CONSTITUTIONAL LAW II OUTLINE

I. DUE PROCESS

A. The Pre-Civil War Situation: Before the Civil War, the guarantees of the Bill of Rights applied to the federal government. Essentially, only the federal government was limited to respect those individual liberties. There was very little concern and few references in the Original Constitution for individual liberties, the document focused mostly on governmental structure (some exceptions like Art I, § 10 and bills of attainder; Art. 1 § 9 and writs of habeas corpus; Art. 4 § 2 and privileges and immunities). The Bill of Rights responded to the demand to address concerns over individual liberties, but only concerned the national government.

*Barron v. Mayor and City of Baltimore* [1833]: Baltimore diverted stream, wharf owner sued city for ruining his wharf and costing him $45,000 without Fifth Amendment just compensation – a due process claim.

*Marshall Held:*  
1) The Bill of Rights restricted only the national government and did not limit state authority. Federal government would have to give just compensation to wharf owner, but Maryland or Baltimore would not. “These Amendments demanded security against the apprehended encroachments of the general government – not against the local governments.” The Constitution grants power, and limits power. No one had been concerned about state power when writing Constitution.

2) Barron should seek recourse through the political process. Or he should seek protection through Maryland’s state constitution. He’s wealthy, enfranchised.

B. The Post-Civil War Reconstruction Amendments: The fundamental question concerns whether the scope of constitutional guarantees in the Bill of Rights is applicable to the states via the Fourteenth Amendment. This was the first time the states were constrained, sparking the incorporation controversy – the focus of the initial debate over the Fourteenth Amendment. After the Civil War, however, the question turned to the appropriate degree of enforcement by the states. To what extent were the Bill of Rights guarantees of individual liberties to be incorporated by the Fourteenth Amendment as applicable to the states?

*The Thirteenth Amendment* [1865]  
§ 1: Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.  
§ 2: Congress shall have the power to enforce …

*The Fourteenth Amendment* [1868]  
§ 1: All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.  
§ 2: Representatives shall be apportioned…  
§ 3: No person shall be a Senator or Representative…who shall have engaged in insurrection…  
§ 4: The validity of the public debt …  
§ 5: The Congress shall have the power to enforce …

*The Fifteenth Amendment* [1870]  
§ 1: The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude.  
§ 2: The Congress shall have the power to enforce …
C. The (Early) Narrow Reading of the Reconstruction Amendments: The Court first interpreted the Amendments narrowly.

_The Slaughter-House Cases_ [1873]: A Louisiana law gave a monopoly on butcher facilities to the Crescent City Live-Stock and Slaughter-House company. Butchers who were excluded from the monopoly claimed the law deprived them of the liberty “to exercise their trade.” The claimed: (1) 13th Amendment challenge with involuntary servitude; and (3) 14th Amendment challenges: (1) that privileges and immunities were abridged, 2) the denial of equal protection, and 3) that they were deprived of property without due process by Louisiana.

**Miller Held:**
1) The purpose of the Reconstruction Amendments limited to former slaves and such situations. The purpose of the 13th Amendment was to end African slavery. The purpose of the 14th Amendment was “more in the way of constitutional protection to the unfortunate race who had suffered so much.” Overturns _Dred Scott_ [1857] because Scott would now be considered citizen, so slave could not bring suit, essentially. Holding in Scott had been jurisdictional, not on merits. 15th Amendment was suffrage.

2) The purpose of the Reconstruction Amendments was not to extend to all states restrictions on individual liberties of all people – that would “radically change the whole theory of the relations of the State and Federal government.”
   a) Privileges and Immunities: Very historically-oriented interpretation. Miller has two-tiered focus: there are national privileges and immunities and state privileges and immunities. Miller misquotes Constitution to make this point. Relies on _Corfield v. Coryell_ [1823] where state could restrict shell fishing in NJ to NJ residents. Miller wants to argue two-tiered focus and plaintiffs are arguing for privileges and immunities that are not national (versus right to trial, right to petition Congress, right to vote in national office, protection against violence when in custody of US Marshals, right to inform government of violations). Miller also misquotes _Corfield_ where Justice Washington had said there were basic rights by all. Miller afraid of growth of a big national government and that citizens will use 14th Amendment to as a perpetual censor to state laws.

   b) Due Process: Butchers argue substantive due process claim. Miller, though, argues that “under no construction” has that liberty interest has never been recognized.

   c) Equal Protection: The Amendments only apply to former slaves.

**Field Dissenting:**
1) ***

2) It would have been a “vain and idle enactment” if the Amendments did not afford protection to individuals from encroachment of “natural and inalienable rights which belong to all citizens” by states. Broad interpretation of liberty is needed.

**Bradley Dissenting:**
1) Purpose not just restricted to “African race” but “embrac[es] all citizens.”

2) The purpose is the celebration of federal powers. The purpose behind the Reconstruction Amendments was the fundamental re-allocation of power from the states to the federal government. The butchers’ job is a claim of a substantive right to be protected by 14th Amendment, even though it’s not procedural fairness. The job is part of property. It is a substantive right.
D. Procedural Due Process (Generally): In addition to substantive due process, due process law also, obviously, concerns procedural questions. The Court has two basic approaches concerning due process in state criminal proceedings:

1) **Fundamental Fairness**: According to the Fundamental Fairness Doctrine, the Court need look at the whole trial process, including the investigation.

   *Adamson v. California* [1947]: Adamson claimed murder conviction violated 14th Amendment because he did not take stand and then prosecution used that to help convict.

   *Frankfurter Dissenting*: “Judicial review imposes upon this Court an exercise of judgment upon the whole course of the proceeding in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.”

   *Black Dissenting*: Black wants the total incorporation of the Bill of Rights into the 14th Amendment. The state’s criminal trial would not be fundamentally fair if the defendant did not get a speedy trial. Overtime Black’s position is honored, with exceptions.

2) **Selective Incorporation/Almost Total Incorporation**: This is used today. The advantage is that it gives a specific item to be pointed to. Easier to argue, perhaps. Gives Court more warrant to intervene and this approach is less subjective. *Schmerber v. California* [1966].

E. Substantive Due Process (Generally): Substantive due process has grown to become the protection of “substantive” rights. Some consider this a contradiction in terms. These are unwritten, generally unenumerated individual rights and liberties that are protected from governmental interference. Basically, the government cannot interfere with these unexpressed rights. Though the Court has since rejected substantive due process for economic liberties, it has enforced substantive due process to protect non-economic liberties. Some consider this a double standard to protect some interests over others. Early treatment of the idea of substantive due process believed that natural law was inherent in the document.

   *Calder v. Bull* [1798]: *Chase Held*: “I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control; although its authority should not be expressly restrained by the Constitution, or fundamental law, of the State.” “There are certain vital principles in our free Republican governments, which will … over-rule an apparent and flagrant abuse of legislative power.” Chase argued that fundamental natural law principles were part of the Constitution, even though the principles were unexpressed.

F. Substantive Due Process as a Protection of Economic Liberties: Substantive due process protection of economic interests has come and gone. For the first third of the Twentieth Century the Court struck down nearly 200 statues.

1) **The Rise of Substantive Due Process as a Protection of Economic Liberties**: Economic theory and social theory played in role in the using substantive due process to undermine and reject regulations of economic activity.

   *Santa Clara County v. Southern Pacific* [1886]: *Held*: Corporations were considered “persons” within the meaning of the 14th Amendment.

   *Allgeyer v. Louisiana* [1897]: Louisiana law prohibited insurance on Louisiana property by any insurance company that had not complied with Louisiana law. Allgeyer used company that had not complied with Louisiana law. *Peckham Held*: Liberty interest: “liberty of contract.” This description of liberty bore great significance on later development of substantive due process. However, what was Court’s warrant?
**Lochner v. New York** [1905]: New York law prohibited bakery employees from working more than 10 hours a day or 60 days per week. Lochner was convicted for permitting an employee in his bakery to work beyond the 10 hour, 60 day maximum. Statute was: a) a labor law; b) health law. Court struck down statute.

**Peckham Held:**
1) Liberty Interest: The interest is the liberty of contract. Peckham’s focus is on the employee’s interest. “The general right to make a contract in relation to his business is part of the liberty of the individual protected by the 14th Amendment.” The employee’s contract is “necessary for the support of himself and his family.”

2) States’ Ends: the Police Power: a) Health: These are legitimate ends and there can be a fair and appropriate exercise of the police power to preserve health, safety or public morals and thus limit the liberty of contract; b) Labor: These are not legitimate ends. Bakers don’t need the protective arm of the state.

3) Means-Ends Relationship: a) Health law: Minimum Rationality: State means of limiting hours of bakers is not directly related to the appropriate state ends of the health of bakers. The law could achieve the health ends if there were “some fair ground, reasonable in and of itself, to say that there is material danger to [health].” “This is not a question of substituting the judgment of the court for that of the legislature.” (Regardless, Peckham uses a higher standard than minimum rationality/mere rationality/mere reasonableness) b) Labor law: not legitimate ends anyway.

**Harlan Dissenting:**
1) Liberty Interest: “There is a liberty of contract…”

2) States’ Ends: There are also “reasonable police regulations.”

3) Means-Ends Relationship: a) Health law: Minimum Rationality: “I find it impossible … to say that there is here no real or substantial relation between the means employed … and the ends.” The means do achieve the ends. b) ***

**Holmes Dissenting:**
1) Liberty Interest: “decisions cutting down the liberty to contract…are familiar to this court”; “A constitution is not intended to embody a particular economic theory”; “The word liberty in the 14th Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion.” The Court is putting in an economic theory of capitalism and is thus reading into the Constitution: “This case is decided upon an economic theory which a large part of the country does not entertain.” (Problems with **Lochner**: “Liberty” is read too expansively; Court has no warrant to read this liberty into Constitution).


3) Mean-Ends Relationship: a) Health law: “A reasonable man might think it a proper measure on the score of health.” b) Labor law: Reasonable. (Problem with **Lochner**: Court applies too strict a standard of review).

**Adair v. United States** [1908]: Federal law prohibited “yellow dog contracts” (contract between ER and EE whereby EE agrees not to join union). **Harlan Held** (Even though Dissenter in **Lochner**): Law infringes on ER and EE liberty of contract. Thus ER could require EE not to join union at part of contract, EE could refuse as part of contract.
**Coppage v. Kansas** [1915]: Kansas law prohibited “yellow dog contracts” (contract between ER and EE whereby EE agrees not to join union). Court struck down law.

*Pitney Held:*
1) Liberty Interest: “Included in the right of personal liberty and the right of private property [is] the right to make contracts.” Thus right to contract is part of liberty and property.

2) States’ Ends: Public good, perhaps, but it is not a legitimate end to limit the liberty of contract.

3) Means-Ends Relationship: Interference not reasonable exercise of police power.

*Holmes Dissenting:*
1) Liberty Interest: ***

2) States’ Ends: ***

3) Means-Ends Relationship: Only way EE can get fair contract if he’s in union.

**Muller v. Oregon** [1908]: (One of the rare post-*Lochner* statutes upheld). Oregon law prohibited females from working in a factory or laundry for more than ten hours during the day. Though Court struck down nearly 200 laws on substantive due process grounds after *Lochner*, however, it upheld the Oregon law. Thus women did not have a liberty interest to work than ten hours a day. (Versus *Lochner* where the bakers could have liberty of contract to work more than ten hours a day). Notably because it applied to women’s liberty to contract, not men’s.

*Brewer Held:*
1) Liberty Interest: Women’s Liberty of contract to work many hours, however, it “is not absolute” thus statute is fine.

**Bunting v. Oregon** [1917]: (One of the rare post-*Lochner* statutes upheld). Oregon law required overtime wages after ten hours and prohibited employees from working more than thirteen hours in a day. Court, strangely did not mention *Lochner*, upheld law.

