viability and to obtain it w/o undue interference from the state, (2) state has power to regulate abortion after viability with exceptions for women’s safety and health, and (3) state has interest in protecting life of woman and potential life of fetus.

B) “Liberty” includes “personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education,” matters involving intimate and personal choices central to personal dignity and autonomy, right to define one’s own concept of existence, meaning, and the universe.

C) Uphold b/c of stare decisis, Roe test hasn’t been unworkable, people have relied on it in shaping their lives, women are more empowered now, no big scientific changes, can’t give in to public pressure

ii. Reformulation of Roe

A) O’Connor 3: trimester framework gone, more weight should be given to state’s legitimate interest in protecting potential life, law can’t place “undue burden” (substantial obstacle) in path of woman seeking abortion, either in purpose or in effect.

B) Blackmun would keep trimester system.

C) Stevens wants strict scrutiny, is with Blackmun.
iii. **Holdings:**
   A) Medical emergency provision upheld unanimously.
   B) Informed consent and 24 hour waiting period upheld by O’Connor 3 and Rehnquist 4.
   C) Spousal notification requirement struck down by O’Connor 3 and Blackmun/Stevens.
   D) Informed parental consent upheld by O’Connor 3 and Rehnquist 4.
   E) Record keeping and reporting upheld by O’Connor 3, Stevens, and Rehnquist 4.

   i. **Majority (Blackmun)**
      A) Women have interest in making abortion decision, maternity could cause physical, psychological, economic harm.
      B) Interest is part of protected “liberty” of DPC.
         1) District Court said it was in 9th A.
      C) This is fundamental right, so apply strict scrutiny. Regulation limiting rights may be justified only by a compelling state interest and must be narrowly drawn to express only the legitimate state interests at stake.
      D) State has important and legitimate interests in protecting women’s lives, protecting potential life, also legitimate interests in safeguarding health and safety, maintaining medical standards.
         1) Maintaining medical standards has been used by states to justify new regulations.
      E) Ducks the issue of when life begins. No one can agree. Otherwise fetus would be protected by DPC from being deprived of “life.”
      F) Viability is the key (of life outside womb).
      G) In first trimester, woman’s interest is compelling, mortality rate from natural birth exceeds mortality rate from abortions during this period, fetus’s life isn’t viable at this point so state’s interest isn’t compelling, abortion decision and effectuation left to medical judgment of woman’s attending physician (and the woman?), state can still regulate medical procedures and standards.
      H) In second trimester, state still doesn’t have compelling interest, but women’s interest isn’t as compelling, state may regulate abortion procedure in ways reasonably related to maternal health (means no strict scrutiny, use *Lee Optical*).
      I) In third trimester, state’s interest in protecting potential life is compelling, so state can regulate or prohibit abortion, except woman still has compelling interest in protecting own life so in cases of emergency where life of mother is at stake abortion must be allowed (so potential life isn’t more important than woman’s interest).
   ii. **Dissent (White)**
      A) Women’s interests are minor, frivolous.
      B) Issue should be left to political process.
   iii. **Justiciability**
      A) Roe was single pregnant woman that couldn’t get an abortion, issue technically moot when case reached Court, but it created exception for situations “capable of repetition while evading review.”
         1) *Defunis v. Odeggard*, affirmative action case, denied entry to law school, sued, then admitted, almost done with class when case reached Court, dismissed for mootness, could be repeated though.
B) John and Mary Doe didn’t have standing, they were married couple, she would have serious problems if she got pregnant, unavailability of abortion affected their sex life, injury was too speculative.

C) Doctor Halford, no standing, no injury, not his rights, he has to come forward as criminal defendant to challenge.

5. **Marriage**
   a. *Zablocki v. Redhail* (1978) (EPC case), interest in marriage is fundamental right (there is right to procreate, so must be right to enter only relationship where that can legally happen, look at other decisions), Wisconsin had legitimate end in collecting child support and counseling, but means aren’t related to ends, there are less intrusive means
      i. Only Stewart saw this as DPC case. You can’t force a poor person to pay.

6. **Bear or Beget a Child**
   a. *Cari*

7. **Family Living Arrangements**
   a. *Moore v. East Clevenand* (1977) (only 4 on DPC grounds), decisions about family living arrangements is fundamental interest, relies on *Meyer Pierce* line of cases, interests of family, history, traditions, state has legitimate/important/compelling interest in preventing pressure on school systems, traffic congestion in neighborhood, type of neighborhood, over-crowding, etc., but means of limiting living arrangements to nuclear family only was not narrowly tailored, could have put a simple occupancy cap in effect,
      i. Grandma was living in home w/ 2 grandsons,
      ii. Stevens said violated property rights.
      iii. Rehnquist says interest in whose room you sleep in is not implicit in concept of ordered liberty, different than right to marry,
   b. *Bell Terre v. Borras*, hippies living in van don’t have fundamental liberty interest.

