I. Overview of the 14th Amendment

A. Historical Overview- the 13th, 14th and 15th amendments were all adopted following the civil war and are collectively referred to as the 'civil war amendments.' These amendments were adopted in an effort to eliminate the effects of slavery and prevent continued discrimination based on race. In order to add in this purpose, all these amendments have congressional enforcement provisions.

1. Pre-Civil War Amendments- prior to the adoption of the civil war amendments the court held the bill of rights does not apply to state governments in Barron v. Baltimore. (Barron’s claims for violation of the fifth amendment were chucked based on the fact it didn’t apply to the St. of MD).

2. Incorporation of the Bill of Rights- the adoption of the civil war amendments created a dispute over if the amendment effectively made the bill of rights applicable to the states. The court first addressed the civil war amendments in the Slaughter House Cases. (421)

   a) Full Incorporation Rejected- Slaughter House Cases- the majority held that the 14th amendment should be limited to the purposes it was adopted for – ending slavery & racial equality—any broader application would be inconsistent. The notion of full incorporation was rejected.

   b) Dissent- Goal Was Centralization- in a dissenting opinion, Justice Bradley stated that the goals of the centralization of the protections of the constitution in the national government and that incorporation was intended.

   c) Modern Interpretation- Selected Incorporation- the Court in a series of decisions has effectively incorporated many of the protections contained within the Bill of Rights as applying to the states.

      1) Included Rights- the Court has adopted the 1st, 4th, 5th (except for below), 6th and 8th amendments in their entirety as being applicable to the states.

      2) Notable Exclusions- the Court has refused to apply the grand jury indictment requirement to states, as well as the civil jury requirement for matters over 20$.
B. **Protections of the Fourteenth Amendment** - the protections of the 14th amendment can be generalized to three main areas based on the language of the amendment itself:

1. **Procedural Due Process** - claim of a violation of procedural due process focuses on the *fundamental fairness of procedures used by the government* to impair a person's right, etc.

2. **Substantive Due Process** - claims of violations of substantive due process focus on *the law itself must be fair and reasonable* with respect to persons *life, liberty, or property* interest.

3. **Equal Protection** - “treat similarly all those similarly situated with application of the law” – claims of violation here is that the law has a disproportionate effect on those who are similarly situated with respect to the law.

II. **14th Amendment Protection of Economic Interests** - the 14th amendment is applied to the economic protections of *life, liberty and property* key to the disputes is whether a claim is in fact within the liberty or property interest of the party as defined by the constitution. In these claims will be made based on a violation of substantive due process, the takings clause, or the contract clause.

A. **Substantive Due Process** - where laws are sought to be invalidated based on a claim that the law infringes on a protected *liberty or property* interest. The issues include a two part analysis: (1) is the interest protected? (2) is the state's infringement of the interest justified? (3) are the means calculated to affect the ends?

1. **Rise of Substantive Due Process** - the court was initially reluctant to apply the 14th amendment’s broad plain language favoring a narrow construction limited to the abolition of slavery.

   a) **Narrow Interpretation - Profession Doesn’t = Liberty/Property Interest** (Slaughter House Cases, 1873 - state monopoly on slaughter house ok) - the majority of the court was unwilling to invalidate state regulation of an industry on the basis it prevented persons from practicing a trade.

   b) **Increasing Scrutiny** (Allgeyer v. Louisiana- req. of insurance license is invalidated) – in Allgeyer the court invalidated a law for the first time on substantive due process. The court found the licensing requirement to be infringing on the freedom to contract.

2. **Judicial Intervention – Lockner v. New York** - (NY limit on number of hours for workers invalidated) the invalidation of statutes under due process analysis hit a zenith. The statute was invalidated on the basis it was an impermissible abridgment of the freedom to contract. The court was replacing the values of the legislature with its own—sitting as a ‘super legislature’ – such interference is still referred to as ‘Locknerising’

   a) **Test = Legitimate End and Means have real and substantial relationship to end.** The test was applied by the court with a hard look as to goals of the legislature and the means used to carry out the ends. Here the statute was invalidated for not having legitimate ends. The test in effect was *strict scrutiny* and required:
1) **Close Fit**- a close fit between the means of the legislature and the ends sought to be achieved must be found by the court.

2) **Limited Objectives**- the court was unwilling to recognize limited acceptable objectives of the legislature (health and safety). Not the redistribution of bargaining power which is what the court found to be the real ends of Lockner.

   b) **Broad Interpretation of Liberty**- the court as part of its finding gave a broad reading to the definitions of liberty- specifically the freedom to contract that is not explicitly guaranteed.

   c) **Refusal to Defer to Legislative Findings**- perhaps most importantly the Lockner court was unwilling to defer to the state legislatures finding that such regulation was necessary to for safety and welfare of the public, claiming that such claims were only “pretext” for the law.

   d) **Dissent**- Court is injecting own views- the dissent objected on the basis that the court was substituting the proclaimed motives of the legislature for its own and was injecting an economic theory into the constitution.

3. **Progeny of Lockner**- after Lockner, the court handed down a series of decisions that invalidated a number of laws on substantive due process grounds. However the court did recognize some classes it considered needed special protection.

   a) **Labor Contracts Protected**- (anti-“Yellow Dog” provision invalidated - Coppage v. Kansas) – the court still continued to invalidate laws it perceived to infringe the freedom of contract – even thought the laws were adopted to protect the party who’s rights the court was protecting.

   b) **Women Wage Restrictions Invalidated**- (minimum wage requirement for women invalidated - Adkins v. Children’s Hospital) – invalidated on the basis that it again infringed on the freedom to contact. Court saw this as a purely economic regulation.

   c) **Women Hour Restrictions Allowed**- (hour restrictions for women upheld- Muller v. Oregon), the court began upheld the state imposed restrictions women’s hours on the basis that they were a disadvantaged class in need of special protection by the state. Court found this regulation to be more concerned with health and welfare.

4. **Decline of Lockner**- in the 1930s, the change in court personal, combined with political pressure put on the court by FDR, and the economic pressure. As a result the court became increasing more deferential to the legislature and less willing to protect economic interests.

   a) **“Substantial Relation” test adopted**- (regulation of milk prices upheld - Nebbia v. New York, 1934, 475)- the court did not change the test of the court in Lockner, however, the court was willing to accept more state interests as valid than the Lockner court. Court accepted regulation as valid as long as met the following two part test:

      1) it is not unreasonable, arbitrary or capricious

      2) real and substantial relation to the ends
b) Deference to State Legislature- (regulation of minimum wage for women upheld [reverse Atkins] West Coast Hotel v. Parrish) – the court became increasingly deferential to the legislatures determination of valid ends as well as the means selected to achieve those ends.