**Adkins v. Children’s Hospital** [1923]: D.C. law required minimum wages for women. Court struck down the D.C. law. Thus women would not be paid minimum wages. Like *Muller*, statute likely considered in light of its application to women, not men.

*Sutherland Held:
1) Liberty Interest: a) Liberty of contract should not be subjected to greater restriction for women than for men. b) Women now have 19th Amendment to protect their liberty.

2) States’ Ends: “Naked, arbitrary exercise of government power.” And law focuses on wages, not hours, thus Capitalist Court doesn’t like at all.

3) Means-Ends Relationship: ***

*Holmes Dissenting:*
1) Liberty Interest: It makes no sense to say that women don’t have a liberty interest to contract to work more than ten hours a day (*Muller*) but they do have a liberty interest to contract for wages.
2) The Decline of Substantive Due Process as a Protection for Economic Liberties: To have gotten around *Lochner* would have required a change on the Court or Amendments to the Constitution. Only four amendments have overturned Supreme Court decisions, however. The New Deal also fought back *Lochner*. Regardless of composition, Court hates to *Lochnerize*.

*Nebia v. New York* [1934]: The first challenge to *Lochner* was *Nebia*. New York started a Milk Control Board that fixed a minimum price of $0.09/quart of milk. Nebia sold milk at $0.065/quart of milk. Nebia was convicted but claimed it was part of his “liberty of contract” to sell the milk at whatever price. Statute upheld.

**Roberts Held:**
1) Liberty Interest: “The due process clause makes no mention of sales or of prices any more than is speaks of business or contracts or buildings or other incidents of property.”

2) States’ Ends/Policy/Purpose: Health and Labor: Sustain the dairy industry so that there’s a safe supply of milk. “Milk is an essential item of diet.” “A state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare…”

3) Means-Ends Relationship: The means would not be justified if they were “arbitrary, discriminatory or demonstrably irrelevant.” “The guaranty of due process demands that the means selected shall have a real and substantial relation to the object sought to be attained.” The means, price regulation, achieves the states’ ends (versus *Lochner* where health was less evident and *Nebbia* Court is far more deferential).

**McReynolds Dissenting:**
1) Liberty Interest: The “little grocer” has a liberty interest to “conduct his business;” and the consumers have a liberty interest in “buying a necessity of life.”

2) States’ Ends: The purpose is to promote public welfare.

3) Means-Ends Relationship: Increasing prices does not have a reasonable relation to promoting the public welfare (something within legislative power). There is no evidence this will help public welfare.

*West Coast Hotel Co. v. Parish* [1937]: Washington statute required minimum wage for women. Opponents argued it violated their freedom of contract with women. Court upheld statute and overruled *Adkins*.

**Hughes Held:**
1) Liberty Interest: “Constitution does not speak of freedom of contract…speaks of liberty and prohibits the deprivation of liberty without due process of law.” “Regulation…reasonable in relation to its subject…is due process.” Broader view of liberty than in *Allgeyer* and *Lochner*.

2) States’ Ends: Ends are within the Police Power. The ends are protecting the health of women, helping women in their bargaining power, ending the “sweating system,” ending the exploitation of women, preventing the community from having to support women.

3) Means-Ends Relationship: Means are not “arbitrary or capricious” to ends.
3) **Extreme Deference to Regulations of Economic Liberties**: After the New Deal transition, the Court became what it is today, far less likely to judicially intervene and extremely deferential towards regulations of economic liberties. Roberts’ decision to join the majority in *West Coast Hotel* was the “switch in time that saved the Nine” from Roosevelt’s Court-packing scheme. Substantive due process has not defeated an economic/business/commercial regulation since 1937.

*U.S. v. Carolene Products* [1938]: Federal statute, the Filled Milk Act, prohibited the interstate shipment of “filled milk” – skimmed milk mixed with non-milk fats. Filled-milkers challenged statute. Court upheld the statute.

*Stone Held*:  
1) Liberty Interest: There is no due process protection of economic rights. But in Footnote 4: the Court has justification to intervene if:  
   1) The Court needs to protect one of the first ten Amendments. (However, most Bill of Rights do not concern procedure);  
   2) The Court needs to consider “legislation which restricts the political processes.” Court will defer to legislative process unless there’s a defect in the process. If it can’t be trusted Court should get involved;  
   3) The Court must consider whether there is prejudice against “discrete and insular minorities” that could not have protected themselves in the political process. *Rehnquist*, however, believes any clever lawyer could find discrete and insular minorities to attack a statute.

2) States’ Ends: a) health because filled milk not as healthy as pure milk, undernourishment occurs; b) prevent fraudulent sales of real milk.

3) Means-Ends Relationship: Rational Basis Review: There is a rational basis that the statute achieves the ends. “The existence of facts supporting the legislative judgment is to be presumed”; “Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry.” Statute is constitutional unless proven that there is no rational basis.

*Olsen v. Nebraska* [1941]: Statute fixed maximum employment agency fees. Court upheld statute. *Douglas Held*: 1) Challengers are trying to get the Court to read things into the Constitution; 2) ***; 3) Mean-Ends Relationship: Minimum Rationality Review.


*Williamson v. Lee Optical* [1955]: Oklahoma statute prohibited opticians from fitting eyeglasses – old or new – without a prescription from an ophthalmologist (a duly licensed physician) or an optometrist (eye examiner, but not physician). Opticians challenged.

*Douglas Held*:  
1) Liberty Interest: ***

2) States’ Ends: 1) public health; 2) eyecare.

3) Means-Ends Relationship: Rational Relationship Standard: Minimum Rationality Test: “The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction…and it might be thought …the legislative measure was a rational way to correct it.” Thus there must be some conceivable basis on which the statute is rational related to the ends.
Ferguson v. Skrupa [1963]: Kansas statute prohibited anyone from engaging “in the business of debt adjustment” unless as part of the practice of law. Court upheld statute. Black Held: “We refuse to sit as a super legislature to weigh the wisdom of legislation.” Harlan Concurring: Focus still on Rational Relationship Standard/Minimum Rationality Test of Williamson: 1) Is there a legitimate ends; 2) Are the means rationally related to the ends?

G. The Takings Clause as a Protection of Economic Liberties: The Takings Clause also protects economic liberties and property. Though more of a property issue, there are constitutional requirements: 1) the private property taken by eminent domain must be taken for public use; 2) there must be just compensation. The Fifth Amendment is incorporated into the Fourteenth Amendment.

The Fifth Amendment [1791]
…Nor shall private property be taken for public use without just compensation.

1) Public Use Requirement and Judicial Deference: There is little inquiry into the reason behind a taking. There is tremendous Court deference to “public use.”

Berman v. Parker [1954]: Douglas Held: “The role of the judiciary in determining whether [the eminent domain] power is being exercised for a public purpose is an extremely narrow one.”

Hawaii Housing Authority v. Midkiff [1984]: Hawaii statute taking land from oligopoly then selling to tenants living on land. Statute upheld. O'Connor Held: “When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings [are] not to be carried out in the federal courts.”

2) Historic Treatment of Regulatory Takings and Just Compensation: The critical inquiry of the Takings Clause is when just compensation is required. Penn Central Brennan Held: There is no “set formula” to determine just compensation. Rather, it is essentially “an ad hoc inquiry.” Furthermore, most questions of what is just compensation do not concern eminent domain but regulatory takings – a “taking” due to the effect of the regulation on the property. If it’s a regulation, then the owner bears the cost. If it’s a regulatory taking, then the cost is spread across society. There have been several tests or ad hoc inquiries:

a) Diminution in Value/Average Reciprocity of Advantage: Maybe a Taking: If a diminution in value, there could have been a taking unless the state interest outweighs the value of the taking.

Mugler v. Kansas [1887]: Held: Benefit to public outweighs burden on brewery.

Pennsylvania Coal Co. v. Mahon [1922]: In 1878, Coal Company conveyed a) surface rights to tenants on the land, but the Company reserved b) the right to remove the minerals under the land; b) surface support. In 1921, the Kohler Act (with exceptions such as if the owner of the coal owned the surface) prohibited mining under any structure used as habitation. Thus, surface owners got the rights to a) and b). Statute struck down as regulatory taking.

Holmes Held: “Extent of the diminution” “If the regulation goes to far it will be recognized as a taking.” The statute has seized rights and the state must pay.
Brandeis Dissenting: a) “The restriction here in question is merely the prohibition of a noxious use.”; b) Pennsylvania has not taken title to the mining rights; c) Average Reciprocity of Advantage

Keystone Bituminous Coal Ass’n v. Debenedictis [1987]: Modern version of Kohler Act – The Subsistence Act prevented mining. Stevens Held: Big Time important public interest outweighs the little diminution in value of the Coal Owners. 27 million tons of coal was just 2% of owners coal. Rehnquist Dissenting: These are essentially the same facts as Penn Coal, there is a taking of the 2%. And public purpose should not outweigh taking – since exercise of a public purpose is necessary for an eminent domain taking anyway.

b) The Noxious Use Test: No Taking: When a regulation prevents the harmful use of land that would be harmful to other landowners, the regulation is not a taking.

Miller v. Schoene [1928]: Virginia ordered all ornamental red cedar trees cut down if they were near an apple orchard. The ornamental red cedar trees could have been a source of communicable disease that could have harmed apple orchards. Apple orchard were far more valuable to Virginia than cedar trees. Cedar tree owners were only paid for the removal of trees, not the lost value. Stone Held: “The state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another.”

c) Environmental Regulation: No Taking: Regulation not a taking if the regulation protects the environment in general. Valid use of police power.

Goldblatt v. Hempstead [1962]: Town safety regulation banning mining as town grew and schools, homes sprung up. Goldblatt owned mine, had to move. Clark Held: “Reasonable, noncompensable exercise of police power.” DBL: General benefit: “Sauce for the goose is sauce for the gander.”

d) Historic Preservation: No Taking: Regulation not a taking if public benefits outweigh the private costs, regulation is not arbitrary, owner gets a “reasonable return.”

Penn Central Transportation Co. v. New York City [1978]: NYC law designated Grand Central a “landmark,” GC couldn’t build fifty-five story building above station, had to get approval for other things. Brennan Held: Historic preservation regulation not a taking because designation not arbitrary, Penn Central still gets reasonable return on original investment in train station. And the regulation extends to all historic buildings. Rehnquist Dissenting: This is not a) Reciprocity of Advantage; b) Prevention of a noxious use, thus a taking.

e) The Invasion Theory: Taking: Government takes physical possession of the property.

Loretto v. Teleprompter Manhattan CATV Corp. [1982]: NY law required landlords to permit cable operators to install wiring in buildings. Apartment owner claimed it was a taking. Marshall Held: Even though it’s a minor occupation, it’s a “permanent physical occupation.” It’s not a temporary invasion or a restriction on use. Blackmun (with Brennan and White) Dissenting: The law has impaired private rights, a balancing test should be used. Saying that this is an invasion is too formalistic.

3) Modern Treatment of Regulatory Takings:

a) Denial of All Economically Beneficial Use: The Denial of all economically beneficial use can be a “total taking.”
Lucas v. South Carolina Coastal Council [1992]: Lucas paid nearly $1M for two beachfront lots on which he planned to build single family vacation homes. South Carolina anti-erosion law then prohibited him from building. (In reality, 1) land was not really “worthless” but just “worth less” to Lucas. It still had value to neighbors, perhaps.; 2) SC had amended law)

Scalia Held (and Rehnquist, O’Connor, Thomas): Though these are ad hoc inquiries, the Fifth Amendment is certainly violated when there is 1) invasion or 2) denial of all economically beneficial use. Not a taking if regulation is stopping a common law nuisance or other property principle. State hasn’t shown common law nuisance or violation of property principle. Case remanded to decide what the SC law does.

Kennedy Concurring: State can go no further than abate common law nuisance or property principles.