8. **Interest of Child in Avoiding Commitment to State Mental Hospital**
   a. *Param v. J.R.*, child has liberty interests in avoiding commitment to state mental hospital and in avoiding stigma attached to it, but this is procedural due process case, Court says process adequately protected by Georgia’s doctor-parent consultation process,
      i. not a substantive due process case, not arguing that child can’t be confined or committed at all,

9. **Right to Engage in Homosexual Sodomy**
   a. *Bowers v. Hardwick* (1986) (Georgia), no fundamental right to engage in homosexual sodomy, not in same group as the family/procreation/contraception-abortion cases, state had interest in promoting morality, test is whether fundamental liberties are “implicit in concept of ordered liberty” (*Palko*) or “deeply rooted in this nation’s history and tradition,” (*Moore*), homosexual conduct has been illegal for centuries,
      i. Right to Be Let Alone – Blackmun’s dissent, right to make choices about most intimate aspects of one’s life, fundamental interest in controlling nature of intimate associations with others, state does have interest in public health and welfare, but no evidence of problem in record, can’t simply impose religious values,

10. **Right to Disconnect Life Support**
    a. *Cruzan v. Director, Missouri Dept. of Health* (1990), patient has right to refuse medical treatment (including life-saving kind), based on common law informed consent doctrine, state has legitimate interest in protecting lives of unconscious people on life support from having life support terminated, means are limiting who is competent to make a decision and requiring there to be clear and convincing evidence of the incompetent person’s wishes,
       i. Brennan’s dissent, Cruzan has fundamental interest, no state interest could outweigh her rights. But is her interest?

11. **Right to Physician-Assisted Suicide**
    a. *Washington v. Glucksburg* (1997), interest in dying is a liberty interest, but not fundamental, right to commit suicide includes right to assistance in committing suicide, looks to English common law and *Palko/Moore* test from *Bowers*, been laws against suicide for hundreds of years, so not fundamental, rational relationship test then, ends need only be legitimate and
proper, there are 5 (p. 581-82), are important and legitimate, means are prohibiting suicide and assisting suicide, rationally related,
   i. O’Connor and Stevens concur, but roughly say that in some instances right to suicide may be fundamental.
   ii. Right to Die With Dignity – Breyer’s dissent, phrases the liberty interest broadly,
b. Companion case *Vacco v. Quill* (1997), EPC case, Court held that people who are terminally ill but not on life support are not similarly situated as terminally ill on life support, so latter can terminate their lives while former can’t,

### III. Equal Protection Analysis

A. Claim involves the rights of a group of people.

B. **Government ends are almost always legitimate and proper at least.** Most laws struck down are because of means.

C. **Rationality Test**

   1. **Traditional Rationality:** classification must be rationally related to a legitimate governmental interest. Court will speculate about governmental ends. Doesn’t really matter if statute is over- or underinclusive. Highly deferential! *REA Test*

   a. **Economic/Social Matters**

   i. *FCC v. Beach Communications* (1993), Thomas: “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonable conceivable set of facts that could provide a rational basis for the classification,”

   ii. *Logan v. Zimmerman Brush Co.* (1982), for economic/social regulations not involving fundamental interest or suspect classification, classification must be reasonably related to legitimate and proper governmental interest; procedure for determining employment discrimination claims, claims processed within 120 days get full consideration on merit, after 120 no consideration; govt. end is preventing employment discrimination, legit. and proper, distinguish meritorious claims from meritless claims; means is totally irrational, not related to determination of merit; decided on due process grounds but 6 justices would have found equal protection grounds too.

   iii. *Schweiger v. Wilson* (1981), mental patients in Medicaid-receiving institutions (public medical hospitals and private mental hospitals) get SSI Comfort Allowance, mental patients in non-Medicaid-receiving institutions (public mental hospitals) do not get SSI Comfort Allowance; end is to give SSI Comfort Allowance to patients in Medicaid-receiving institutions (purpose of not giving SSI Comfort Allowance or Medicaid to patients in public mental institutions is that those are traditionally responsibility of the state), is legit and proper; means are drawn directly in terms of the purpose.

      A) Dissent says this is mere tautology, majority sees what Congress did and then says it intended to do exactly what it did; end was to pay cash benefits for personal needs other than medical care and maintenance; not rationally related because patients in all institutions have same need for comfort allowance.

   iv. *U.S. Railroad Retirement Board v. Fritz* (1980), classifications drawn among types of employees eligible for railroad and/or social security benefits upon retirement; end was to preserve solvency of railroad retirement system by reducing windfall benefits but protecting relative equities and providing benefits to employees; only look to see if means are patently arbitrary or irrational, they are not

      A) Dissent says analysis is totally tautological, looks to see what Congress did and then decides if it did what it wanted; wants court to look at actual purpose

   v. *New Orleans v. Dukes* (1976), pushcart vendors w/ 8 years experience could sell in French Quarter, less than 8 years couldn’t, effectively grandfathered in 1 company;
end is preserving distinctive charm, legitimate; means are rationally related, doesn’t matter that this could be prospectively irrational if this company later detracts from charm, overrules Morey, only matters that city thinks it adds to charm now.

vi. **McDonald v. Board of Election Commissioners** (1969), Illinois law said you could get absentee ballot if you were outside your county of residence, so prisoners outside county of residence could get one, but prisoners inside their county of residence could not; fundamental interest in voting is different than interest in obtaining absentee ballot, so rationality analysis applies; end of absentee balloting is to encourage voting; is rational because state can adds groups to list one at a time, doesn’t have to do it all at once.

vii. **Morey v. Doud** (1957), most money order business had to show financial stability, American Express did not; end is to protect consumers from financially shaky companies; means are prospectively irrational, Amex is clearly stable now, but could turn shaky in future.

viii. **Railway Express Agency v. New York** (1949), vehicles could display ads for vehicle-owners products/services, could not display any other ads; end is traffic safety, Court speculates on this; means are rationally related, limit number of ads so less distractions, govt. can achieve end one step at a time, doesn’t need to outlaw all ads.

ix. **Smith v. Cohoon** (1931), Florida law said most commercial vehicle operators had to post liability bond or show evidence of car insurance, but not carriers of agricultural or seafood products; end was making sure injured persons would be compensated; not sure how this was resolved.