1) **Don’t inquire into policy motives**- Specifically the court became increasingly reluctant to inquire into the policy reasons or goals of the legislature in adopting a legislative measure.

2) **Don’t look at likelihood of success**- nor will the court inquire into the actual likelihood that the measures adopted by the legislature will in fact be successful.

c) Presumptively Valid-‘Rational Basis’- (prohibition of ‘filled’ milk upheld- US v. Carolene Products)- the court stated that the legislature will be presumed to have a rational basis that the means would achieve the ends- the court would not interfere with those findings- not a super legislature. Additionally in the (in)famous footnote 4 – the court stated situations where statutes would face **greater scrutiny**-

1) **Contrary to Specific Text** – where a law appears ‘on its face’ to be unconstitutional- the court will subject it to higher scrutiny.

2) **Political Process Narrowed**- where the law restricts the political process which can ordinarily be expected to bring about the repeal of undesirable legislation – restrictions on franchise.

3) **‘Discrete and Insular Minority’**- when the legislation is aimed at or particularly affects group (religious, racial, ethnicity, etc.) because of the inability to seek remedy through the majority dominated political process.

d) Less Burdensome Alternative Irrelevant- (4 hours off to vote upheld- Day-Bright Light v. Missouri)- the court will not investigate to determine if the legislature adopted the best solution to the problem, only that the ends are affected by the means—this would be conceded intruding into the policy sphere of the legislature.

5. **Modern Test- “Rational Relation” - Williamson v. Lee Optical**-(uphold OK statute regulating opticians, optometrists- etc.- 1955) the court effectively completely reversed Lockner by the adoption of the rational relation test. This is the last case where the USSC considered an economic due process claim. Specifically the court said it is **not for the courts to balance the advantages or disadvantages** of the law.

a) **The Rational Relation Test**-the test adopted by the court is a two part analysis-

1) **Are the ends of the legislature legitimate?**

2) **Are the means rationally related to those ends?**
b) Court will Hypothesize reasons for adoption- Highly Deferential - the case represents a new high for deference to the legislature as the court was willing to hypothesize reasons for the adoption of the law/regulation.

c) Effect = No Protection for Economic Interests- the effect is that the court will not invalidate a statute on substantive due process grounds, it has not struck down a statute on those grounds since 1937.

B. Takings Clause- the 5th and 14th amendments prohibit the taking of private property by the government without the payment of just compensation. The taking of this property must be for public use but no further inquiry into motives is applied by the court. The rational basis behind this clause is a belief the government should leave settled rights alone. Issues arise under the clause based on defining “taking” of property v. regulation of it.

1. Overview of Regulation v. Taking- government regulation made subject to the police power (such as zoning, etc.) may significantly reduce the value of the property without any physical invasion- when is this reduction entitled to compensation?

a) Regulation = No required compensation- where a law is determined to merely regulate as a part of the police power, no compensation is due to the property owner.

b) Common Factors in taking claims- the court may determine that a regulation is in fact a taking and is therefore entitled to compensation under the takings clause- common threats between cases determined to be takings include:

1) Arbitrary Singling Out- where a single owner is singled out, rather than a class of property owners, the court is more likely to find a taking.

2) Regulation Destroys Expectations- where the government has made specific assurances that the property may be used for certain activities, this doesn’t mean that the government is estopped from reneging the permits- but must compensate aggrieved owners.

3) Regulation Renders Property Useless- where the regulation effectively renders the property useless for any purpose, not just the intended purpose, a taking may be inferred.

2. Historical Tests Used in Determine Takings- the court has had particularly vague and nebulous tests for determining taking versus regulations. The court has used the following tests in the past:

a) Diminution in Value- (coal support law determined to be taking- Penn. Coal v. Mahon)- where a state action cases a drastic reduction in value compared against the interests of the state in regulating- such action may be deemed a taking.

1) State interest Greater = No taking- (coal support law upheld- Keystone v. DeBenedictis) - the court may determine that the state interest in prevent a use for the land is great enough that state regulation will not constitute a taking, even though value in the land is greatly diminished.
b) Noxious Use Test- (cedar tree cutting law upheld- *Miller v. Schoene*) where a regulation prevent use of land that would be harmful to other landowners or the public in general, it will be considered a regulation rather than a taking.

c) Environmental = Regulation- (prevention in mining in pit upheld, *Goldblatt v. Hemstead*)- where the state exercises the police power to protect the environment in general (i.e. no direct effect on another land owner) such actions will generally be considered regulation not taking.

d) Landmark Preservation- (grand central station protection upheld, *Penn Cen. Trans Co. v. NYC*)- where a state prevent the use of property for another purpose based on a landmark protection theme, such law will almost always be considered to be as a regulation (as long as done as part of a scheme rather than individual targeting).

e) Physical Invasion- (cable company wiring buildings = taking – *Lorretto v. Teleprompter*)- where the action constitutes a permanent physical occupation such activity will be considered a taking and is therefore entitled to compensation.

3. Modern Test- *Lucas v. SC-(1992)* (SC ordinance barring construction of permanent structure held as taking)- the court attempted to establish a framework test for application where the state enacts certain requirements w/which the owner must comply:

   a) Physical Invasion = Taking- if the action by the state causes a permanent physical invasion of the property will be considered a taking.

   b) Denial of Economically Viable Use = Taking- laws may regulate the use of the land a take away some particular use- however, where the regulation prevents all economically viable uses for the land.

   c) Common Law Nuisance = Not Taking- if the purpose that the land could be used for is barred by common law nuisance principles a taking still will not be considered a taking.

   d) Otherwise = Balancing tests- where the prior tests are inconclusive the court- the court should take the ad hoc approach of balancing the public interests with the interests of the property owner.