Blackmun Dissenting: Just because there’s a diminution in value doesn’t mean it’s a taking. Look at Penn Central.

Stevens Dissenting: Majority stops legislature and state from regulating property. Court is Lochnerizing! And SC has already changed law! Majority is stepping in and protecting economic interests!

b) Conditions on Building Permits: Heightened Scrutiny:

Dolan v. City of Tigard [1994]: Dolan wanted permit to increase her plumbing in her electrical store. City would not give Dolan the permit unless she dedicated part of her property for a 1) flood plain and 2) a bicycle path.

Rehnquist Held (and Scal, O’C, K, Thom): Conditions are unconstitutional. To be a “constitutional condition” state/city must meet burden of showing:

1) Essential Nexus: There must be an “essential nexus,” thus a relationship, between the legitimate state interests and the imposed conditions. There is an essential nexus between the (a) state/city’s interests (drainage which is indeed legitimate) and the (b) conditions (flood plain, reduction of traffic path).

2) Rough Proportionality: There must a “rough proportionality,” thus a degree of connection in “nature and extent” between the (b) imposed conditions and the (c) effects of the project. First, there is no “rough proportionality” between the imposed flood plain, with title to transfer to the city, and Dolan’s increase in plumbing because the city would take ownership of the flood plain, not Dolan. Second, there is no “rough proportionality” between the bicycle path and increased congestion to Dolan’s store because there is no reasonable relationship between additional increased bike/vehicle trips to Dolan’s and the path. Rehnquist uses “rough proportionality” language so there will be more protection under Takings than either Due Process (Minimum Rationality Test of Williamson) or Equal Protection. Also, building permits, conditions are more focused on individuals.

Stevens (and Blackmun and Ginsburg): “The correct inquiry should instead concentrate on whether the required nexus is present and…consider condition’s nature or germaneness only.”
H. The Contracts Clause as a Protection of Economic Liberties: The Contracts Clause also protects economic liberties. It served as the major form of judicial protection of economic rights for many years before due process and takings issues became more popular. Furthermore, it is explicitly mentioned in the Constitution.

Article I

1) **Versus Ex Post Facto Laws**: Ex post facto laws deal with criminal laws. Otherwise, to challenge federal ex post facto provision, look to due process. The challenge state ex post facto provision, look to the K Clause.

    *Eastern Enterprises v. Apfel* [1998]: *Thomas Concurring*: Court should consider applicability of ex post facto to civil laws.

2) **Early History of the Contracts Clause – Public Contracts**: The Clause was meant to prevent the states from relieving debtors of private contractual obligations – debtor relief laws that left creditors holding the bag. However, the first interpretations of the Clause focused on public Ks.

    *Fletcher v. Peck* [1810]: In 1795, Georgia legislature granted land to investors. After accusations of bribery, in 1796 the Georgia legislature passed a law that rescinded the legislature’s deal. *Marshall Held*: 1796 Georgia law struck down, public K could not be later rescinded.

    *Trustees of Dartmouth College v. Woodward* [1819]: NH attempted to fill the Board of Dartmouth by revoking the 1769 charter to the school thereby making Dartmouth public. *Marshall Held*: NH can’t revoke public K implicit in Dartmouth’s charter. *Story Concurring*: If NH wanted to change K, it should have reserved right to change K in K.

3) **Loopholes in the Contracts Clause**: There are several loopholes in the protection of property for private interests. Primarily, the K Clause is not applicable to judicial interpretations:

    a) **State Can Reserve Power to Change K**: State can reserve the power in the K to change the K in the future. *Dartmouth*.

    b) **State Can Enact Prospective Insolvency Law**: Though state cannot make retroactive laws altering Ks, state can make law altering prospective Ks.

        *Ogden v. Saunders* [1827]: NY law permitted discharge of debtor’s obligation after the law became effective. *Held*: Law did not impair previous Ks.

    c) **State Can Change Remedies Available**: Though the state cannot alter a K, it can alter the remedies available for the K. For example, state could change time required to repay K, as long as state didn’t alter obligation. *Blaisdell*.

    d) **Publically Granted Privileges are Interpreted Narrowly**: A public K can be narrowly defined if indeed state alters K.


    e) **State Cannot Alienate its Police Power**: Essentially, the state can’t say that it “won’t not prohibit” something in the future. Otherwise, state is saying in K that it will keep something legal.
Stone v. Mississippi [1880]: State contracted right to run lottery. Next year, state declared lottery illegal. State can’t contract away right to make something illegal.

f) State Can Interfere with Ks to Promote Public Health, Welfare, Morals: If the state has a compelling interest, state can interfere with a K as part of Police Power. El Paso v. Simmons: State interest is maintaining authority to govern, quieting title.

4) State Impairment of Private Contracts: Less Deferential Test: In Blaisdell, decided the same year as Nebia, the Court indicated in both decisions the beginnings of deference to state legislature in impairment of economic interests. This statement was loudest in Blaisdell, upholding alteration of Ks. To evaluate according to Allied Structural, look and see if there is a “minimal alteration” of the K. If so, end inquiry. However, if it is “severe impairment,” alteration of K is justifiable if law passes the five steps:

a) Emergency: The legislature must have declared that there is an emergency need for the legislation.

Home Building & Loan Assn. v. Blaisdell [1934]: Minnesota law postponed mortgage sales and extended post-sale redemption period. Minnesota had declared a Depression-era economic emergency, unpopular foreclosures were very common, law clearly helped debtors. Meanwhile, HB & L’s rights to occupy property, sell or otherwise were postponed for two years. Held: Statute upheld. Sutherland Dissenting: This law does exactly what the Contracts Clause prohibits, altering K and destroying for “period of delay, all remedy.”

Allied Structural Steel Co. v. Spannaus [1978]: Minnesota law required ERs with pension plans who terminate plan or leave Minnesota to provide pensions to all employees or to make a lump sum payment to Minnesota. Allied, the ER, had a different agreement with its EEs than required by Minnesota law. Stewart Held: Pension plan law is not necessary for this emergency. Because there is a severe impairment, the inquiry must be pushed farther. Brennan Dissenting (and White and Marshall): Court should defer.

b) State is Protecting Basic Societal Interest: There must be a public interest or need. Blaisdell: Interest is adequate housing supply. Allied Structural: This is not a broad societal interest, law only applies to 100+ large corporations, very narrowly.

c) Appropriately Tailored Relief: The relief must be appropriately tailored to the emergency. Thus relief must be very narrow. Allied Structural: There is no emergency to tailor relief to, anyway.

d) Reasonable Conditions: The condition must be reasonable. Blaisdell: Conditions are reasonable, creditors still received monthly payments. Allied Structural: Conditions are unreasonable, state has never regulated this area before.

e) Temporary Measures: Relief cannot be permanent. Blaisdell: Creditors could eventually get house, there was just a delay in time.

5) State Impairment of Private Contracts: Modern Deferential Test: Law must pass three steps (above test not overruled in Energy Reserves or Exxon. So both could be used):

a) Substantial Impairment Required: If there is a substantial impairment of a contractual obligation, then the state must satisfy the following two steps.
Energy Reserves Group v. Kansas Power & Light [1983]: KPL agreed to buy natural gas from ERG at the highest price permitted by regulations. Kansas law barred price increases that ERG could impose. Blackmun Held: Law upheld. But to strike law, there must be a) substantial impairment of a contractual relationship; and if so state must show b) there is a significant and legitimate purpose behind the regulation and c) the adjustment of the obligations is based upon “reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.” ERG did not endure substantial impairment because it knew at K formation of federal and state regulation of prices. Thus no need for second and third steps.

Exxon Corp. v. Eagerton [1983]: Alabama law prohibited producers from passing on tax to consumers. Mashall Held: Impairment on pass-through Ks was an incidental product of “a generally applicable rule of conduct.” Not substantial at all, not even a need to even consider three-step inquiry.

b) State Must Have Significant and Legitimate Public Purpose: Burden is on the State. Energy Reserves: Blackmun evaluates anyway, it would be significant and legitimate to protect consumers.

c) Adjustment Must Be Reasonable & Appropriate to Public Purpose: Burden is on the State. Energy Reserves: Blackmun evaluates anyway, Kansas had chosen appropriate and reasonable means compared with private interest.

6) State Impairment of Public Contracts:

a) Strong Public Interest Test: A state can modify its contractual obligations if there is a “strong public interest.”

El Paso v. Simmons [1965]: Texas statute changed right of landowners to reinstate their claim for land. White Held: Texas statute altered Texas’ contractual obligations, but justified because of public interest. State public interest was achieving stability of land titles. Black Dissenting: Texas has broken its contractual obligation.

b) Modern Heightened Test if State Self-Interest: The Court will allow less deference to the legislature when the legislature’s own obligations are at stake, balancing the contractual impairment against state interest.

United States Trust Co. v. New Jersey [1977]: 1974 New Jersey law repealed NJ’s 1962 promise to bondholders not to use Port Authority revenue to subsidize rail transit (improving transit, energy conservation, environmental protection).

Blackmun Held: NJ’s repeal was neither necessary nor reasonable as State’s self-interest was at stake. NJ was impairing its own obligations. “A state cannot refuse to meet its legitimate financial obligations simply because it would prefer to spend the money to promote the public good.”

1) Necessary: The law was not necessary because there were “less impairing” ways to achieve resource conservation and improve rail transit. Even though politically undesirable, state could have taxes gas or resorted to other means.

2) Reasonable: The law was not necessary because circumstances hadn’t changed radically that would permit repeal. Concerns about
transit, energy, environment were also known in 1962. *El Paso v. Simmons*: reasonable to change because times changed.

*Brennan Dissenting (and White and Marshall)*: Prefers deference to NJ just as there was deference to state legislature in *El Paso v. Simmons* because 1) There are credit mkts to discipline the state; 2) Bondholders have political protection; 3) This is *Lochnerizing* – Court is strictly interpreting state economic regulations where it should defer.

1. **Substantive Due Process as a Protection of Non-Economic (Fundamental) Liberties**: Two years after the Court generally rejected substantive due process protection for non-economic liberties (*Ferguson* in 1963), the Court began the use of substantive due process to protect non-economic liberties in *Griswold* in 1965. Substantive due process considers persons’ interest and rights – regardless of other interests. Plaintiff goes to Court and says “the government won’t let me…”

1) **Justiciability Issues**: With Substantive Due Process (and Equal Protection) claims, the claim must first get to the Court.

   a) **Limits on the Court’s Power**: There are three limits on the Court’s Power: 1) Article III such as jurisdiction, cases or controversies, diversity; 2) Court-made limits; 3) Congressional limitations. Claim must pass all three to get into Court.

   b) **Real Meaning of Justiciability: Prudential Concerns**: In addition to above, the claim must satisfy other criteria of justiciability claim: 1) Must not be seeking Advisory opinions; 2) Must not be a Collusive Suit; 3) Must have Standing. Defendants are already in Court, so they’ve passed this barrier. And Court looks differently at defendants than plaintiffs because the Constitution is a sword, not a defense; 4) Ripeness – being ready for litigation; 5) Mootness – must not be moot – Court must be able to redress wrong. (*Roe* is an exception).

2) **Early Protection of NonEconomic Liberties**: Prior to 1965, there are antecedents of the Court finding liberty interests even though they are unenumerated, not in Constitution.


   *Meyer v. Nebraska* [1923]: Nebraska statute prohibited teaching non-English languages. *McReynolds Held*: Statute struck down. Liberty interest: 1) teachers’ interest in sharing information and pursuing their calling; 2) students’ interest in learning and opportunities to gain more knowledge; 3) parents’ liberty in raising children. *Holmes Dissenting*: Are we reading liberties into Constitution?

   *Pierce v. Society of Sisters* [1925]: Oregon law required children to attend public schools. *McReynolds Held*: Liberty interest is liberty of “parents and guardians to direct the upbringing and education of children under their control.”