2. **“Rationality with Bite:”** classification must be substantially related to a legitimate and actual governmental interest.

a. Economic/Social Matters

i. **U.S. Railroad Retirement Board v. Fritz** (1980) (Brennan dissenting) wants actual purpose looked at, but only rational analysis

ii. **N.Y.C. Transit Authority v. Beazer** (1979), upheld provision prohibiting methadone users (people in drug treatment) from holding certain jobs, dissent upset b/c they wanted requirement of individual determinations of current drug use.

iii. **Massachusetts Board of Retirement v. Murgia** (1976) (Brennan dissenting), mandatory police retirement at 50, he wanted “fair and substantial relation” to legislature’s “announced purposes.”

iv. **Dept. of Agriculture v. Moreno** (1973), law said only households of related persons could get food stamps, meant to freeze out hippies and communes, “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate govt. interest,” govt. must spell out its actual purposes, Court won’t speculate.

b. Mental Retardation

i. **Cleburne v. Cleburne Living Center, Inc.** (1985), zoning ordinance said most group homes don’t need special permit, but group homes for insane, feeble-minded, alcoholics, drug addicts, and mentally-retarded to, requires signatures of all property-owners within 200 feet and is only good for one year; majority applies rationality test, not strict scrutiny b/c (4) slippery slope concerns (what other groups? mentally ill?), (3) not politically powerless b/c there has been legis. action on their behalf, (1) retardation is immutable trait but govt. cand make decisions regarding benefits, legitimate decision-making institutions can take retardation into account, (2) progress is being made to fight discrimination, have gotten favorable treatment in legislatures lately, less reason for judicial concern; purpose is keeping people w/ certain undesirable characteristics out of local neighborhoods; record doesn’t show how characteristics of intended occupants rationally justify excluding mentally-retarded
but not others, issues of over- and under inclusiveness, can’t take one step at time in regulating groups
A) Stevens and Burger concur, fine with rationality test “properly understood,”
B) Marshall is afraid lower courts will miss the heightened rationality here and only apply traditional rationality test, extremely deferential, or courts could start taking rationality test too far and begin *Lochnerizing*, is good to have different levels.

c. **Homosexuality**
i. *Romer v. Evans* (1996), Amendment 2 to Colo. Const. rescinded, repealed, and prohibited any laws prohibiting discrimination based on sexual orientation; classification viewed as most people can go to any level of govt. to get laws changed but homosexuals and their advocates must to state constitutional level to get laws changed; rationality test applied; purpose of respect for freedom of association and liberties of landlords/employers to have religious/personal objections is legitimate; but not rationally related here, provision is over- and underinclusive, applies to only one trait, then applies across the board, govt. must remain open impartially to all citizens, there is possible covert purpose of pure animus, this is impermissible, can’t desire to harm a politically unpopular group.
A) Scalia dissents, only denial is that homosexuals can’t get special treatment, standard anti-discrimination laws still apply, state can preserve traditional sexual mores, state can prohibit homosexual conduct, should be able to prohibit special protection of homosexuals.

D. **Strict Scrutiny:** classification must be necessary (least restrictive means) to the achievement of a compelling governmental interest. Over- or underinclusiveness matters. Treat similarly all those persons/things that are similarly situated with respect to the purpose of the law. *Korematsu Test*
1. **Suspect Classifications Strand**
a. **Race**
i. *Lee v. Washington*, 1968, Alabama can’t separate prisoners on basis of race generally; but prisoners can be separated by race after race riot, generally not allowed, but here there is interest in maintaining order in prison, separation would be necessary to stop the riot.

    ii. *Loving v. Virginia* (1967), Virginia anti-miscegenation statute penalizes marriages between whites and non-whites (except descendants of Pocahontas), doesn’t penalize marriages between whites (or descendants of Pocahontas nor between non-whites; there is no legitimate purpose for the statute, purpose of maintaining white supremacy is invalid.
A) *Name v. Name* (1955), same statute, Vir. Sup. Ct. said purpose of maintaining white supremacy was valid, Court denied cert. b/c it was right after *Brown*.

    iii. *Brown v. Board of Education (Brown I)* (1954), classification is one school for white children, one school for black children; both have interest in receiving education; there is compelling govt. interest in providing an education; segregated schools are not necessary to providing education, they make black children feel inferior; “separate but equal” doctrine of *Plessy* overturned.
A) *Plessy v. Ferguson* (1896), classification is one rail car for whites, another for blacks; govt. has interest in maintaining public comfort and order; means are applying customs and usages of Louisiana people including segregation; if this makes blacks feel inferior it is only because they interpret it that way, 14th A. guarantees political equality, social equality must come from “natural affinities” of the two races.

    iv. *McLaurin v. Oklahoma State Regents* (1950), white students can sit in any part of lunchroom, black students only in one part; this impeded ability to have proper educational experience by interacting with classmates.
v. **Sweatt v. Painter** (1948), U. of Texas Law School for whites, another one hastily built for blacks; latter didn’t provide same educational opportunities at UT, inferior faculty, no alumni, small library, isolated from practitioners, etc.