4. Conditions on Building Permits = Heightened Scrutiny- in order to prevent ‘taking’ of property that would require compensation- some states have attempted to circumvent the taking by requiring that a property owner allow public access, etc. in order to be eligible for a permit. Such actions are subject to heightened scrutiny where their outright enactment would require a taking.

   a) “Essential nexus” Requirement- (easement requirement for beach property invalidated, *Nollan v. California Coastal Cnsn.* )- the court required that the means chosen by the government must substantially advance the governmental objective. There must be an essential nexus between the government’s goal and the means selected to accomplish the goal.

   b) “Rough Proportionality” Requirement- (business permit requirement of a 15 foot easement labeled taking, *Dolan v. City of Tigard*)- a few years after the
establishment of the essential nexus requirement that the *nature* and the *extent* of the permit condition bear a *rough proportionality* to the projected impact of the development.

1) **Nature Requirement** - the requirement’s nature must be related to the condition of the permit. (bike path not in nature of hardware store expansion; easement requirement to beach no in nature of maintain sight lines). The ends of the condition must be related to the condition.

2) **Extent Requirement** - the requirement must only be applied to extent necessary for the accomplishment of the state objective (must be tight fit between means and ends)- the means must not reach beyond the ends.
C. **Contract Clause**- article I, section 10 of the Constitution states that no state shall pass a law impairing the obligation of contracts. The provision was enacted to protect the 'debtor relief' laws that many states had passed before the adoption of the Constitution and protect creditors. This clause has varied application based on whether the parties to the contract are both private or if the state is involved. The clause is applied to the federal government through reverse incorporation of the 5th amendment.

1. **Loopholes in the Contracts Clause**- while the clause doesn’t purport to have any limits, as applied by the courts, there are ways around the clause:

   a) *Doesn’t Apply to Judicial Interpretations*

   b) *Doesn’t Apply where state reserves power to alter contract* - (Darmouth v. NH) – where a state specifically reserves the right to modify a contract it will have the power to do so.

   c) *Proactive Limits are allowed* - prohibition is only against retroactive impairment - laws the prospectively impair future contracts are not susceptible to invalidation.

   d) *State Can Alter Remedies* - while a state cannot impair the contract itself it may effectively invalidated it by altering the available remedies. (Blaisdell, infra)

   e) *Courts Can Narrowly Define Public Contracts* - terms of contracts may be narrowly constructed by courts to allow what would otherwise be impairment of obligation (Charles River Bridge, infra).

   f) *State Cannot Alienate Police Power*

   g) *Private Contracts may be violated for state police interest* - where the state has a compelling health or safety interest - the clause may be violated (Allied Steel, infra).

2. **Private Contracts**- while used broadly initially, the contracts clause has been all but abandoned by the current court as a basis for striking down legislation.

   a) *Vital Public Interest May Allow Impairment* - (emergency depression measure pushing back payments upheld - Home Building & Loan v. Blaisdell) The court held that such impairment may be the valid use of the police power, this resulted in the court holding valid the exact type of statute the clause was enacted to prevent. The court cited the following factors:

   1) **Emergency**

   2) **Public Interest/Need**

   3) **Relief was tailored to emergency** - (narrow application)

   4) **Reasonable Conditions** - still received some payment

   5) **Temporary Measure** - measure was to expire after period.
b) **Blaisdell Factors Reapplied**-(invalidate state restriction on pension funding- *Allied Structural Steel v. Spannaus, 1978*) – here the court again applied the five factors set forth in Blaisdell and found the law did not meet with them.

c) **Modern = More Deferential**- (prevention of contract escalator provision upheld, *Energy Reserves Group v. KS Power*) the court relied on a three step test- here the contract was ruled to not have been substantially impaired because the parties “reasonable expectations” were not offended-

1) **Is there a substantial impairment of the contract**?- if the effect on the is not substantial, the inquiry is over

2) **State have a significant and legitimate public purpose**?- specifically a public safety or health or any other use of the police power.

3) **Adjustment reasonable & appropriate to public purposes**? – finally is the impairment justified for the public good weighed against the private interest.

d) **General Rule of Conduct = Not under Contract Clause**- (pass-through barred from adjusting contract price up upheld- *Exxon v. Eagerton*)- where a law has an effect on a contract, but proscribes a general course of contact rather than specifically aimed at a contract, the impairment will be treated as an *incidental by-product* and the contract clause will not be applied.

3. **Public Contracts**- like private contracts, the modern court has very seldom invoked the contract clause for invalidating action by the state. However, the test for public contracts varies from that of private contracts—requiring higher scrutiny based on the desire to prevent states from reneging on prior contracts made with individuals.

a) **Modification allowed where “strong public interest”**- (modification eliminating title reclamation held as valid -*El Paso v. Simmons*)- where the state has a strong public interest in altering the contract (here to quiet title for lands), impairment of the contract may be allowed.

b) **Heightened Scrutiny Where State Self Interest** -( invalidate state violation of bond security provision - *US Trust v. NJ*) – the court applied the test from *Simmons*, adding the obligation modification will be constitutional only if it is *reasonable* and *necessary* to support an important public purpose.

1) **‘Necessity’ Defined**- only necessary where objective could not be met by *less drastic alternatives*, her the Court said they could.

2) **‘Reasonable’ Defined**- only reasonable where modification is induced by *unforeseen developments* occurring after the contract was made.

3) **No Balancing Test**- the court declined to offer a balancing test between the public benefit and the determent of the other party of the contract where the state was a party.
III. Substantive Due Process- Non-Economic Rights- unlike economic interests, the court is willing to extend protection to non-economic and invalidate laws as violations of substantive due process.

A. Overview- analysis of due process concerns is tons of fun, so let’s look at what is important in the big scheme of things…

1. Justiciability of Due Process Claims- Bruce wants us all to keep in mind that issues like standing, ripeness, mootness, and the dreaded premature adjudication can still jump up and bite you in the ass, so to review- note that these are often invoked by the court when they wish to preclude a decision on the merits-

   a) Article III- remember the constitution constrains jurisdiction of the federal courts to cases and controversies arising under the constitution/laws of the US (and diversity).

   b) Procedural Limits- these limits are placed on the court by its own discretion- including standing, ripeness, and mootness which are all concerns in due process cases.

2. Two-tier Tests (3pts. for alliteration)- the court applies two differing standards of review based on the nature of the interest that is asserted as being protected by the due process clause, these tests can be applied by the following three questions:

   a) Is the interest part of the constitutionally protected liberty? - if it is the court will inquire as to what the source of the right is and is that right considered to be fundamental? This is important for determining the level of review. If it is not protected by the constitution, the due process clause will not be applied. Determined by?