   *Skinner v. Oklahoma* [1942]: Oklahoma law required sterilizing felons thrice convicted of “moral turpitude.” Court avoided chance to use substantive due process to invalidate, used equal protection instead. *Douglas Held*: Marriage and procreation fundamental liberty.

3) **Use of Contraceptives**: The Court’s first finding of a substantive due process right came with contraception.

   *Griswold v. Connecticut* [1965]: Connecticut law prohibited use of contraceptives. Several attempts had been made to get into Court to challenge the connecticut law.
[**Tilestown v. Ullman** [1943]: Doctor was asserting patients’ rights to counseling and Court wouldn’t let him argue for rights of others, just for his own, thus not standing for Doctor. **Poe v. Ullman** [1961]: In Griswold, married couples wanted contraceptive information from their Doctor. Though plaintiffs passed standing barrier, no prosecution. And contraceptives could be purchased for medical reasons]. Court in **Griswold** considered two physicians convicted of violating the anti-contraceptive law. Overall **Holding:** Connecticut Statute has a Mean-Ends deficiency **Goldberg, Warren, Brennan** and **Harlan and White** requiring Heightened Scrutiny, but that’s about it.

**Douglas Held:** Statute struck.
1) Liberty Interest: “Zone of Privacy”: In the penumbra – shadow, emanation – of the Bill of Rights there are protected interests. Douglas does not decide case on due process grounds, rather, that there is a “zone of privacy” for married couples within the Bill of Rights. He looks at laundry list of Amendments. Douglas wrongly uses **Meyer** and **Pierce**, however, because those cases are not cases of incorporation but about the definition of liberty. Douglas *Lochnerizes*!

2) States Ends: Douglas does not assess whether state can regulate morality.

3) ***

**Goldberg (and Warren and Brennan) Concurring:**
1) Liberty Interest: 9th Amendment is not the source of Constitutional Rights. Rather, judges must look to “traditions and [collective] conscience of our people” to determine whether a principle is “so rooted [there] as to be ranked as fundamental.” “Right of privacy in the marital relation is fundamental and basic.”

2) States’ Ends: Prohibiting or limiting adultery is legitimate. However, the ends must be compelling and Connecticut’s ends are dubious. BDL: Rare that a Court says Ends are no good, anyway.

3) Means-Ends Relationship: Regardless of Ends, more than a mere rational relationship is required. There are other means that Connecticut could use, such as the statutes it already has to meet is tends.

**Harlan Concurring:**
1) Liberty Interest: There are basic values “implicit in the concept of ordered liberty.”

2) States’ Ends: Moral Judgment

3) Means-Ends Relationship: It must be more than “rationally related.” These means are obnoxiously intrusive.

**White Concurring:**
1) Liberty Interest: Privacy interest of a married couple.

2) States’ Ends: Prohibit promiscuous or illicit sexual relationships. BDL: Court will rarely say no good.


**Black (and Stewart) Dissenting:**
1) Liberty Interest: Disagrees with the “recent discovery” that the 9th Amendment and Due Process can be used to strike down notions contrary the “collective conscience.”

2) States Ends: ***
3) Means-Ends Rel.: Any new standards are just like the “arbitrary and capricious” standard when **Lochnerizing**.

*Stewart (and Black) Dissenting:*
1) Liberty Interest: Court can’t find the liberty interest. Bill of Rights already has long list of interests that are protected. Rather, Court “turns somersaults with history.” Parties should resort to political process. Middle class married people, not insular minority.

2) States’ Ends: ***

3) Means-Ends Relationship: ***

**Carey v. Population Services International** [1977]: NY law prohibited the sale or distribution of contraceptives to minors under 16.

*Brennan Plurality Held (and Stewart, Marshall, Blackmun):*
1) Liberty Interest: Right of decision in matters of childbearing, as in **Griswold** and **Roe**.

2) States’ Ends: Ends must be compelling.

3) Means-Ends Relationship: More than rational relationship required. Means must be narrowly drawn to effectuate legitimate state interest.

*White Concurring in Judgment:*
1) ***

2) ***

3) M-E Rel.: State has not shown means advances ends.

*White Concurring:*
1) ***

2) ***

3) M-E Rel.: Means are irrational.

*Powell Concurring:*
1) ***

2) ***

3) M-E Rel.: Means are defective.

3) **Abortion**: Substantive due process has also been expanded to grant the right to an abortion, with limits.

**Roe v. Wade** [1973]: Texas law forbade abortions unless “by medical advice for the purpose of saving the life of the mother.” Roe has standing even though case was moot – Court believe situation was “capable of repetition yet evading review.” 50 states had such laws.

*Blackmun Held:*
1) Liberty Interest: Mother: Right of Privacy is found in the 14th Amendment’s “concept of personal liberty.” **Griswold, Meyer.** “The right of personal privacy includes the abortion decision.” Unborn Fetus: However “have never been recognized in the law as
persons in the whole sense.” (probably why Court won’t say when life begins, otherwise fetus would have due process protection).

2) States’ Interests: 1) Safeguarding health of pregnant women; 2 protecting potentiality of human life. However, state interest need be “compelling” when “fundamental rights” are involved.
   - 1st Trimester: States’ interests are not compelling.
   - 2nd Trimester: States’ interest is compelling.
   - 3rd Trimester (at viability of Fetus): States’ interest is compelling.

3) Mean-Ends Rel.: Strict Scrutiny: Legislation must be “narrowly drawn” to express only the legitimate state interests.
   - 1st Trimester: Statute violates due process because state interest not compelling.
   - 2nd Trimester: “State may regulate to the extent that the regulation reasonably related to maternal health.” *Williamson v. Lee Optical*.
   - 3rd Trimester (at viability of Fetus): State may definitely regulate.

_S Stewart Concurring:_

***

_D Douglas Concurring:_

***

*White Dissenting (and Rehnquist):*
1) Liberty Interest: This is not a fundamental interest. Court finds a liberty interest “with scarcely any reason or authority.” Furthermore, 50 states have regulated. Leave it with the people. Court’s decision is “an exercise of raw judicial power.”

2) States’ Interest: ***

3) Means-Ends Rel.: ***

_Rehnquist Dissenting:_
1) Liberty Interest: This is not a fundamental interest, even though, “I agree that liberty embraces more than the rights found in the Bill of Rights.” Worse than *Lochner*, court is actually legislating.

2) States’ Interest: Likely valid state objective.

3) Means-Ends Rel.: Look to *Williamson v. Lee Optical*.

_Planed Parenthood of Southeastern Pa. v. Casey* [1992]: Pennsylvania law had many restrictions on abortion, except in cases of medical emergency. Court evaluated all in reconsidering *Roe*.

_O’Connor, Kennedy, Souter, Blackmun & Stevens Held* (5 Total):
1) Reaffirming *Roe*’s 3 principles: “The essential holding of *Roe* should be retained and once again reaffirmed.” (liberty interest, states’ power, states’ interest). However, the Court doesn’t say that Roe was rightly decided.)

_O’Connor, Kennedy, Souter, Blackmun & Stevens Held* (5 Total):
2) *Roe*’s Definition of Liberty: “Constitutional protection of the woman’s decision to terminate her pregnancy derives from the Due Process Clause.” “There is a realm of personal liberty which the government may not enter.” “Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family
relationships, child rearing, and education.” BDL: This level of generality is easily protected. Not as easy when it’s just sex.

_O'Connor, Kennedy, Souter, Blackmun & Stevens Held (5 Total):

III) Stare Decisis: Previous legal principles upheld. No development or evolution in law should trump stare decisis. People have come to rely on _Roe_. Court doesn’t want to be considered politically pressured. (And Court’s opinion hadn’t changed in _Casey_).

_Lochner_: Overruled because bad economic assumptions. (And Court’s opinion had changed).

_Plessy_: Overruled because AAs are equal. (And Court’s opinion had changed).

_O'Connor, Kennedy, Souter (3 Total):

IV) Reformulation of Roe: “We reject the trimester framework.” Instead, plurality adopts an “undue burden” test. Before viability: Woman has interest, state has interest. But state cannot impose an undue burden that has “purpose or effect of placing a substantial obstacle” in the path of the woman. After viability: State is free to regulate. (This is NOT strict scrutiny: thus not stare decisis because right is not treated as fundamental).

_Stevens Disagreeing: _
IV) Doesn’t want _Roe_ reformulated, stick with trimester system.

_Court Held (9 Total):

V-A) Medical Emergency: Upheld.

_O'Connor, Kennedy, Souter & 4 Held (7 Total):


_O'Connor, Kennedy, Souter, Blackmun & Stevens Held (5 Total):

V-C) Spousal Consent: Struck. Could be an undue burden because of spousal abuse.

_O'Connor, Kennedy, Souter, & 4 Held (7 Total):


_O'Connor, Kennedy, Souter, Stevens & 4 Held (8 Total):


_Scalia, Rehnquist, Thomas & White Dissenting:

1) Liberty Interest: There is no fundamental liberty interest.

2) States’ Ends: ***

3) Mean-Ends Rel.: Minimal Scrutiny. Majority is not stare decisis anyway because it’s not strict scrutiny as was used in _Roe_.

4) _Family Relationships_: Some family-related rights are fundamental, some aren’t.

_Zablocki v. Redhail_ [1978]: Wisconsin law prohibited marriage by anyone under an obligation to support a minor. Court analyzed under due process, but case demonstrates fundamental right to marry. Statute Struck.

_Marshall Held:

1) Liberty Interest: Right to marry is fundamental interest. Looks to _Loving_ and _Griswold_. Right is on par with procreation, childbirth (_Roe_), etc.

2) States’ Interest: There needs to be “sufficiently important state interests.” States’ interests are legitimate, such as “safeguarding the welfare of out-of-custody children.”
3) Means-Ends Relationship: Classification must be “closely tailored to effectuate only those interests.” Classification “unnecessarily impinges” on right to marry. There are less intrusive means than this “collection device.” Denying marriage won’t make someone pay money they don’t already have.

_Moore v. East Cleveland_ [1977]: City ordinance limited occupancy in a house to a single “family” – a couple and dependent children. Grandmother lived in House with grandsons, who were cousins, not siblings. Statute struck.

**Powell Held (for Plurality of 4):**
1) Liberty Interest: There is a liberty interest in families living together. Source is history and tradition. “Wisdom of civilization supports a larger conception of the family.” Doesn’t say that interest is fundamental, though.

2) States’ Interests: Prevent overcrowding, minimize traffic and parking congestion, minimize financial pressures on schools. Ends are fine.

3) Means-Ends Rel.: Minimal scrutiny (deferential rationality) is inappropriate. However, plurality did not give clear definition of what level of scrutiny was appropriate. Ordinance does not survive minimal scrutiny standard. Ordinance only marginally served the state/city interests. Big problem with means. Limit people/square foot, for example, instead.

**White Dissenting:**
1) Liberty Interest: Emphasis on history and tradition would “broaden enormously the horizons” of substantive due process.

2) ***

3) ***

**Stewart Dissenting (and Rehnquist):**
1) Liberty Interest: This goes too far.

2) ***

3) ***

_Param v. J.R._ [1979]: Georgia statute permitted superintendents of state hospitals to allow parents to admit children without having had an adversarial hearing, thus neutral, hearing. Statute upheld.

**Held:**
1) Liberty Interest: Child’s interest in avoiding stigma, confinement. Also parents interest in upbringing child.

2) States Interest: Allow parents to raise children.


5) **Sexuality:**


**White Held:**
1) Liberty Interest: There is no fundamental liberty interest to engage in homosexual sodomy.

   Precedent: Right is not related to child rearing and education (Pierce and Meyer), family relationships (Moore), procreation (Skinner), marriage (Loving, Zablocki). Thus there is no connection between recognized rights and the “right” to engage in homosexual sodomy.