vi. **Korematsu v. United States** (1944), upheld the exclusion and internment of Japanese-Americans during WWII; classifications based on race were “suspect” and faced “rigid [strict] scrutiny,” but there was compelling interest in national security, was necessary despite being over- and underinclusiveness (not all Japanese were spies, didn’t restrict German-Americans or Italian-Americans).

vii. **Missouri ex rel Gains v. Canada** (1938), whites can attend Mizzou Law School, state will pay for blacks to attend a different school; violates equal protection, MO must provide a separate but equal school within Missouri or let him attend Mizzou.

viii. **Strauder v. West Virginia** (1880), only whites could serve on jury, Court said purpose of 14th A. was to end discrimination based on color, law invalid.

b. **Benign Race-Based Classifications**

i. **Adarand Constructors, Inc. v. Pena** (1995), program provides financial incentives to federal contractors for hiring subcontractors certified as DBE (minority-owned), a race-based classification; strict scrutiny applies to both federal and state action using overt racial preferences, must be narrowly tailored measures that further compelling govt. interest (overturns Metro Broadcasting which applied intermediate scrutiny to federal programs w/ benign racial classifications), (isn’t clear what “narrow tailoring” test is but look to Croson and Metro Broadcasting dissent, only compelling interest is remedying effects of identified racial discrimination); case remanded.

   A) Majority was dissent in Metro Broadcasting plus Thomas.

   B) Scalia concurs, only compelling interest is remedying effects of individual discrimination.

   C) Stevens dissents, nonremedial actions may also be compelling interests, Congress has much more institutional competence than state legislatures or city councils.

   D) Thomas opposes all racial distinctions.

ii. **Metro Broadcasting, Inc. v. FCC** (1990), two minority preference policies involving enhancement in minority ownership of broadcast licenses and emergency sale of licenses to minorities; Brennan applied intermediate scrutiny, there is distinction between federal and state use of benign racial classifications based on Fullilove and Croson; upheld, strong deference to Congress.

   A) Dissent is majority in Adarson minus Thomas; apply strict scrutiny to federal and state programs, Fullilove was remedial program under 14th A. § 5, this is not; only recognized compelling interest is remedying effects of past (identified) racial discrimination; interest here is not compelling, too amorphous, and means are not narrowly tailored, rely on stereotypes.

iii. **Richmond v. J.A. Croson Co.** (1989), city of Richmond had set aside program for local subcontractors that mirrored Fullilove program, there was some evidence of discrimination and discriminatory effect in current system, but no finding of direct racial discrimination by the city or its prime contractors; apply strict scrutiny, there is fundamental difference between fed. power and state/local power, Congress gets power from 14th A. § 5, latter limited by § 1, not same situation as Fullilove; city can use racial preference spending to remedy identified racial discrimination in which it has been passive participant, strict scrutiny applies to all races, hard to tell difference between benign and invidious purposes, blacks are majority on city council so don’t need protection; 5 findings of the council are not specific enough to show prior purposeful racial discrimination, so no compelling interest, extreme disparate impact could show it but not enough info here, societal discrimination isn’t compelling interest (Wygant); not narrowly tailored, applies to Eskimos but they’ve never been discriminated against, overbroad, if remedial to blacks should be limited to blacks.
A) Stevens concurs, only courts should find identified prior discrimination and order remedial measures, not legislative bodies; this is overbroad, not all white contractors have discriminated, not all minority subcontractors have been victims.

B) Scalia concurs, must be specific identified discrimination.

C) Marshall dissents, doesn’t matter that majority of council is black, are minority in the state and the nation, numbers aren’t only indicator of need for protection, also history of unequal treatment.


A) Powell plurality, strict scrutiny, providing minority role models to overcome past societal discrimination is not compelling interest, there must be showing of identified prior discrimination; in any event means weren’t necessary either, hiring imposes diffuse burden while firing imposes burden on individuals, could have laid off equally while still focusing hiring efforts on minorities.

B) O’Connor concurred, agreed that providing minority role models and correcting societal discrimination are not compelling interest, but do not need finding of identified prior discrimination from a court or other body before instituting remedial program, this would undermine creation of such programs.

C) Marshall dissented, board made deal with teachers, they agreed.

D) Stevens dissented, minority role models are compelling interest.

v. Fullilove v. Klutznick (1980), requirement in congressional spending bill required 10% of federal funds granted for local public works projects must be used by state/local grantee to procure services from certain minority-controlled companies (blacks, Spanish-speakers, Orientals, Eskimos, and Aleuts);

A) Burger plurality, doesn’t matter if you apply strict or intermediate scrutiny from Bakke, in both cases Congress could determine that traditional procurement methods would perpetuate effects of prior discrimination, can remedy that, deference paid to Congress.

B) Powell concurred, applied strict scrutiny.

C) Marshall concurred, applied intermediate scrutiny.

D) Stewart dissented, all racial classifications are invidious and unconstitutional, unless justifiable as remedy for adequately proven past discrimination, not the case here.

E) Stevens dissented, Congress was sloppy at determing 10% figure, so not narrowly tailored, particular identification is important.

vi. Regents of Univ. of California v. Bakke (1978), UCD Med School admissions program reserved at least 16 slots for minorities. Agreement only that race may in some way be taken into account in admissions process.