      1) Common Law/Precedent (meir & pierce)

      2) “reasoned judgment” (Casey)

      3) History & Traditions (Bowers & Cruzan)

   b) What are the states ends? The next inquiry will be into the ends that are sought to be effected by the state, the level of review is dependant on the right:

      1) Where Fundamental = Must be Compelling- where the interest is considered to be fundamental, the state must have a compelling interest or at least as ‘legitimate & substantial’ one. The state must prove these ends (hypothesize?)

      2) Where Not = Must be Legitimate- where an interest is not deemed fundamental the test is merely that the ends be legitimate under the rational relation test adopted by Lee Optical, supra. The court may hypothesize these ends.
c) What is the means/ends relationship? - the court will finally inquire into the relationship between the means of the state and the ends chosen to effect them-(will they be hypothesized or must be stated by legislature?)

1) Where Fundamental = Heightened Scrutiny - where an interest was deemed fundamental specifically a tighter fit will be required between the ends and means.

⇒ Necessary to achieve permissible state policy (Griswold)

⇒ Narrowly drawn to affect only legitimate state interest (Roe and Carey, Zablocki)

⇒ Are there Less intrusive means? (White in Griswold)

⇒ Will the means work? (Carey)

2) Were Not = Rationally Related - where not a fundamental interest the court will apply the rational relation test adopted under Lee Optical, supra.
3. **Fundamental Rights**-
   a) *Children’s Education*
   b) *Contraception*
   c) *Abortion*
   d) *Marriage*

4. **Non-Fundamental**
   a) *Right to Die*
   b) *Personal Appearance*
   c) *Sodomy*
   d) *Freedom from Disclosure*

5. ‘**Right to Privacy**’ - note that the court does not recognize a right to privacy, but rather recognizes a liberty interest in the person to not have things disclosed and do what they want.

6. **Early Cases - Control of Children’s Education** - the court did not invalidate many statutes before 1965 for violations of substantive due process, however one non-economic right that was consistently protected was right to control a child’s education.
   a) *Right to Language* - (WWI statute prohibiting teaching German invalidated- *Meyer v. Nebraska*) - the court cited the common law as the source of liberty interest - the court appeared to apply a ‘mere rationality’ test - but found no valid state interest.
   b) *Liberty to Select Schools* - (statute requiring attendance of public school struck down- *Pierce v. Society of Sisters*) - the court recognized a liberty in parents to decide to direct the upbringing and upbringing of their children.

**B. Use of Contraceptives – *Griswold v. Connecticut*** - in 1965, the court struck down a CT statute barring the use of contraceptives with the marital relationship, the court had passed on several earlier chances to hear the claim on the basis of justiciability.

1. **Court Opinion - Not decided on Due Process Grounds** - (Douglas) - writing for the court did not decide the case on due process grounds but said that the right to contraception was protected by the “penumbra” of the bill of rights in a “zone of privacy.”

2. **Concurring - Liberty Interest Protected by Due Process** - (Goldberg, Brennan, & Warren) - invalidated the statute of substantive due process grounds finding the use of contraceptives to be a **fundamental interest** that is protected by the Constitution.
a) **Source**- traditional and collective conscious of our people

b) **State’s End**- must be compelling (strict scrutiny) (not discussed here)

c) **Means/Ends**- must be necessary to achieve ends- look for less burdensome alternative. (here overly broad)

3. **Dissent- Locknerizing = Should be Left to Legislature**-(Black & Stewart)- in dissent they saw the Bill of Rights as an exhaustive list of protected rights and emphasized the proper remedy was the political process- that any action to invalidate the statute the court would be Locknerizing.

4. **Right Affirmed- Carey v. Pop. Serv. Int’t**- in 1977 (post-Roe), the court upheld the right to contraceptives as being fundamental in invalidating a NY statute restricting the sale of contraceptives.

a) **Source**- the source of the right is cited to Griswold and Roe.

b) **State’s End**- must be compelling (here stated they are not) additionally Brennan would require states to delineate ends and means/ends relationship.

c) **Means/Ends**- must be narrowly drawn to effectuate legitimate state interest.

C. **Abortion- Roe v. Wade**- in 1973, the court used due process ground for the invalidation of a Texas statute forbidding abortion except in the case of life of the mother- the case had justiciability issues (i.e. plaintiff was no longer pregnant at the time of appeal)- allowed on ‘capable of repetition yet evading review’.

1. **Holding-Balancing Interests In a Trimester Framework**- in an almost legislative decision Brennan, writing for the court laid out the protection of the right recognized in a trimester framework-

a) **First Trimester**- abortions may not be banned or strictly regulated during this stage-based on the mother’s fundamental interest v. a state interest that has not yet become compelling.

b) **Second Trimester**- during this period the state may have an interest in the health of the mother is compelling that may protected by restricting the manner of abortion, but not through an outright ban.

c) **Third Trimester**- typically the court notes the fetus has become viable at this point and as a result state interest in the fetus is compelling and the state may regulate abortion.

2. **Test Used In Roe**- in Roe, the majority found that mother had a fundamental interest in a right to privacy regarding her pregnancy triggering strict scrutiny.

a) **Source**- cite penumbra of rights (Griswold), implicit in the concept of ordered liberty (Palko), Meyer, and Loving.

b) **State’s End**- right must be countervailed by a compelling state interest.
c) **Means/Ends**- even where states interest is compelling, the means must be *narrowly drawn to express only a legitimate state interest.*

3. **Dissent- Not Fundamental Interest**- in separate dissents, White expressed that this issue should be left to the political process and Rehnquist stated the Lee optical test was the proper one to apply—essentially neither found a 'fundamental interest' to be protected here.

4. **“Undue Burden” Test- Planned Parenthood v. Casey**- (1992, PA statute restricting abortions partially struck down and partially upheld) The court in Casey upheld the Roe, but replaced the trimester framework with an “undue burden” test. The court in Casey can be split into three voting blocks-

   a) **Liberal Block (Blackmun & Stevens)**- original authors of opinion in Roe, voted to uphold Roe in its entirety.

   b) **Conservative Block (Scalia, Rehnquist, Thomas & White)**- voted to uphold the statute in its entirety and overturn Roe. Would not apply strict scrutiny.

   c) **Swing Block (O’Connor, Souter & Kennedy)**- the case ended up being decided by the swing block of three justices who upheld the general Roe principle, but abandoned the trimester frame work of interests

      1) **Stare Decisis concern**- the justices seem to agree that Roe is here and they have their stuck with it – reversal undermines court legitimacy, Roe is not unworkable or weaker priciple.