   History and Tradition: This is not traditionally part of historic liberty nor tradition. These values aren’t implicit in Constitution. “No cognizable roots.”

   Prudential Concerns: Court won’t extend right because that’s when the Court become vulnerable and comes nearest to illegitimacy. Won’t Lochnerize.

2) States’ Interest: Prescribe morality, states’ citizens want state to do this.

3) Means-Ends Rel.: Rational basis is fine. Williamson.

  Burger Concurring:
  1) Liberty Interest: There’s no liberty interest, that would cast aside moral teaching since the Romans.

  2) States’ Interest: ***

  3) M-E Rel.: ***

  Powell Concurring:
  1) Liberty Interest: There’s no fundamental liberty interest. But law could be challenged under 8th Amendment.

  2) States’ Interest: ***

  3) M-E Rel.: ***

  Blackmun (and Brennan, Marshall & Stevens) Dissenting:
  1) Liberty Interest: There is a fundamental right to be left alone and engage in intimacy. This is an intimate decision. It is one of the most valued rights. There is a right to make the decision (the decisional right) and a spatial right of the home.

  2) States’ Interest: Health and welfare, have decent society with Judeo-Christian values.

  3) M-E Rel.: This law goes too far in that it is enforcing morality. There must be some justification beyond conformity to religious doctrine.

  Stevens (and Brennan & Marshall) Dissenting:
  1) Liberty Interest: There is a fundamental interest “for the vast majority of Georgia’s citizens.” Intimate decisions already protected by the Court regarding marital bedroom!

  2) States’ Interest: Enforcing morality.

  3) M-E Rel.: The law goes to broadly anyway, but only enforces it on some. Distinctions cannot be tolerated, everyone has this liberty interest even if the law supposedly applies to heterosexuals, too.

6) Death:

   Cruzan v. Director, Missouri Dept. of Health [1990]: Missouri law required that life-sustaining treatment could only be removed if there was “clear and convincing evidence” that the patient, when competent, had desired for the removal life-sustaining treatment. Law upheld.
**Rehnquist Held:**
1) Liberty Interest: There is a common law interest of a competent person refusing medical treatment. Interest in this case, though, is the liberty of woman’s surrogates (her parents) to make decision about woman.

2) States’ Interest: Protection and preservation of human life. “There can be no gainsaying this interest.” Wrongful removal of treatment. Missouri has a substantial interest.

3) M-E Rel.: Rational Basis: “Missouri has permissibly sought to advance these interests.” Basically, balancing test of interests because it is not a fundamental liberty interest.

**O’Connor Concurring:**
1) Liberty Interest: Refusal of food and water is a fundamental liberty interest for the competent. Certain interests are free from restraint and intrusion.

2) States’ Interest: ***

3) M-E Rel.: There are, however, limits on the state. O’C reserves scrutiny level for future.

**Scalia Concurring:**
Court shouldn’t even consider – this issue is for the state political process to decide. Like all substantive due process, this should not be before Court.

**Brennan Dissenting (and Marshall and Blackmun):**
1) Liberty Interest: Woman has a liberty interest in dying with dignity.

2) States’ Interest: General interest in preservation of life. However, “No state interests could outweigh” this woman’s right to die.

3) M-E Rel.: Strict indeed. No state interests could outweigh.


**Rehnquist Held:**
1) Liberty Interest: There is not common law, historical nor traditional evidence supporting the right to commit suicide. Framed narrowly: “right to commit suicide which itself includes a right to assistance in doing so.” Thus court just looks at helping suicide, not right to suicide.

2) States’ Interest: Preservation of human life, helping vulnerable groups, protecting ethics of the medical profession and as healers, preventing euthanasia.

3) M-E Rel.: Rational Basis: Statute meets ends.

**O’Connor Concurring:** There may be a decision in future where liberty interest of the competent in committing suicide is found…

II. EQUAL PROTECTION:
Versus due process, equal protection is often preferred by Court because it won’t create a new right thereby making some conduct ungovernable. “Invocation of the equal protection clause, does not disable any governmental body from dealing with the subject at hand.” Jackson Concurring REA. Claims are either:
1)over-inclusive (reaching more people than necessary) and/or
2)under-inclusive (reaching fewer than necessary).
Consider: 1) Rule; 2) Class.; 3) Ends – but EP is rarely concerned with the Ends!; 4) Rel.: The focus of EP.

A. Economic Classifications: The Old Traditional/Mere Rationality/Minimal Scrutiny/Deferential Test:
(The government must 1) Treat similarly those who are 2) similarly situated with respect to 3) the purpose of the law). The classification must be reasonably related to a legitimate governmental objective. Government is allowed to make generalizations when governing. Williamson v. Lee Optical: Reform may be taken “One Step at a Time.”

1) General Deference:

Railway Express Agency v. New York [1949]: NYC ordinance prohibited truck owners from carrying advertisements except for their own advertisement. REA carried ads, was then prohibited from carrying ads for anything but itself. REA claims ordinance under-inclusive and over-inclusive, ads. Owner ads just as distracting.

Douglas Held
1) Rule: Owner ads permitted, non-owner ads prohibited.

2) Classification: Owner ads and non-owner ads. : Local authorities “may well have concluded” that advertisements were different. Thus, equal protection would not apply.

3) Ends: Traffic Safety by reducing distraction.

4) M-E Rel.: Mere Rationality. “If the classification has relation to the purpose” even though this is under-inclusive to ends.

Jackson Concurring:
4) It’s reasonable to ban some, allow others.

McDonald v. Board of Election Commissioners [1969]:

Warren Held:
1) Rule: Voters awaiting trial in County Jail cannot have absentee ballots.

2) Classification: Similarly Situated: Cook County Voters in Non-Cook County Jail (get) and Cook County Voters in Cook County Jail (don’t get).

3) Ends: Encourage voting, avoid jailer influence on voters.

4) M-E Rel.: Classification is violative of due process “only if no grounds can be conceived to justify them.” Voting policy does not violate due process. Legislatures may reform “one step at a time.”

Smith v. Cahoon [1931]:

Hughes Held:
1) Rule: Commercial water vehicles must have insurance, except those that carry agricultural products or seafood.
2) Class.: vehicles carrying agric. Products, those that don’t.

3) Ends: Public safety

4) M-E Rel.: Classification to achieve public safety “wholly arbitrary.” Statute struck. The type of product being carried has nothing to do with highway safety.

*Morey v. Doud* [1957]:

*Burton Held*
1) Rule: Companies must have minimum capital when filling money orders, except for American Express, which was exempted by name.

2) Class: AMEX and all other companies.

3) Ends: Foster financial responsibility and protect the integrity of money orders.

4) Rel.: Statute prospectively irrational. AMEX might be insolvent in future, then the purpose wouldn’t be met. Also, another company could reach status of AMEX, still have to meet minimum capital level. Statute struck.

*New Orleans v. Dukes* [1976]:

*Held*
1) Rule: Only pushcart vendors who had been around for 8 or more years could have a license to work in the French Quarter.

2) Class: Those who’ve worked 8+, those who’ve worked less than 8.

3) Ends: Preserve the appearance and custom of the French Quarter.

4) Rel.: Overruling *Morey v. Doud*, it had “departed from equal protection analysis of exclusively economic regulation.” Means-Ends are achieved.

2) **Deference if “Conceivable Basis”**:  

*U.S. Railroad Retirement Board v. Fritz* [1980]:

*Rehnquist Held:*
1) Rule: EEs who as of a certain date lacked requisite req. would not receive dual benefits.

2) Class: EEs who received, EEs who did not receive.

3) Ends: Phasing out windall benefits, solvency of RR. Just needs to be conceivable.

4) Rel.: Minimal scrutiny. The plain language marks the beginning and the end of the inquiry. The ends are “plausible.” Appropriate to end “windfall” benefits. Court won’t use less deferential *Guano* Test. Court will use more deferential *Lindsley* Test, look to the ends mentioned by government.

*Stevens & Brennan & Marshall Dissenting:*
1) Rule: ***
2) Class: ***

3) Ends: ***

4) Rel.: Majority is Tautological: They’re saying the purpose is what the purpose does! The classification doesn’t meet the ends, though, rather classification is “inimical” to ends….Beginning of “Rationality With Bite” where Court must look to actual purpose.

3) **Deference Even if Not Best Classification:**

   **Schweiker v. Wilson** [1981]:

   **Blackmun Holding:**
   1) Rule: Needy, aged, blind and disabled in public institutions would not get SSI “comfort allowances” unless the institution also got Medicaid.
   2) Class: Mental patients in public and private hospitals eligible for Medicaid; mental patients in public hospitals ineligible for Medicaid….or rather, those in hospitals that received Medicaid; others in hospitals that didn’t receive Medicaid.
   3) Ends: Provide subsistence for needy, aged, blind, avoid spending resources on those in hospitals already receiving aid from the state; so give SSI to those receiving Medicaid.
   4) Rel.: Perfectly reasonable classification to achieve reasonable and identifiable objective.

   **Powell Dissenting** (even though he was in deferential majority in Fritz):
   4) It shouldn’t be that “purpose can be suggested by ingenuity of government lawyer.” There should be a “fair and substantial relation.” Wants more Rationality w/Bite analysis.

B. For Some Economic Classifications: The Marginally Heightened/“Rationality w/Bite” Test: The classification must be **substantially related** to the government’s **stated** ends.

1) **Use of Rationality w/Bite:** Legislation based, seemingly, not upon economics, got the “Bite.”

   **Logan v. Zimmerman Brush Co.** [1982]:

   **Blackmun Held:**
   1) Rule: Illinois law gave full consideration to discrimination claims processed w/in 120 days. Those not processed w/in 120 days were dropped.
   2) Classif.: Those claims processed, those that weren’t, even though class. is not mentioned in statute, it develops.
   3) Ends: End discrimination against the handicapped, protect defendants from frivolous suits.
   4) Rel.: “The Illinois statute runs afoul of the lowest level of permissible equal protection scrutiny.” Class. not consistent at all with ends, totally irrational.
   Blackmun even cites dissent in **Schweiker**!

3) **Modern Standard: Extreme Defeference:** Rejection of “Rationality w/Bite”:
FCC v. Beach Communications [1993]:

Thomas Held:
1) Rule: Communications Act distinguished b/w cable facilities.

2) Class.: Distinction among cable facilities. Legislature must draw the line somewhere.

3) Ends: “We never require a legislature to articulate its reasons for enacting a statute.”

4) Rel.: Relationship should be viewed by “rational speculation unsupported by evidence or empirical data.” Attackers of statute have burden to “negative every conceivable basis which might support it.”

C. Suspect Classifications: Strict Scrutiny/Fatal in Fact Test: The classification must be necessary to achieve the government’s compelling ends. Burden on government to show that ends are compelling, classification is necessary to achieve those ends.

1) Overt/De Jure Racial Classifications: Classifications by race are analyzed “strict in theory” but are “fatal in fact.” Race is an obvious, immutable, distinguishing characteristic rarely used for much more than discrimination. And 14th Amendment enacted to end discrimination.

Strauder v. West Virginia [1879]:

Strong Held:
1) Rule: Only whites could be on juries.

2) Class: Black defendant who gets white jury and white defendant who gets white jury.

3) Ends: Invidious discrimination.

4) Rel.: Conviction of defendant by all white jury overruled.

Korematsu v. United States [1944]:

Black Held:
1) Rule: Those of Japanese descent are forced out of West Coast areas, forced to abide by curfews.


3) Ends: National security, these ends are compelling.

4) Rel.: Strict scrutiny. However, Court says classification passes strict scrutiny. This is the test to use for racial classifications. Case has no weight today.

Loving v. Virginia [1967]:

Warren Held:
1) Rule: State forbids intermarriage.
2) Class(es): Whites marrying whites; Blacks marrying blacks; whites marrying non whites.