A) Powell, strict scrutiny, problem with benign classifications is (1) not clear if preference is really benign (refers to UJO, Hasidic Jews case), (2) preferential programs may reinforce stereotypes, (3) measure of inequity in forcing innocent persons like Bakke to bear burden of redress of grievances not of his making; 4 purposes, (i) reducing minority deficit in med school and profession not valid purpose b/c is a blatant preference; (ii) there is no finding of societal discrimination so this can’t be purpose, if there was finding of identified discrimination it would be OK, but there’s not; (iii) no data that this will increase number of physicians serving underserved communities; BUT (iv) obtaining educational benefits from having diverse student body is compelling interest, “robust exchange of ideas,” but program not narrowly tailored, has a quota, suggests that Harvard program using individualized determinations taking race into account is good.
B) Brennan 4, intermediate scrutiny, problem with benign classifications is (1) may reinforce stereotypes, (2) there is some burden to nonminorities but no intent to burden them so its OK, no racially discriminatory purpose to make the effect illegal, (3) UCD program doesn’t stigmatize (Powell says this isn’t part of analysis); 4 purposes, (i) reducing minority deficit in med school and profession not valid purpose b/c is a blatant preference; (ii) there is no finding of societal discrimination so this can’t be purpose, if there was finding of identified discrimination it would be OK, but there’s not; purpose of remedying societal discrimination is sufficiently important if there is sound basis for concluding that minority underrepresentation is substantial and chronic and that handicap of past discrimination is impeding minority access to practice of medicine, state can adopt race-conscious program to remove disparate racial impact if it is caused by prior discrimination, there has been sufficient societal discrimination here; substantially related, Bakke won’t carry same stigma as minority, program is “not unreasonable,” so presumably its reasonable,

C) Stevens 4, didn’t discuss EPC b/c Calif. Sup. Ct. only decided issue on statutory grounds, Title VI of CRA of 1964.

c. Alienage


A) BLACK LETTER LAW: General rule is to apply strict scrutiny unless the "political function" exception applies, in which case the rationality test applies.

1) Political function exception applies to laws that exclude aliens from “positions intimately related to the process of democratic self-government.” Doesn’t apply to economic functions of govt.

2) Political function is determined by *Cabell* two prong test:

   a) Specificity of the classification: is it substantially over- or underinclusive? If so, undercuts governmental claim that classification serves legitimate political ends.

   b) If narrowly tailored as above, must also apply only to those who “perform functions that go to the heart of representative govt.”

B) Notaries public don’t perform functions that go to heart of rep. govt., no discretionary power, no influence on public policy, only ministerial/clerical tasks, so no political function exception (skips first part of test, but may be underinclusive too, no court reporters or secretaries included); strict scrutiny applies, struck down.

ii. *Cabell* (1983), Spanish-speaking probation officer executes public policy, political function exception applies, rationality review.

iii. *Ambach v. Norwick* (1979), public school teachers limited to citizens; political function exception applies, teachers have lots of discretionary power and influence; rationality test; purpose of education is preparing students to participate as citizens; classification is rationally related.

iv. *Foley v. Connellie* (1978), NY state troopers limited to citizens; political function exception applies, troopers have broad discretionary powers, exercise constitutional powers of govt.; rationality test; NY had purpose of preserving basic conception of political community, citizens protecting each other, avoiding depreciation of citizenship; classification is rationally related.

A) Marshall dissents, policemen have little discretion, they enforce laws made by legislature, like trash collectors have little discretion, they pick up trash.

v. *In re Griffiths* (1973) (companion to *Dougall*), only citizens could be members of the bar; political function exception didn’t apply; strict scrutiny applied; interests in
high professional standards is substantial but not compelling, neither are role in protecting client’s interest, officers of court); classification not necessary.

A) Rehnquist dissents to Griffiths and Dougall, suspect classifications limited to race due to historical warrant, there are differences in Const. between citizens and aliens, 14th A. § 1 defines citizenship, uses “persons” at some points and “citizens” at others, can make anyone a “discrete and insular minority” so discounts that, alienage is not immutable, you can become a citizen.

vi. Sugarman v. Dougall (1973), NY law said only citizens could have certain permanent positions within competitive civil service; strict scrutiny applied; compelling purpose was needing undivided loyalty, reserving scarce resources (govt. jobs) for citizens, and having stable group of civil servants within state; but not necessary because both over- and underinclusive, not all high-level jobs included, but many typing or trash collecting jobs were, aliens pay taxes just like citizens, and many state employees commute from nearby states while not all aliens will be deported; Political Function exception is created though, for matters firmly within state’s constitutional prerogative, state can discriminate to preserve basic conception of a political community, ex. qualifications of voters or elected officials, direct participation in formulation, execution, or review of broad public policy.

vii. Graham v. Richardson (1971), all citizens eligible for welfare benefits, but LPRs only if they’ve been here 15 years; since aliens can’t vote for at least 5 years (until they can naturalize), they are “discrete and insular minority,” historically discriminated against, therefore strict scrutiny applies; purpose of limiting distribution of scarce resources to citizens is not compelling b/c aliens pay taxes too, also Congress has power to create naturalization standards and Supremacy Clause operates.