      2) **Undue Burden Test**- law will be invalid where it imposes an undue burden on woman’s ability to make the decision. State will not be allowed to place a substantial obstacle in the path of woman seeking to abort a non-viable fetus.

      3) **Seem to Reject ‘Fundamental’ status of interest**- the court doesn’t apply strict scrutiny- therefore it seems they are not treating abortion as being a ‘fundamental’ interest.

   d) **Outcome of Statute**- after the court’s ruling, here’s what was left of the statute:

      1) **Informed Consent Period**- upheld 5-4 (O’Connor 3 + Rehnquist 4)

      2) **Spousal Notification**- **invalidated 5-4 (O’Connor 3 + Brennan & Stevens)**- based on possible spousal abuse concerns.

      3) **Parental consent**- upheld 5-4 (O’Connor 3 + Rehnquist 4).
D. **Other ‘Fundamental Rights’** - the court has also recognized other fundamental rights relating specifically with children, reproduction, and the marital relationship.

1. **Family Life- Moore v. East Cleveland**- (OH statute prohibiting non-nuclear family members from living in same residence invalidated). The court recognizing living with any part of ones family (extended or otherwise) as a liberty interest protected by the constitution. The court did **not** state that this interest was **fundamental**.

   a) **Source**- Powell takes source of history, tradition, basic societal values

   b) **State’s End**- seems to apply a middle level of review- something less than compelling seems to be okay.

   c) **Means/Ends**- here invalidate as means are over-broad to meet ends- labeled ‘tenuous’.

2. **Marriage- Zablocki v. Redhail**- (WI statute restricting marriage rights of person’s with prior children is in validated.) The right to marriage was found to be a **fundamental** interest ‘precedent cases already protecting family’. Source of right was cited to prior cases, here statute was subjected to ‘critical examination’ fails to have compelling state interest with closely tailored means.

3. **Send your kid to the loony-bin- Parham v. J.R.**- (statute not requiring adversarial hearing for children before commitment upheld) – relying in part on the decisions regarding a fundamental right to control child’s upbringing court upheld statute allowing parents to send junior to the nut-house.

E. **Non-Fundamental Rights**- the court has also refused to protect some rights as not being constitutionally protected **fundamental** interests. These rights are **not** protected by the heightened scrutiny afforded protected rights and are subject to a **rational relation test** (Lee Optical).

1. **Disclosure of Prescription Information (Whalan v. Roe)**- (court upholds statute allowing transmittal of prescription data)- court acknowledged an interest in keeping the information private. The court noted that security steps had been taken by the state and applied a **rational relationship** test to the law and found the state interest in the information sufficient.

2. **Physical Appearance (Kelly v. Johnson)**- (court upheld a regulation governing the length of a police officers hair). The court cited the states end’s (esprit de corps) and means (haircut) and weight them based on a **rational relation test**. Interest here was not fundamental since it was in capacity as a police officer and not person at large.

3. **Right to Refuse Unwanted Medical Treatment - (Cruzan v. MO Dept. Health)**- (uphold state court order baring the removal of life sustaining fluids to veggie woman)- the court recognized that a **competent** person has a liberty interest to decline unwanted medical procedures. The court does not define such an interest as fundamental- here the court **uphold restrictions requiring competent decisions.**
a) **Source**- court recognizes a common law interest in informed refusal of medical treatment.

b) **State’s End**- the states ends here are not required to be compelling- a middle level of scrutiny seems to be applied – balancing test.

c) **Means/Ends Relationship**- court applies a modified scrutiny test where it balanced the interests of the state with the patients.

4. **Suicide (Washington v. Glucksberg)**- (WA statute prohibiting the assistance in suicide is upheld)- Majority (Rehnquist, Scalia, Kennedy, Thomas) refused to recognize suicide as a fundamental interest, the court did not actually recognize a liberty interest in suicide, but did apply the rational relation test.

   a) **No Fundamental Interest**- here the court cites that common law, history, etc. show a prohibition of such an interest – thus it is clearly not fundamental. *Not deeply rooted in tradition.*

   b) **Use Rational Relation Test**- the law is upheld by a rational relationship basis.

   c) **Leave for Political Process**- the court here does not want to affect the political process regarding the issue with its decision.

   d) **Future Determination**- at least 5 justices seem that the may recognize a liberty interest in committing suicide. (Ginsberg, O’Connor, Stevens, Bria, Souter).

**F. Non-Protected Rights**- some ‘rights’ according to the court are not rights at all, they are not protected by the Constitution at all, therefore they are not protected by the 14th amendments due process clause.

1. **Sodomy**- (Bowers v. Hardwick)- (GA sodomy law criminalizing anal and oral sex is upheld)- the court failed to recognize any general right the sexual relations as a fundamental interest. The court did so on the basis that acts in the home such as adultery, incest, etc. are proscribed despite privacy. Means/ends where not weighted in the case since no interest was recognized.

   a) **Not a ‘fundamental interest’**- the court claims that this interest in not fundamental based on prior cases- it is not related to procreation, not implicit in concept of ordered liberty, or historically protected.

   b) **Court will not Extend Fundamental Protections**- the court stated that it should be concerned with ‘locknerizing’ where ruling would make law with no cognizable roots in the language or design of the constitution.

   c) **Dissent**- (Blackmun, Stevens, Brennan, & Marshall)- would strike law based on a freedom to do whatever one wants in own home (no gvt. Interest or because statute was overly broad (applied to married people too)

2. **Adultery**- (Hollenbaugh v. Carnegie Free Library)- the court denied cert. to a lower court case that allowed the discharge of two employees ‘living in sin’. No ruling has been handed down on a ‘right to adulterate’. 
IV. Equal Protection Clause- the 14th amendment also contains a guarantee of equal protection under law. The court has interpreted this phrase to mean “treat similarly all those who are similarly situated with respect to the purpose of the law.”

A. Overview- equal protection arises as an issue where the law makes a classification. These classifications are sometimes over-inclusive (reaching more persons than necessary) and/or under-inclusive (reaching fewer) with respect to those targeted for regulation.

1. Preferred to Due Process Invalidation- the court will often prefer invalidation based on equal protection because the legislature will be able to attempt to regulate the area with a better drafted provision, where due process in validation will ‘create a right’ and make future regulation more difficult.