3) Ends: “There is patently no legitimate overriding purpose independent of invidious discrimination racial discrimination…” White Supremacy.

4) Rel.: Rejection of equal application theory. Just because statute applies to both blacks and white participants in intermarriage, it fails strict scrutiny. Classification focuses on race.

**Lee v. Washington** [1968]:

*Black, Harlan, Stewart Concurring:*
1) Rule: Prisoners segregated.

2) Class: Blacks, whites, must be necessary.

3) Ends: Prison discipline, must be compelling.

4) Rel.: “prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails.”

**Plessy v. Ferguson** [1896]:

*Brown Held:*
1) Rule: Blacks in one RR car, whites in another.

2) Class: Blacks, whites.

3) Ends: For promotion of public good, maintaining public order (tautological?)

4) Rel.: Means accomplish ends. Separation does not mean unequal, nor is unequal just because “colored race” choose to feel that they are inferior.

*Harlan Dissenting:*
1) Rule: ***

2) Class: ***

3) Ends: Racial hate, promoting inferiority, promote racism.

4) Rel.: This is just plain wrong.

**Gaines** [1938], **Painter** [1950], **McLaurin** [1950]: NAACP leads up to Brown and equality in all public schools. Court found thrice separate but unequal.

**Brown v. Board of Education (Brown I)** [1954]:

*Warren (for Unanimous Court):*
1) Rule: Segregation on race in public schools.

2) Class: White students, black students.
3) Ends: Purpose is the compulsory education of children and providing education opportunities. (DBL: Case should have been decided on more solid grounds, such as the impermissible ends of racism).

4) Rel.: “Separate educational facilities are inherently unequal.” Big question was whether the Court could desegregate the schools. Court rules yes because 1868 14th Amendment is broader than its 1866 pre-cursor. Court doesn’t look to differences in facilities (as it did in Gaines, Painter, et al) but at:
   a) Education Benefit Theory: Blacks would have better opportunities, and learn better, if they were in the same class with whites. (But has this really been shown 50 years later?)
   b) Stigma: separating according to race stigmatizes black students (But what about separate theaters, beaches that don’t have to do w/education? And then what about historically all Black schools?)

Brown v. Board of Education (Brown II) [1955]: The remedy phase. Remanded to trial courts to use “equitable principles.”

2) Fundamental Interests: (Not dealt with).

D. Quasi-Suspect Classifications: Intermediate/Heightened Scrutiny: There must be an exceedingly persuasive justification: the classification must be substantially related to an important governmental objective. Get a male/female dichotomy to trigger heightened scrutiny.

1) Early Treatment of Gender Classifications:

   Goesaert v. Cleary [1948]:
   
   Frankfurter Held:
   1) Rule: No woman could attain a bartender’s license unless she was the wife of daughter of the male owner.
   
   2) Class: Court sees classification among two groups of women (those who are wives/daughters, and those who aren’t) However, in reality, classification is between men and women (men who can work in bar regardless, women who can work in bar because w/d, and women who aren’t w/d).
   
   3) Ends: “Minimize hazards that may confront a barmaid.”
   
   4) Rel.: Rational Relation: Having men around will minimize hazards. DBL: This really won’t minimize hazards.

2) Rationality Standard:

   Reed v. Reed [1971]:
   
   Burger Held:
   1) Rule: Men are preferred over women as an administrator of an estate.
   
   2) Class: Men, women.
   
   3) Ends: Reduce workload, administrative conveniency, avoid an individualized hearing.
4) Rel.: Rationality Standard: Though ends are achieved, this is just plain enforcing stereotypes and utterly arbitrary. (…Beginnings of heightened suspicions of sex-based classifications) Statute invalid.

3) Shift to Heightened Scrutiny – Regardless in Burden on Men or on Women: Burden on government to show that Craig Test satisfied.

**Frontiero v. Richardson** [1973]:

*Brennan (and Douglas, White & Marshall) Plurality:*
1) Rule: Male servicemembers automatically had wives registered as dependents; female servicemembers, however, had to prove that their husband was a dependent.

2) Class: Female servicemembers who must show dependent’s income and other info. to prove dependency; male servicemembers who need not show.

3) Ends: Administrative convenience,

4) Rel.: Strict Scrutiny advocated, not attained. Laws protecting women “put women, not on a pedestal, but in a cage.” Even if this is rationally related, there’s not proof that, say, 99% of female servicemembers don’t have dependent and 99% of males do.

**Craig v. Boren** [1976]:

*Brennan Held:*
1) Rule: Women between the ages of 18 and 21 could buy 3.2% beer; men b/w the ages of 18 and 21 could not buy the beer.

2) Class: Women b/w the ages of 18 & 21 and men b/w the ages of 18 & 21.

3) Ends: Traffic safety and decreasing drunken driving. Court won’t say this is not a good purpose.

4) Rel.: Intermediate Scrutiny: Intermediate/Heightened scrutiny comes to life: class. must be “substantially related to an important governmental objective.” Court focuses on means: a) Sex is often a bad proxy; b) only 2% of men DUI; c) statute stops purchase – not consumption.

*Stevens Concurring:*
4) Rel.: This statute reinforces stereotype that men are reckless.

*Rehnquist Dissenting:*
4) Rel.: Apply Rational Basis Test: Regardless if 2% of men DUI, that’s still far worse than the .18% of women who do! Furthermore, this law burdens men, not women (as in Frontiero).

4) **Variations on Craig:** “Exceedingly Persuasive Justification”:

**MUW v. Hogan** [1982]:

*O’Connor Held:*
1) Rule: Only women could be admitted to the MUW nursing school; men could audit.
2) Class: Men and women.

3) Ends: compensatory purpose; beneficial single-sex education.

4) Rel.: There is no “exceedingly persuasive justification” for the classification and it is not “substantially and directly related to its proposed…objective.” Compensatory purpose doesn’t quite work when women dominate the industry and as for single-sex ed., men can already audit. And sex is being used “as a proxy for other, more germane bases of classification.”

**J.E.B. v. Alabama** [1994]:

*Blackmun Held:*
1) Rule: Sex could be used in a peremptory challenge. Alabama used 9 of 10 of its peremptory challenges to strike men from the jury pool (defendant was man in paternity case).

2) Class: Men and Women.

3) Ends: Fair and impartial jury.

4) Rel.: “Exceedingly persuasive justification” required. Rule struck. Gender, like race, is an unconstitutional proxy for competence. This “is the very stereotype the law condemns.” Re-raises possibility of making sex suspect from *Frontiero v. Brennan*.

*O’Connor Concurring:*
1) Rule: **

2) Class: **

3) Ends: **

4) Rel.: Sometimes sex is a legitimate proxy because genders are actually different. She fears this rule will be used in private litigation, too. *J.E.B.* just applies when government is an actor.

*Scalia Dissenting:*
1) Rule: **

2) Class: **

3) Ends: **

4) Rel.: Rational Basis: Men and women in a paternity action are not similarly situated. And men can strike women! Men were not discriminated against!

**United States v. Virginia** [1996]:

Ginsburg Held:
1) Rule: Women excluded from VMI.

2) Class: Men who could enroll, women who could not.

3) Ends: a) single-sex benefits of diversity; b) adversative method.
4) Rel.: Justification must be “exceedingly persuasive:” Court applies *MUW-Craig* Test: the state must show classification serves “important governmental objectives” and classification is “substantially related to those objectives.” Objectives must be genuine, not made up. Classification does not further single-sex benefits of diversity (helps only state’s sons) nor adversative method (totally over- and under-inclusive).

**Rehnquist Concurring:**
4) Rel.: We should stick to “substantially related to an important governmental objective.” “Exceedingly persuasive justification is too cloudy.” *Rehnquist* changes from his position in *Craig*.

Scalia Dissenting:
4) Rel.: This is “politics-smuggled-into-law” and essentially strict scrutiny. We should have rational basis test.

5) **“Real” Differences Between Men and Women:** What about when men and women are not “similarly situated?” – If it’s Not Overt – Must Show Intent!

**Geduldig v. Aiello** [1974]:

**Stewart Held:**
1) Rule: California disability program did not cover “normal pregnancy and childbirth.”

2) Class: Not similarly situated: Pregnant women and non-pregnant persons.

3) Ends: Preserving fiscal integrity of its program, keeping cost down of coverage for all.

4) Rel.: Covering some, not others is rationally related to the ends. Title VII overturned *Geduldig* – barring discrimination based on pregnancy.

**Brennan (and Douglass and Marshall) Dissenting:**
1) Rule: ***

2) Class: Women w/women’s illnesses; Men w/ men’s illnesses.

3) Ends: ***

4) Rel.: There shouldn’t be rational test but higher. This is discrimination.

**Michael M. v. Superior Court** [1981]:

**Rehnquist Plurality Held:**
1) Rule: California prohibited male participation but not female participation in statutory rape.

2) Class: Minor males treated differently than minor females. Males with partner under 18 guilty, females not guilty when partner under 18. (Though there may be other laws that would reach females). They are not similarly situated.

3) Ends: Prevent illegitimate teenage pregnancies, prevent physical injury and loss of chastity, stop premarital sex, consequences fall more heavily on women. Strong governmental interest.
4) Rel.: Statute reasonable relation. Uses “sharper focus.” Rationality w/Bite? Or heightened scrutiny?

Stevens Dissenting:
4) Rel.: There should be evenhanded enforcement of the law.

Brennan, Marshall, White Dissenting:
4) Rel.: Gender-neutral will not make law less effective, but will make twice as many arrests!

Rostker v. Goldberg [1981]:

Rehnquist Held:
1) Rule: Men registered for draft, women did not.
2) Class: Men, women
3) Ends: Prepare for the draft of combat troops. “Important governmental interest.” Women can’t serve in combat anyway.
4) Rel.: Heightened/ Intermediate Scrutiny: Classification is substantially related to government’s goal of troops. And Court is deferential to Congress. BDL: Too deferential.

Marshall Held:
1) Rule: ***
2) Class: ***
3) Ends: Combat troops, yes, but what about the 80,000 non-combat troops!
4) Rel.: Court should evaluate is gender class. is “substantially related to an important governmental objective.” Not if neutral classification is substantially related, as Court seems to do.

6) Preference for Mothers:

Caban v. Mohammed [1979]:

Powell Held:
1) Rule: Mother of illegitimate child can block child’s adoption; father of illegitimate child cannot unless he can show that adoption is not in best interests of child.
2) Class: Mothers of illegitimate children who want to block child’s adoption; fathers of illegitimate children who want to block the adoption.
3) Ends: Promoting the best interest of illegitimate children in adoption.
4) Rel.: There is no showing of a “substantial relationship” to the state’s interests.

Stevens (& Burger & Rehnquist) Dissenting:
1) Rule: ***
2) Class: ***

3) Ends: ***

4) Rel.: even though classification appears “arbitrary in this isolated case,” there are indeed differences. Stevens hates archaic generalizations, but this he thinks is a good one.

**Parham v. Hughes** [1979]:

*Stewart (& Burger & Rehnquist & Stevens) Plurality:*

1) Rule: Mother can sue for wrongful death of illegitimate child; father cannot sue for wrongful death of illegitimate child unless he had formally legitimated child.

2) Class: Mothers who want to sue for the wrongful death; fathers who want to sue for the wrongful death who have legitimated child; fathers who want to sue for wrongful death who have not legitimated child; legitimate children both of who’s parents can sue; illegitimate children neither of who’s parents can sue.

3) Ends: Avoid fraudulent claims of paternity to get money.

4) Rel.: This is a classification among groups of men. DBL: As for the classification between men and women, they are not similarly situated and thus the classification is fine (because it’s easy to know who mom is, hard to know who dad is).

**Nguyen v. I.N.S.** [2001]:

*Kennedy Held:*

1) Rule: Citizen mother (with non-citizen father) automatically has illegitimate child as citizen; citizen father (with non-citizen mother) gets illegitimate child as citizen after proving steps a, b, c.