2. Fundamental Interest Strand

a. Classification affects a fundamental interest, ex. Redhale, interest in getting married is fundamental, classification is between rich and poor (afford to make child support payments or not), overlaps with due process, also voting, access to ballot as a candidate, access to court as litigant, interstate movement.

E. Intermediate Scrutiny: classification must have an exceedingly persuasive justification and be substantially related to an important governmental interest. Burden is on state. Only look at actual/genuine purposes. Can’t rely on overbroad generalizations about different talents, capacities, or preferences of males or females. VMI Test (based on Craig and Hogan).

1. Suspect Classifications

a. Sex/Gender

i. United States v. Virginia (The VMI Case) (1996), Ginsburg, test is laid out exactly as above; classification is men can attend VMI, women must attend VWIL; there is important govt. interest in providing single-sex education benefits and in using adversative method for character development and leadership training; classification is not substantially related, men and women are similarly situated b/c both can take advantage of both benefits, but VWIL is not equivalent of VMI.

A) Rehnquist concurs, doesn’t like addition of “exceedingly persuasive” language, that is supposed to be alternative, not addition, but does not like the actual purposes requirement.

B) Scalia dissents, doesn’t like “exceedingly persuasive” language, only Craig should apply, but he’d prefer rationality; classification is substantially related to important govt. interest.

C) At least 7.5 justices agree with Craig.

ii. J.E.B. v. Alabama ex rel T.B. (1994), preemptory challenges on basis of sex are disallowed; preemptory challenges serve important govt. purpose, strike jurors that you think aren’t impartial; but striking based on sex is not substantially related to impartiality b/c it is based on invidious and archaic stereotypes of men and women,
nothing indicates that gender is an accurate predictor for juror’s attitudes, only
reinforces stereotypes condemned by law, there are better proxies.
A) This is easy to get around.
B) Scalia dissents, preemptory challenges existed for 120 years with EPC and
no problems, both sides struck the opposite sex, both had positive opposing views.

iii. Mississippi University for Women v. Hogan (1982), female-only nursing school
(all others in state were coed), he wanted to attend one in town; same standard
applies no matter which sex is discriminated against; classification must be
substantially related to important govt. interest (Craig) OR state must have
“exceedingly persuasive justification” for classification; look at actual purpose;
important govt. interest is benign compensation for past discrimination; this may be
OK under some circumstances, but not substantially related here because this
reinforces stereotypes in professions, nurses are stereotypically women.
A) Powell dissents, purpose was providing women w/ traditionally popular and
respected choice of educational environment.

iv. Rostker v. Goldberg (1981), men must register for draft but not women; Craig
test applied; purpose of registration is to prepare for draft of combat troops, an
important govt. interest; means are substantially related b/c only men can be combat
troops, so men and women aren’t similarly situated, this isn’t challenged.
A) Marshall dissents, in draft of 650K, there are 80K noncombat positions, men
and women are similarly situated towards them, administrative convenience
in not registering women for them is not acceptable end, can register women
and not conscript them.

v. Michael M. v. Superior Court (1981), statutory rape law punished men of any age
who had sex with female under 18, didn’t punish women of any age who had sex
with male under 18.
A) Rehnquist plurality, rationality test b/c no invidious discrimination, purpose
is to prevent illegitimate teenage pregnancies, harms females more, protect
from injury or loss of chastity, promote morality; means rationally related,
women are punished by nature, but men need state punishment, gender-
neutral statute may discourage females from reporting.
B) Blackmun upheld based on Reed and Craig.
C) Brennan said state can’t show substantial relationship to preventing teenage
pregnancies b/c when statute was passed, that wasn’t its purpose, then
purpose was based on outmoded stereotypes
D) Stevens says males could report females that violate, agrees that women
suffer greater harm from act in question, that is more reason to apply statute,
not less.

vi. Orr v. Orr (1979), Alabama law made men pay alimony after divorce, but not
women; sex-based classification, Craig test; purpose of reinforcing model of wife
playing dependent role in family is impermissible, reinforces stereotypes, but
purposes of providing help for needy spouses and rectifying past discrimination and
helping spouse find work were important; but law is not substantially related to either
b/c there is already individualized hearing (divorce proceeding) to determine actual
need of both spouses, so no need for a proxy.

vii. Parham v. Hughes (1979), Georgia law said mothers of illegitimate children can
sue for the child’s death, but fathers can’t unless they’ve legitimatized the child;
classification is between fathers who have legitimatized their children and those who
haven’t, not sex-based; rationality test applies; legitimate purpose is preventing
absent fathers from cashing in; this is rationally related, much harder for women to
make false claim.

viii. Caban v. Mohammed (1979), mothers of illegitimate children (born out of
wedlock) can block adoption by withholding consent, but fathers must show that
adoption is not in best interests of the child; overt sex-based classification; promoting adoption is important govt. purpose; means not substantially related b/c based on overbroad generalizations of nature of maternal and paternal relationships.

A) Stevens dissents, there is a difference between maternal and paternal relationships, is substantially related.

B) Stewart dissents, mothers and fathers not similarly situated.

ix. Califano v. Goldfarb (1977) (similar to Weinberger), widow-recipient gets federal benefits automatically, but widower-recipient must show dependency on deceased wife for 1/2 income; classification viewed as dead men’s beneficiaries get more benefits than dead women’s; purpose is providing benefits to survivors; not related b/c based on stereotypes.