2. Levels of Scrutiny- courts have applied differing levels of scrutiny based on the type of classification, there are essentially four levels:

   a) Mere Rationality- this level only requires that the means be reasonably related to the ends. This standard is usually used with economic issues under the equal protection clause. Court may even create ends or obligation may be on plaintiff to refute all possible legitimate ends.

   b) Rationality ‘with Bite’- another level of intermediate scrutiny applied by the recent Court, the court inquires more into the means/ends relationship than it would in a mere rationality test, specifically the means are substantially related to a stated legislative end.

   c) Intermediate Level of Scrutiny- first used in sexual classification, but has also been used in alienage and illegitimacy.– the court has used this require that the ends = important government objectives and that the means = substantially related toward achieving those objectives. Court will not create ends- must be stated.

   d) Strict Scrutiny- this level of scrutiny is applied in suspect classifications or where the classification effects a fundamental interest. It requires that the state ends must be compelling. The means chosen must be necessary to effect ends. Most laws will fail strict scrutiny (fatal in fact).

3. Questions in Equal Protection Analysis- Big Bruce says when addressing any equal protection claim the following questions should, nay must be addressed:

   a) What is the Rule?

   b) What is the Classification?

   c) What is the State’s Interest/End?

   d) What is the Means/Ends Relationship?

   e) What is the Proper Level of Scrutiny?
4. **Saving Statutes From Invalidation** - people say, I have this statute that looks like it may be invalidated, how can I prevent this? Big Bruce says try the following:

   a) ‘Step’ Regulation - the court has show willingness to allow under-inclusive classifications to stand on the basis that the legislature is attempting to solve the problem a step at time, therefore different treatment is okay.

   b) *Dual End* - by attributing a dual end to the statute, if the state can show that while the groups are similarly situated with respect to one way in which they are treated different, then show that they are **not** similarly situated with respect to another aim of the statute.

**B. Economic Issues** - as in substantive due process, the court is extremely differential to state legislatures with application of the equal protection clause. The court will apply the ‘mere rationality’ test, its lowest level of scrutiny. Court will even hypothesize as to the ends of the legislature where none are provided. As a result the clause does not provide a lot of protection.

1. **Mere Rationality Test - REA v. New York** - (NYC ordinance allowed only the truck owner’s billboards to be on side, no others- upheld) – restriction was upheld as a step in achieving the states ends. The court exercised extreme deference and did not inquire into the effectiveness of the means of achieving the ends.

   a) **Rule**: only owner ads on side of vehicle

   b) **Classification**: non-owner ads and owner ads

   c) **End**: increase traffic safety

   d) **Scrutiny**: mere rationality- even though grossly under inclusive – valid on a step theory. Court willing to hypothesize conclusions of legislature.

2. **Invalid For “Prospective Irrationality” - Morey v. Doud** - (Ill. statute requiring that money order business have minimum capital, but exempted AMEX by name – struck down) this is the last time the Court invalidated an economic statute on equal protection grounds.

   a) **Rule**: all money order comp. must have capital, except AMEX

   b) **Classification**: AMEX and all other companies

   c) **End**: protect integrity of money orders

   d) **Scrutiny**: court claimed statute was prospectively irrational in that while AMEX was currently solvent, it could become insolvent, or another company could attain AMEX status, there for the statute was prospectively under/over-inclusive as well

3. **Deference to Legislature - New Orleans v. Dukes** - (uphold statute prohibiting carts in French quarter, unless operated from more than 8 years). This decision reaffirmed a commitment to deference to state legislatures in economic matters and **effectively overruled Morey v. Doud** by only applying a mere rationality test.
a) Rule: no carts, unless in business over 8 years

b) Classification: carts in business < 8 yrs and carts in business > 8 years

c) End: maintain charm of French Quarter.

d) Scrutiny: apply mere rationality test- look to stated ends of legislature (no further investigation).

4. “Conceivable Basis”- All That’s Necessary- US RR Retire. v. Fitz- the court here applied the rational basis test and stated that a statute had a plausible purpose will meet the test regardless of if that attributed purpose was relied on by the legislature. The majority stated there has never been a requirement that a legislature specifically relied on a purpose for validity (Rehnquist + 5)

a) Rule: disallowing dual qualification for retirement benefits

b) Classification: those who receive RR & SS benefits and those who could only receive one or the other.

c) End: here probably phasing out of dual benefits- need only be conceivable ends, no actual reliance by legislature must be demonstrated.

d) Scrutiny: mere rationality test applied – here statute was neither arbitrary or irrational with relation to purpose attributed to legislature- present court would be reluctant to imagine purposes, but will look to ones mentioned by legislature.

e) Concurrence/Dissent- Look to Actual Purpose Only- (Brennan, Marshall, Stevens)- this is maybe the birth of ‘rationality with bite’ analysis based on applying the rational relation test only based on the actual legislative purpose, a slightly higher scrutiny than mere rationality. Specifically they wished to prevent the use of a retrospective goal of the statute being used to justify it.

5. ‘Best’ Classification Not Required- Scweiker v. Wilson- as part of the rational relation test, the court will not look to see if the classification could have been drawn more exactly. The court will only look that the statute is rationally related to a conceivable end.

a) Rule: only patients in public facilities receive Medicare benefits.

b) Classification: those receiving benefits & those who are not

c) End: providing patients in public facility is state responsibility.

d) Scrutiny: rational relation with a reasonable and identifiable objective- court will not inquire into other methods of classification. It can be overinclusive, underinclusive, etc.

e) Dissent- Fair and Substantial relation to the asserted purpose- (Powell) would have applied differing purpose to Congress, none was asserted specifically by law of
humanitarianism – in which case persons are similarly situated and law is not rational.

C. **Social Legislation** - where legislation is adopted that creates a classification that is not based on economics, a fundamental right or a suspect classification, the court will apply a test of *rationality with bite* - essentially this is a slightly higher level of scrutiny - in require that law has a *rational relation to an articulated purpose*.

1. **Must Conform to Stated Purpose** - *Logan v. Zimmerman* - here the court invalidated a law because it through administration a requirement was added that was *inconstant with the stated goals of the law*. This is 'rationality with bite'. – like Barq’s this one’s got bite.

   a) *Rule* - must have fact-finding conference within 120 of filling employment discrimination complaint, otherwise claim will be dismissed.

   b) *Classification* - those who have conf. Within 120 and those who do not

   c) *End* - the legislature *stated the ends as eliminate employ discrim and protect Defendants from frivolous lawsuits.*

   d) *Scrutiny* - here a *rationality with bite* standard was used as the court looked to the stated legislative goals and found the classification was not consistent with either purpose.