2) Class:


4) Rel.: Heightened Scrutiny: There are significant differences between these two groups of people (mothers and fathers) and thus classification is “substantially related to governmental objectives.”

*O’Connor Dissenting:*

1) Rule: ***

2) Class:

3) Ends:

4) Rel.: “The fit between the means and ends is [far] too attenuated.” DNA testing could achieve purpose #1, As for #2, Court focuses on opportunity, not reality. Gender is used as a proxy. **M.U.W:** And this is “the very stereotype the law condemns.” **J.E.B.**
6) **Benign/Non-Invidious Gender-Based Classifications:** In all equal protection, the focus question is still on whether the government can confer a benefit on some but not others. Even though it appears the *M.U.W./Craig* Test is used, -- these cases are all before *M.U.W./Craig*. So class. will be upheld if 1) class. of women is not hurt; 2) court will look for actual purpose if there’s a “benign” purpose.

**Kahn v. Shevin** [1974]:

*Douglas Held (was in *Frontiero* 4, actually):*

1) Rule: Widows exempt from state property tax; widowers are not.

2) Class: Widows owing state property tax; widowers owing state property tax.

3) Ends: “Cushion financial impact of spousal loss”

4) Rel.: Deferential standard (two years before *Craig*). “Fair and substantial relation to the legislation.” Wants lower standard for benign classifications.

*Brennan & White & Marshall Dissenting:*

1) Rule: ***

2) Class: ***

3) Ends: ***

4) Rel.: This is totally over-inclusive, under-inclusive. There should be “close judicial scrutiny.” State should have some test where only needy widows get the exemption and then ends will be met.

**Orr v. Orr** [1979]:

*Brennan Held:*

1) Rule: Men must pay alimony, women need not pay alimony.

2) Class: Men who pay alimony, women who don’t apy.

3) Ends: a) Reinforce the model of the wife (state doesn’t argue this ends); b) help needy spouses (legitimate and important); c) compensate women for past discrimination (legitimate and important).

4) Rel.: *Craig* Test: Law does not substantially meet ends because re: b) there was already a hearing to determine need and c) who had been discriminated against during marriage. Thus no need for a generalization. Plus, some women may get alimony who don’t need it. And this statute may reinforce stereotypes by putting women in their “proper place.”

7) **Seemingly Benign, but Discriminatory to Women:**

**Weinberger v. Wiesenfeld** [1975]:

*Brennan Held:*

1) Rule: When man died, SS benefits went to his widow and to his children; when woman died, SS benefits only went to her children.

2) Class: Men who won’t get wife’s benefits, Women who will get husband’s benefits.
3) Ends: Gov’t say benign, compensatory purpose. But Brennan says this is made up and invented. Purpose must genuine. Actual purpose was to allow women not to work and devote themselves to the care of their children.

4) Rel.: This is totally irrational because men won’t be able to stay at home and look after their kids.

**Burger Concurring:**
1) ***

2) Class.: Men who got SS protection for their survivors; women who did not get SS protection for their survivors

3) ***

4) Rel: This statute discriminates because male wage-earners get more for their work than female wage-earners do.

**Califano v. Goldfarb [1977]:**

**Brennan Plurality:**
1) Rule: SS benefits given to EE’s widow; SS benefits only given to EE’s widower if EE could have shown that he was receiving more than half his support from wife at time of death.

2) Class: Male wage-earner and female wage-earners; widows who get benefits who don’t need, widowers who don’t get benefits who do need.

3) Ends: Income support for widows. Actual purpose was income support for dependent spouses.

4) Rel.: Sex as proxy does not accomplish actual purposes.

**Stevens Concurring:**
1) ***

2) Class.: Widows who get benefits who don’t need, widowers who don’t get benefits who do need

3) ***

4) ***

7) **Alienage: For Legally Resident Aliens (Not Illegals):**

**Graham v. Richardson [1971]:**

**Blackmun Held:**
1) Rule: States denied welfare benefits denied to aliens.

2) Class: Aliens; citizens.

3) Ends: Save resources.
4) Rel.: Strict Scrutiny: (Like Race): “Aliens are a ‘discrete and insular’ minority.” Aliens pay taxes too. (Also preemption and dormant commerce clause arguments could be made).

In Re Griffiths [1973]:

Powell Held:
1) Rule: Aliens could not practice law in Connecticut.

2) Class: Aliens qualified to practice law, Citizens qualified to practice law.

3) Ends: High professional standards in protecting clients, having lawyers as officers of the Court. Purpose must be “constitutionally permissible and substantial.” These are sufficient, certainly.

4) Rel.: Strict Scrutiny: Use of alienage must be “necessary” to accomplish purpose. Class. is not necessary.

Rehnquist Dissenting (and in Sugarman):
1) Rule: ***

2) Class: ***

3) Ends: ***

4) Rel.: This should not be strict scrutiny. a) Alienage is used elsewhere in Constitution; b) discrete and insular minorities are everywhere; c) being an alien is not immutable – it can be changed (unlike race).

Sugarman v. Dougall [1973]:

Blackmun Held:
1) Rule: Aliens barred from serving as EEs in NY’s “competitive civil service”.

2) Class: Aliens and citizens.

3) Ends: Having employees with “undivided loyalty;” defining political community.

4) Rel.: Strict Scrutiny: Class. does not achieve end. “Neither narrow nor precise.” Over and under-inclusive. Under-inclusive because aliens only forbidden from “menial” jobs, not upper level ones level jobs. But, the Sugarman Exception: State can discriminate in: “important nonelective executive, legislative and judicial positions” and positions involving “formulation, execution or review of broad public policy.” Thus Court did believe citizens should be governed by citizens.

8) Use of the Sugarman Exception: The Political Function:

Foley v. Connellie [1978]:

Burger Held:
1) Rule: Aliens could not serve as NY state troopers.

2) Class: Aliens and citizens.
3) Ends: Governance by citizens, not minimizing benefits of being a citizen.

4) Rel.: Rational: Class is “firmly within the State’s constitutional prerogatives.”
There is a rational relationship.

Marshall Dissenting:
4) “A Policeman executes public policy like sanitation engineer…public
Toilet???

Ambach v. Norwick [1979]:

Powell Held:
1) Rule: Aliens could not be NY public school teachers.
2) Class: Aliens and citizens.
3) Ends: Preservation of society’s values.
4) Rel.: Minimal scrutiny: teachers are in public function exception of
Sugarman.

Cabell v. Chavez-Salido [1982]:

Held:
1) Rule: Aliens could not be probation officers.
2) Class: Aliens; citizens.
3) Ends: have “peace officers”
4) Rel.: Minimal scrutiny: Aliens can be excluded, probation officers are serving
political function.

9) Modern Treatment of Aliens: The law today: Strict Scrutiny

Bernal v. Fainter [1984]:

Marshall Held:
1) Rule: Aliens cannot serve as Texas notaries public.
2) Class: Aliens; citizens. DBL Must be least restrictive means!
Sugarman: only a) applies to positions “intimately related to the
process of democratic self-government;” b) does not apply to economic
functions of government.
3) Ends: DBL: Must be Compelling!
4) Rel.: Strict Scrutiny: Sugarman Exception must be narrowly construed,
otherwise “discrete and insular” minorities will be swallowed up. Duties of
notary public are “essentially clerical and ministerial” and not within political
function exception.

DBL: Cabell First Prong of Test: Class. must be a) specific, not under-
or over-; Cabell Second Prong of Test: b) position must be one that
goes “to the heart of representative government.”
If it passes Cabell/Sugarman, use Rational Basis.
10) **Illegitimacy:**

*Clark v. Jeter [1988]*:

*O'Connor Held:*

1) Rule: 6 year statute of limitations on support for illegitimates.

2) Class: illegitimates, legitimates.

3) Ends: avoiding fraudulent claims.

4) Rel.: Heightened/Intermediate Scrutiny: Statute must be “substantially related to an important governmental purpose.”
   a) it’s an immutable characteristic
   b) BUT illegitimate children are not a “discrete and insular minority in the political process and stigma is changing.

11) **Disability, Age, Poverty:**

*Cleburne v. Cleburne Living Center [1985]*:

*White Held:*

1) Rule: Mental group home required to get “special permit” of signatures of all neighbors within 200 feet.

2) Class:

3) Ends: a) alleviate fears of neighbors; b) prevent harassment by neighborhood kids; c) prevent flood; d) population increase. These really aren’t good purposes, particularly the first two.

4) Rel.: Not a suspect classification: Mere Rationality: There must be “a rational means to serve a legitimate ends.” There is “no rational basis for believing that the home would achieve purposes. Rational, not heightened because: a) they’d have to use Strict Scrutiny elsewhere…slippery…slope, b) mentally disabled not politically powerless (?); c) leave it to the government; d) don’t second-guess the legislature.

*Stevens & Burger:*

4) Rel.: Stick with rational basis. This is not race.

*Marshall (& Brennan & Blackmun) Dissenting and Concurring:*

4) Rel.: This is not the Rational Basis Test anyway! It’s not broad, blind deference. This is w/more bite than Lee Optical! Basically it’s Heightened and it should be heightened. And lower cts may now start treating econ. Classifications w/bit.

12) **Sexual Orientation:**

*Romer v. Evans [1996]*:

*Kennedy Held:*

1) Rule: Colorado Constitutional Amendment forbids local governments from enacting law including homosexuals as protected from discrimination. Other minorities can still get protection on local level, however.
2) Class: *Kennedy*: Homosexuals and others; But *DBL*: Gays and lesbians must resort to the political process to redress; other minorities can go elsewhere. (“disqualification from right to seek protection from the law.”) G&Ls must play political game differently. These individuals singled out on single trait.

3) Ends: State says to a) reserve resources to fight other discrimination; b) promoting freedom of association. *Kennedy*: Purpose is not legitimate: it’s really designed to make homosexuals unequal, this is impermissible. *DBL*: But how does Court know it’s bad ends?

4) Rel.: Minimal scrutiny/Mere Rationality: Homosexuals not suspect, but this law fails even minimal rationality. There’s no relationship.

*Scalia (& Rehnquist & Thomas) Dissenting:*

1) Rule: ***

2) Class: It’s not impermissible: It would not be impermissible to restrict the political redress for some group. Ex.: state law prohibiting Ks to relatives. Relatives must resort to political process.

3) Ends: The State can legislate sexual mores! It did in *Bowers*! State can make homosexual conduct illegal! Court cannot say that these ends are “evil.” Also polygamy et al.

4) Rel.: These are lawful democratic actions, leave it to the state. This is an act of political will.

E. Discriminatory Purpose or Effect (versus Overt Classification)/De Facto: If discrimination is not overt, look to purpose (not classes)! Types of discriminatory laws:

1) **Overt/De Jure Discrimination:** Overt discrimination is just plain blatant. Like *Strauder*, *Brown* et al. It is not neutral like:

2) **Discrimination in the Administration of the Law:**

   *Yick Wo* [1886]: San Francisco denied laundry permits to 200 out of 200 Chinese applicants; approved laundry permits to 79 out of 80 white applicants. *Held*: Though law was facially fair and impartial, in its administration it is a discriminatory law. There were no other grounds than race to explain the difference in administration. “Evil eye and unequal hand.”

3) **Discriminatory Motive:** Very hard to show an impermissible intent, whereby, act or law done because of racial motivations.

   *Gomillion v. Lightfoot* [1960]: Redefined boundaries of Tuskegee into a 28-sided figure excluding 395 of 400 black voters. *Frankfurter Held*: “Soley concerned with segregating white and colored voters by fencing Negro citizens out of town.”

   *Palmer v. Thompson* [1971]: Jackson Mississippi closed all public swimming pools after they were ordered desegregated. *Black Held*: There could have been other reasons than just fear of integration: fear of violence, economic concerns. There is only the possibility of an impermissible purpose here. *White Dissenting*: It’s just plain fear of desegregation.