A) Dissent wanted heightened scrutiny only for invidious discrimination against women, here it was benign, didn’t disadvantage women, women in past had been victims of unequal treatment.

x. Craig v. Boren (1976), classification is women 18-20 can buy 3.2% beer, men 18-20 can’t buy 3.2% beer; must have important govt. objectives and be substantially related to achievement of those objectives, not just legitimate and rationally related, not compelling and necessary either; purpose was traffic safety and reducing drunk driving, is important; but not substantially related, statistically young men make up tiny fraction of all people pulled over for drunk driving, so do young women (2% and .18% respectively of total), gender being used as proxy for more germane bases of classification, is archaic, overbroad, inaccurate.

A) Rehnquist says important govt. interest part is brand new, although Royster Guano said “fair and substantial relation,” also sees significance in statistics.

xi. Weinberger v. Wiesenfeld (1975), benefits paid based on earnings of deceased male go to widow and children, but benefits paid based on earnings of deceased female go only to children; standard unclear; state said benign purpose of remedying past discrimination and helping women provide, but Brennan reformulated, to provide children deprived of one parent w/ opportunity to receive at home supervision and care of other parent; classification based on stereotypes that women stay home and men work, impermissible.

A) Can also be read as female wage-earners getting less protection for survivors than male wage-earners, purpose is providing for survivors, not related b/c discriminates against women based on stereotypes.

xii. Kahn v. Shevin (1974), state property tax exemption for widows, not widowers; apply rationality test; cushioning financial burden on women after husband’s death is legitimate govt. purpose, also rectify past discrimination; rationally related b/c women have harder time finding jobs.

A) Brennan and Marshall apply strict scrutiny, purpose is compelling, but not necessary b/c a narrower program would work, actual income test, this is overinclusive.

xiii. Geduldig v. Aiello (1974), Calif. disability insurance program didn’t pay for only a couple things including normal pregnancy (but would pay if miscarriage, etc.); classification is between pregnant women and all non-pregnant persons, not overt sex-based; apply rationality test; end is fiscal integrity; means are rationally related, keeps costs down, pays for what it does cover completely, underinclusive but can be expanded later.

A) Brennan dissents, female-only scenario is not covered, male only scenarios (prostate removal, circumcision, hemophilia, gout) are, is overt sex-based classification; applies Frontiero strict scrutiny; still problems b/c must show intentional sex-based classification, here abnormal pregnancies are covered.

xiv. Frontiero v. Richardson (1973), spouses of male soldiers automatically get dependency allowance, but spouses of female soldiers must in fact be dependent on female for +50% of joint income.
A) 4 justices apply strict scrutiny, make note of Reed’s departure from traditional rationality, long history of sex discrimination, like race, sex is immutable characteristic, like race, women lack political power, like blacks, characteristic at issue here has little to do with contribution to society; purpose here is administrative convenience and cost-saving, this is impermissible, not compelling; not necessary either, is over- and underinclusive.

B) 3 justices apply rationality review under Reed, administrative convenience isn’t rationally related to classification of men v. women.

xv. Reed v. Reed (1971), Iowa law said if son dies intestate, either father or mother could administer the estate, but if both apply, automatically goes to father; rationality review applied; purpose is administrative convenience, eliminate petty disputes, is legitimate; but classification of men v. women is not rationally related, this is type of arbitrary legislative choice that equal protection prohibits.

A) Seems rationally related though. Ups the ante.

xvi. Goesaert v. Cleary (1948), Michigan law prohibits women from having bartender’s license unless they are daughter or wife of bar owner; classification is women who are daughters/wives of bar owners v. all other women, not sex-based classification; law has legitimate purpose (protecting women?); is rationally related (because safer in their father’s/husband’s bar?)

A) Dissent sees sex-based classification, but benign end is legitimate, can protect women from bad things, but this isn’t rationally related.

xvii. Royster Guano (1920), fair and substantial relation is required.

b. Illegitimacy

i. Clark v. Jeter (1988), statute of limitations prevented claims for support of nonmarital children after 6 years; intermediate scrutiny applies, classification must be substantially related to important govt. interests; preventing stale or fraudulent claims may be important govt. interest; but classification is not substantially related.

A) Standards have been very inconsistent.

ii. Levy v. Louisiana (1968), 3 classes of children, (1) legitimate children, (2) acknowledged illegitimate children (are now in fact legitimated by marriage of parents), and (3) unacknowledged illegitimate children, the latter couldn’t sue to recover for wrongful death of their mother, struck down on some heightened rationality standard.

F. Disparate Impact or Effect

1. BLACK LETTER LAW: (Washington-Arlington Heights Test)

a. An overtly race-neutral law that (a) is discriminatory in its administration, (b) was adopted with a racially-discriminatory motive, purpose, or intent, or (c) has a racially disproportionate effect.

b. Plaintiff must show that “a discriminatory purpose has been a motivating factor in the decision,” though not the sole factor, and then burden shifts to defendant to show that the same decision would have been made even without the discriminatory purpose.

c. Factors to consider in showing discriminatory purpose include:

i. impact of the official action (clear pattern unexplainable on grounds other than race);

ii. historical background of the decision;

iii. specific sequence of events leading up to challenged decision;

iv. departure from normal procedures;

v. substantive departures from usual factors, especially if factor in question would usually lead to different result;

vi. legislative or administrative history; and

vii. testimony of actual legislators as to why they voted how they did (weak factor).
d. In reality, must show that discriminatory purpose was the sole factor in the decision since defendant can negative everything else out.