2. **Modern – Extreme Deference** - *FCC v. Beach Comm (1993)* - the court seemed to reject rationality with bite in this reiteration of broad deference to the legislature. Justice Thomas for the Majority:

   a) *Extreme Deference to Legislative Choice* - particularly in statutes where the legislature must ‘draw the line’ somewhere, the court should be extremely deferential in the legislatures decision. Court should abstain from judging wisdom, fairness or logic of legislative choice.

   b) *Any Reasonably Conceivable Purpose* - the court required that the challenger to negate any every conceivable basis which might support the statute. The court will not require that the legislature enumerate reasons for the statute. Such a test would seem to allow retrospective purposes to be designated.

   c) *Concurring in Judgment*(Stevens) – sees these extreme deference as to far- any statute may be maintain if plaintiff is required to negate every possible reasonable basis.

V. **Equal Protection - Suspect Classifications** - where classification are made that single out a group traditionally discriminated against the court will apply *strict scrutiny* to such classifications on the basis that although they purport to have a benevolent or non-discriminatory purpose but the court is *concerned about a sinister and insidious motive*.

A. **Overview of Suspect Classifications** - the court will subject classifications deemed to be suspect to *strict scrutiny* – this entails that the *burden is switched to the government* to demonstrate *compelling state interest* in the ends and that only *necessary means* are utilized to achieve those ends. These protection are also based on Carolene Products theory of “discrete and insular minorities” that have an *inability to seek remedy through the political process*. 
1. **Strict in Theory, Fatal in Fact**- in reality the fact that a law is subject to strict scrutiny is almost always fatal in fact, meaning that it is almost always struck down as being a violation of equal protection.

2. **Proving Discrimination**- purposeful discrimination of a statute may be demonstrated in any of the following ways:
   
   a) *On it face*- the law by its very wording is discriminatory.
   
   b) *As Applied*- while the text is neutral, the law may be applied in a discriminatory matter.
   
   c) *Enacted with Discriminatory Purpose*- even if the law is neutral in language and application, it may have been enacted with a diabolical and evil plan to discriminate.
   
   d) *Disproportionate Adverse Impact*- even if the law is neutral in language, application, and enactment- it may be found to be discriminatory based on a disproportionate impact on a suspect class.
   
   e) *Romer*- provides an anomaly- struck down on the basis that it prevented a class from ever seeking to protection as a classification in and of itself.

3. **Suspect Classifications**-
   
   a) *Race*- has been consistently treated as suspect with strict scrutiny applied.
   
   b) *Alienage*- also treats as suspect with strict scrutiny where state are acting (except Sugarman exception), different for federal – where congressional action may be unreviewable.

4. **Quasi-Suspect Classifications**- these classes are subject to varying degrees of intermediate scrutiny.
   
   a) *Sex*- seems to be quasi-suspect, the court applies a modified intermediate scrutiny that may require an ‘exceeding persuasive justification’
   
   b) *Legitimacy*- quasi-suspect – court will apply intermediate level of scrutiny.

5. **Non-Suspect**- although both below are non-suspect classes by their decisions, both still had statutes struck down as a violation under the mere rationality test.
   
   a) *Mental Retardation* - is a non-suspect classification and subject only to a merely rational test.
   
   b) *Sexual Orientation* - also had the rational relation test applied to it in *Romer* - thus seeming to make it a non-suspect classification.

**B. Overt Racial Classifications**- classifications based on race have always been subject to strict scrutiny based on the fact that race is a obvious, immutable, and distinguishing characteristic and as such there is a presumption of a possible underlining discriminative motive. Oh yeah, don’t forget that the 14th amendment was enacted specifically to prevent discrimination based on race (see Civil War, 1860-65).
Laws creating racial classification will only be allowed where there is a compelling state interest, the means are necessary to achieve the interest, and there is no discriminatory purpose behind the law.

1. **Classification = Badge of Inferiority- (Stauder v. W. VA)**- (law preventing blacks from serving on juries invalidated). Strict scrutiny in racial cases is based on a belief that exclusion of a particular group that is regularly treated as inferior can create a stigma or caste of implied inferiority.

2. **Compelling State Ends = OK- Korematsu v. US**- this case is the last time the court upheld an overt racial classification. Japanese decent were excluded from certain areas of west coast during WWII. Korematsu would almost certainly be decided differently today and has no real weight.

   a) **Applied Strict Scrutiny**- the court here for the first time classified race as a suspect classification and applied strict scrutiny and found the war time need to be compelling and the means adopted by the legislature to be necessary to achieving those goals.

   b) **Prison Order- Lee v. Washington**- the court also allow a racial separation to be implement by prisons where a concern of maintain order creates a compelling end and necessary means(preventing race riots).

3. **Equal Application Doesn’t = Equal Protection- Loving v. Virginia**- (statute restricting interracial marriage was invalidated [blacks – any non-white; whites – only white and descendents of Pocahontas ]- the fact a law applies equally to both races will not insulate from strict scrutiny. “the fact of equal application does not immunize a statute from the very heavy burden of justification”

   a) **No Permissible State Objective**- here the court found no legitimate overriding purpose independent of invidious racial discrimination that might justify the racial classification. In short, no compelling state ends.

   b) **Also Violated Due Process Clause**- also note that the statute could have been invalidated on substantive due process grounds (abridging marital rights) and also fundamental interest – equal protection grounds.

4. **Separate but Equal- Plessy v. Fergusson**- (Law upheld requiring separate but equal RR cars for black & white). The court based its finding on a separate treatment was not necessarily stigmatizing as inferior.

   a) **14th Goal = Legal Equality**- the court claimed that the 14th amendment didn’t abolish racial distinctions (i.e. insure social equality) but was only a guarantee of legal & political equality.

   b) **Dissent (Harlan)**- such a read of the statute was naïve- the real purpose wasn’t to keep whites out of black cars, but only to keep blacks out of whites. Statute has a discriminatory purpose = invalid.