4) **Neutral on Face, but Disproportionate Impact or Effect:** Demonstrating Purposeful Discrimination: Laws aren’t overtly discriminatory anymore, so this is big.
a) Disproportionate/Disparate Impact is Not Enough – Demonstrating a Racially Discriminatory Intent or Purpose:

**Griggs v. Duke Power** [1971]: Job intelligence test had disproportionate impact on minorities. *Held*: Disproportionate impact is enough to show discrimination.

**Washington v. Davis** [1976]: Qualifying Test for DC cops. Four times as many blacks as whites failed the Test.

*White Held*: Differential effect is not sufficient. Challengers must show Test was purposefully or intentionally discriminatory, “official action will not be held unconstitutional solely because it results in a racially disproportionate impact.” *Griggs* is not accepted. Just because it treats one group differently, it shouldn’t be struck, otherwise, “tax, welfare, public service, regulatory, licensing” could all be struck too.

b) *Ways to Show Discriminatory Intent or Purpose*: Strict Scrutiny: After showing discriminatory purpose (doesn’t need to be the sole purpose). If racial, strict scrutiny is triggered. If gender, heightened scrutiny is triggered.

**Arlington Heights v. Metropolitan Housing Corp** [1977]: Non-profit developer wanted area rezoned so he could build multiple-family housing in single family area. Housing would likely be for poor minorities. Chicago suburb refused.

*Powell Held*: Suburb’s action not guided by discriminatory intent or purpose. However, there is a framework by which to show discriminatory intent or purpose (It’s *VERY* Difficult), but needn’t be sole purpose:

1) Starting Point: Disparate Impact. *Gomillion*.
2) Historical Background of the Decision.
3) Specific Sequence of Events: No need to discriminate because there are no minorities, then they show up, for example.
4) Departure From Prior Procedure: For example, if Arlington Heights changed zoning procedure.
5) Changing Substantive Standards: For example, if Arlington Heights changed zoning standards.
6) Legislative of Administrative History: “The Dumb Legislator” Inquiry.
7) Legislator Testimony (Very rare).

*AND* Burden then just shifts to Defendants, they can say there were other motivations and they would have acted the same anyway! (Test #1: Not the sole purpose).

**Personnel Administrator of Mass. v. Feeney** [1979]: State law mandated “absolute lifetime” preference to veterans over non-veterans in the selection for Mass. state civil service positions. 98% of veterans were men.

*Stevens Held*: “14th Amendment guarantees equal laws, not equal results.” Big Q: Whether disc. purpose shaped legislation – “intent is a factor or it is not.” Legislature must have enacted law “because of” not “in spite of” discrimination. Nothing in record shows that. Statute upheld. (This is the law today).

3) Ends: Reward Vets, ease transition from war, encourage patriotic service.
Stevens Concurring: Deal with covertly, not overtly.

Marshall & Brennan Dissenting: Test is not whether law was enacted “because of” BUT “appreciable role.” DBL: Marshall is wrong! He wrongly converts covert to overt! The Test is Arlington Heights, too. (Thus, Test #2: “Because of” Test).

Rogers v. Lodge [1982]: Georgia County had at large voting system. Real harm: dilution of black voting power – group claim (not voting restriction or access to office).

White Held: No discriminatory intent in adoption of scheme, but there was a discriminatory intent in maintaining the voting scheme. a) No black had ever been elected (though county was 53%); b) historically: blacks denied party membership, historic discrimination, etc. Remedy can’t be larger in scope than the problem itself.

Powell & Rehnquist Dissenting: There is not enough evidence. These are “deeply subjective inquiries.”

Stevens Dissenting: Of course there was intent, but it’s politics.

Hunter v. Underwood [1985]: Portion of Alabama Constitution disenfranchised anyone convicted of a crime of “moral turpitude.” Harm: 10X as many blacks as whites couldn’t vote.

Rehnquist Held: Government must show that statute would have been enacted without the discriminatory intent. (Test #3: “But For” Test like Arlington Heights). It was a motivating factor. Statute struck. Case doesn’t really show what matters in litigating EP however. Go after like Zablocki – voting could be a fundamental interest.

c) Restructuring the Political Process:

Washington v. Seattle School Dist. [1982]: Washington State initiative prevented local school boards from busing local kids to other school districts, unless a judge had ordered forced busing. Seattle had started busing because its schools were de facto segregated.

Blackmun Held: This is racially motivated re-allocation of power. Schools that wish to integrate will now have to appeal to state political process. (like Romer, some must go to state only, others may go to local, and state). Initiative struck. It was done because of race.

Powell Dissenting (& Burger, Rehnquist & O’Connor): This is fine, school boards are subordinate to state anyway!

Crawford v. Los Angeles Board of Education [1982]: California law limited state courts’ power to order busing to no more than what federal courts could do. California courts had been ordering busing to remedy de facto segregation, whereas federal only deal with de jure.

Powell Held: Law upheld. Though advocates of desegregated schools had route foreclosed, it wasn’t racially motivated. Other constitutional issues?
F. The Benign Use of Racial Criteria:

1) **Affirmative Action in Education**: Focus is not who benefits and who doesn’t, but that some others were intentionally harmed in conferral of benefit to others. Focus also on the Means!

*Regents of the University of California v. Bakke* [1978]: UC Davis Med School admitted 100 students each year, 16 spots were reserved for “Blacks, Chicanos, Asians and American Indians.”

*Powell Plurality*: a) Bakke gets in; b) the quota program is unlawful; c) race is allowable as a consideration.

1) Rule: 16 spots left for non-whites.

2) Class: white students and black, chicano…

3) Ends: Four Possible purposes:
   ii) Countering Societal Discrimination: Not compelling. Countering Identified however, is compelling. Burden should be on them to end their discrimination.
   iii) Increasing # of Minority Physicians: Not compelling. Why would black doctors be better than white? More altruistic?
   iv) Having a Diverse Student Body: Compelling. First Amendment Right. There is “no warrant for judicial interference in the academic process.”

4) Rel.: Strict Scrutiny: Any classification based on race should be subject to strict scrutiny, Court should not focus on who is discrete and insular. That always changes (German Americans, etc)! To achieve goal #4, race could be used but not as the determinative factor. There are more narrowly tailored ways to achieve goal, such as Harvard’s plan (though it was not before the Court so the Court could not overrule it).

*The Brennan 4 (Brennan, White, Marshall, Blackmun) Concurring*: Title VI is not violated.

1) Rule: ***

2) Class: ***

3) Ends:
   ii) Countering Societal Discrimination: This is fine (*Brennan* is not right).

4) Rel.: Intermediate Scrutiny: Use version of *Craig* Test – class must be “reasonable.” And Davis is not intending to hurt a particular group (like German Americans) thus *Arlington Heights* wouldn’t stop Davis. Court should defer. Bakke doesn’t have any stigma. Accepted students don’t have any stigma, they study the same, etc.

*Stevens, (&Stewart, Rehnquist & Burger), Concurring/Dissenting*: Did not reach the EP issue, deciding on statutory grounds that Davis violated Title VI of the Civil Rights Act, which said, “Race cannot be the basis of excluding anyone form participation in a federally funded program.” (Government should be enforcing, rather).
2) **Public Employment and Contracting**: “Set Asides” of certain jobs for minorities.

   a) “Set Asides” – Show Past Specific Discrimination:

   **Wygant v. Jackson Board of Education** [1986]: Jackson took “affirmative steps” to hire more minority teachers after having few minority teachers. Board of Ed. and teachers’ union cut a deal – in faculty layoffs, no more minorities would be cut than percentage of minorities already working. During layoffs, some non-minorities with more seniority than minorities got fired, brought suit.

   **Powell Plurality (&Burger and Rehnquist) Held:**
   1) Rule: ***
   2) Class: Minorities and non-minorities.
   3) Ends: Have minority role models for students. Not compelling: it has “no logical stopping point.” If it were to make up for past discrimination, defendant must show it had discriminated in past. Jackson Board has not shown.
   4) M-E Rel.: Strict Scrutiny: EP violation. Even if it were to make up for past discrimination, firing wouldn’t accomplish those ends.

   **O’Connor Concurring:**
   3) Ends: Role models and societal discrimination: Not good. Specific/remedial discrimination, however, defendant shouldn’t have to prove otherwise that might undermine their incentive to change in the first place.

   b) Congressional “Set Asides”:

   **Fullilove v. Klutznick** [1980]:

   **Burger & White & Powell Plurality Held:**
   1) Rule: 10% of funds in a federal works project must be used by state or local grantee to procure services from
   2) Class:
   3) Ends: Remedy past discrimination.
   4) M-E Rel.: Deference to Congress, there are past findings of discrimination by Congress.

   **Stewart & Rehnquist Dissenting:**
   4) M-E Rel.: “This is wrong the way *Plessy* was wrong.”

   **Stevens Dissenting:**
   4) M-E Rel.: 10% is a “slapdash.” This a legislative classification based on race.

   c) Local “Set Asides”:

   **Richmond v. J.A. Croson Co.** [1989]: City wanted Court to use *Wygant*, MBEs wanted Court to use *Fullilove*. So are MBEs impossible?
**O’Connor (& Rehnquist, White, Stevens & Kennedy) Held:**

1) Rule: Richmond, VA gave 30% set asides to MBEs (Minority Business Enterprises).

2) Class: MBEs and non-MBEs

3) Ends: From 1978 to 1983 only 0.67% of city’s construction Ks went to minorities businesses, even though minorities comprised 50% of city.

   Findings: No direct evidence of race discrimination by the City of Richmond itself. Identified discrimination is required. These are not compelling. And only identified discrimination would be compelling. And 50% of city is black – they big. (And vs. Fullilove, Congress can do some things that state just can’t. Thus Fullilove is not dispositive (Kennedy disagrees).

4) M-E Rel.: ***

**O’Connor & Rehnquist & White:**

1) Rule: ***

2) Class: ***

3) Ends: City may remedy discrimination within it jurisdiction.

4) M-E Rel.: ***

**O’Connor & Rehnquist & White & Kennedy:**

1) Rule: ***

2) Class: ***

3) Ends: ***

4) M-E: Strict Scrutiny: Set-aside was not narrowly tailored to accomplish objective. “Classifications based on race carry a danger of stigmatic harm.” Standard should not depend on who’s burdened or benefited. Quoting Bakke: “the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” And: blacks don’t appear to be an insular and discrete minority in Richmond. And there must be highly qualified findings of discrimination. Plus there could be a better way in Richmond, simpligy bidding process, etc.

**Stevens Concurring:**

1) Rule: ***

2) Class: ***

3) Ends: States shouldn’t be deciding remedies, Court should.

4) M-E Rel.: Doesn’t adopt a standard, looks to specifics of case. They’re legislative based on stereotypes.

**Marshall Dissenting:**
4) This should be fine.

d) Finally: Congressional and State Set Asides:

*Adarand Constructors, Inc. v. Pena* [1995]:

*O'Connor (& Kennedy, Rehnquist, Thomas & Scalia) Held:*

1) Rule: Congressional set asides in federal Ks to socially and economically disadvantaged individuals.

2) Class: Certain racial groups, nor-racial groups.

3) Ends: Remedying for identifiable past discrimination is the only sufficiently compelling governmental interest.

4) M-E Rel.: Strict Scrutiny for both federal and state governments in minority preferences. There must be a compelling governmental interest and the means must be narrowly-tailored to that interest. Overrules *Metro Broadcasting* [1990] (fed can discriminate). Racial categorizations are Bad, bad, bad.

*Stevens & Ginsburg Dissenting:*

1) Rule: ***

2) Class: ***

3) Ends: ***

4) M-E Rel.: Congress should be able to do this and Court should treat Congress differently than state. Congress has different standards.