2. **Hunter v. Underwood** (1985), 1901 Ala. law disenfranchised persons convicted of crime involving moral turpitude; no overt racial classification; now law had effect of disenfranchising 1.7 times as many blacks as whites despite blacks being the minority in population, historically 10 times as many blacks as whites disenfranchised, 1901 constitutional convention had rampant white supremacy, they designated crimes they though blacks committed as one involving moral turpitude; law is struck down.
   a. Theoretically current legislature could reenact law, no racial hostility rampant now, only want to prevent felons from voting.
   b. Also Court had concerns regarding fundamental interest in voting.

3. **Crawford v. Los Angeles Board of Education** (1982), state courts interpreted state EPC to prohibit both *de jure* and *de facto* segregation in schools, ordered a busing program, no findings of discriminatory intent, Proposition 1 passed, said that state court can’t order a busing plan unless it is to remedy a specific violation of EPC of 14th A. and a federal court would be able order the same remedy; claim was creation of dual court system, state EPC claims regarding busing decided under federal standard, all other state EPC claims decided under state standard; Court upheld statute, can’t be violation of 14th A. to order state courts to follow 14th A., not same as repeal in Hunter because state EPC still required more in general than 14th A.

4. **Washington v. Seattle School District** (1982), school instituted mandatory busing program to combat *de facto* racial segregation in its schools, very successful and burdens born by all races, then Initiative 350 said no school board could directly or indirectly require students to attend school outside their neighborhood; classification is those that want to make decisions on pupil assignment based on race must use statewide political process, all others can use local political process; there is evidence of discriminatory purpose, initiative proposed because of its effect on race-conscious busing decisions, indicates purpose of segregation, is impermissible.
   a. Dissent sees purpose as “fairly educating all children in a multiracial society,” state can do that however it wants, can prescribe local school board powers, so can limit them too, as result of this decision, state can’t override local school board decisions.

5. **Rogers v. Lodge** (1982), Burke Co., Georgia had County Commission made of 5 commissioners elected at large from the entire county since 1911, 52% white voter, 48% black voters, but never elected a black commissioner, claim that state maintained this system to dilute voting power of blacks; no overt classification here; critical fact is that no black has ever been elected, need more, has had adverse effect on black voter registration, on participation in Democratic party, discrimination in public services has resulted (less trash pickup for black areas); Court strikes down system, orders new 5 district system created.
   a. All the evidence is effect-related, nothing directly shows intent of legislators.
   b. Remedy could be drawn in way that still dilutes black voting power.
   c. Stevens dissents, acknowledges that some legislators did have subjective intent to discriminate and still do, but Court should look to more objective factors like shape of district, this is a political decision.

6. **Personnel Administrator of Massachusetts v. Feeney** (1979), veterans in state civil service get absolute lifetime preference over nonveterans, 98.2% of veterans are men, 1.8% are women; not sex-based classification, is veterans v. nonveterans; therefore twofold inquiry: (1) whether statutory classification is neutral in that it’s not overtly or covertly based on gender discrimination and (2) whether adverse impact reflects invidious discrimination (Stevens correctly points out that THIS IS SAME THING); “discriminatory purpose” implies that legislature acted because of, not merely in spite of, foreseeable consequences adversely affecting women, awareness is not enough, 1.8M men and 2.9M women are nonveterans, so legislature wasn’t trying to harm women exclusively.
   a. Marshall dissents, test is whether illicit consideration had an appreciable role in shaping legislature enactment, gives much more weight to foreseeable consequences, also points out that until 1971, preference didn’t apply to “jobs especially calling for women,” so preference only applied to traditionally male jobs, shows sex-based discrimination, treats this as overt sex-based discrimination, applies *Craig*. 

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7. Arlington Heights v. Metropolitan Housing Corp. (1977), wealthy Chicago suburb refused to rezone land from single-dwelling homes to multiple-dwelling buildings so developer could build federally subsidized housing for low and middle income residents, including minorities; Court applied above test based on Washington; plaintiffs had not shown any racially-discriminatory motive; furthermore zone had long been designated for single-family homes, nothing unusual about the process.

8. Washington v. Davis (1976), 4 times as many blacks as whites failed the civil service entry test (Test 21) to become DC police officers; Court required showing of discriminatory intent or motive; none here, test served a rational purpose, legitimate interest in literate police force, strong efforts to recruit blacks negated notion of invidious purpose, people who don’t pass aren’t similarly situated as those who do with respect to interest in having literate police force; adopting plain discriminatory effects/impact test leads to slippery slope, all kinds of decisions have adverse consequences for some.
   a. Stevens concurs, is common law that people generally intend the natural and foreseeable consequences of their actions, give more weight to discriminatory effect/impact, very difficult to show actual discriminatory purpose or motive, but here test is valid.


11. Gomillion v. Lightfoot (1960), Alabama redefined boundaries of Tuskegee from square to 28-sided shape that excluded all but 5 black voters, held impermissible.

12. Yick Wo v. Hopkins (1886), San Francisco ordinance prohibited laundry operations in non-brick/stone buildings, could get permit for wood buildings, 79/80 permits granted went to whites, all 200 Chinese applicants denied; only possible explanation for discriminatory effect is purpose to deprive Chinese of ability to operate laundry, racial hostility is impermissible purpose for law.