5. **Intervening Decisions**- in between the cases of Brown and Plessy a number of court decision indicated that a trend of finding separate as inherently unequal was developing- grad school cases.
6. **Separate is Inherently Unequal- Brown v. Board of Education**- (de jure segregation in public schools prohibited) this case was a 9-0 decision and reversed the holding of *Plessy*. The decision set forth the landmark foundation that *separate was inherently unequal* because of the stigma it can carry with it.

   a) *Similarly Situated not Similarly Treated*- the invalidation was based on the fact that black and white children were similarly situated with respect to their right to education but were not treated the same (stigmatization).

   b) *No discussion of Validity of Ends*- the decision doesn’t discuss the validity of the ends in segregation- i.e. conceivably segregation that did not create a stigma would comply with Brown.

   c) *Progeny Invalidate all De Jure Segregation*- in subsequent cases, *per curium* opinions were used uphold many lower court decisions upholding

   d) *La Pierre Prefers Ends Invalidation*- Big Bruce says the decision would be on much more solid constitutional ground if the court had invalidated on the basis that was set forward by Harlan in *Plessy* (impermissible end).

7. **Enforcing Equality- Brown II**- in Brown II, the court ordered that policies eliminating the desegregation policies “with all deliberate speed”

C. **Sex Based Overt Classifications**- laws that make classifications overtly based on gender are looked at based on an *Intermediate Level of Scrutiny* making it a *Quasi-Suspect Classification*. Reasoning may be that classifying statutes are rarely intended as having paternalistic rather than misogynistic intent, but like race is a gender is an immutable quality. Women also have a former status as a ‘discreet and insular minority’ because of not receiving franchise rights until 1920s. this mid-level review is applied whether the statute burdens men or women.

1. **Early = Rational Relation Test- Goesart v. Cleary**- the court initially applied on rational relation scrutiny to gender based classifications. While these case has never been explicitly overruled, it has be specifically disapproved.

   a) *Rule*- no women could be bartender, unless wife or daughter of male bar owner. (upheld)

   b) *Classification*- women who could be bartenders *and* women who couldn’t (majority) or who female bar owners could hire *and* who male bar owners could hire (dissent).

   c) *Ends*- protect women from moral and social hazards of working at Oz.

   d) *Scrutiny*- the court here applied a *rational relation* test, with extreme deference to the legislature. The court here found the means were rationally related to the state end.

2. **Rationality With Bite- Ends Scrutiny- Reed v. Reed**- in the 1970s court began to apply stricter review to overt gender classifications. While purporting to still apply a rationality standard, the court looked more closely at state means/ends in the regulation.

   a) *Rule*- men should be favored as probate administrators (struck down)
b) **Classification** - men and women
c) **Ends** - simplify probate procedures - administrative convenience.
d) **Scrutiny** - mere rationality, however the court invalidate the statute based on the arbitrary legislative choice in the statute. The court seemed to look at the means/ends relationship.

3. **Rationality Rejected** - **Frontiero v. Richardson** - in a plurality opinion the court applied strict scrutiny to sex based classification comparing them to race. The comparison was based on the fact that women, like minorities, face a history of discrimination, vastly underrepresented in political process and is an immutable characteristic.

a) **Rule** - male servicemen dependants automatically get benefits, female serviceman - must show male dependence. (struck down)
b) **Classification** - men and women (servicemen or spouses)
c) **Ends** - administrative convenience and cost savings
d) **Scrutiny** - the court applied strict scrutiny - determining that the administrative convenience was not a compelling end.

4. **Intermediate Scrutiny, (even for men)** - **Craig v. Boren** - the court retreated from the requirement of strict scrutiny adopted by a plurality in **Frontiero** and replaced it with an intermediate level. In applying intermediate scrutiny, the court required important government objectives and the gender classification must substantially related to the objectives.

a) **Rule** - beer sale restricted to men under 21 and women under 18. (struck down).
b) **Classification** - 18-21 men and 18-21 women.
c) **Ends** - decrease DUIs - men have higher percentage than women according to state.
d) **Scrutiny** - in applying the test the court scrutinized the ends and means separately - finding that the ends were not important and that the means were a poor fit anyway - (only 2% of 18-21 drive drunk, statute didn’t prohibit consumption anyway)
e) **Dissent** - (Rehnquist) - would only apply rational relation and would justify under ‘one step’ at a time reform.

5. **Rationality w/Bite Revisited** - **Michael M v. Superior Court (81)** - in a plurality decision, the court up held the statutory rape law. The court reverted to a rationality with bite standard in finding that there were both a strong governemental interest and a reasonable relation in the means.

a) **Rule** - statutory rape law punished the male party but not the female where both were under age. (upheld)
b) Classification- complicated matrix, but the essential concern is that males are guilty where partner is under 18, females are never guilty.

c) Ends- preserve chaste women- prevent illegitimate children.

d) Scrutiny- the court seemed to apply a mere rationality test with a ‘sharper focus’- a rationality with bite here the court found a strong governmental interest with the means having reasonable relation to the ends.

6. “Exceedingly Persuasive Justification” - MUW v. Hogan (82)- the court refined the 'heightened scrutiny' of Craig in addressing this remedial statute. The court required that the government present an exceedingly persuasive justification of the classification (ends scrutiny) and that the means bear a direct and substantial relation to the ends. The court resolved to apply the same level of scrutiny for burdening of men or women.

a) Rule- only women may be admitted to nursing school, men may audit but not enroll for credit.

b) Classification- men and women

c) Ends- claimed by state to compensate women for past discrimination

d) Scrutiny- the court reformulated the Craig test and added the requirement of higher ends scrutiny exceedingly persuasive justification. The court also look at the actual purpose of the statute.

e) Compensatory Purpose Rejected- the court did not see the compensatory purpose as valid since nursing is a field traditionally dominated by women. Therefore the there is no exceedingly persuasive justifications for the classification. The court articulated some reasons for rejecting a benign classification:

1) Historical Discriminative Treatment- here there is none, women have always been nurses.

2) Doesn’t Further Stereotypes- the benign classification should attempt to remedy rather than perpetuate, here they are perpetuated “only women can be nurses”.

3) “Actual Purpose” = Compensatory- the legislature should cite the compensatory purpose as a motivating factor in the legislation rather than an ex post facto justification.

7. Note Cases- Benevolent Sexual Classifications- many of these cases focus benefits being paid to women always, but only to men who can demonstrate need. Note that these are often invalidated based on discrimination towards women wage earners (spouse not guaranteed benefits like male worker), rather than burdening of men.

a) Tailored to Remedy = OK- Kahn v. Shevin- state property tax exemption for female widows with no parallel exemption for men upheld. Court found that statute was
tailored to remedy specific policy and was designed to remedy past discrimination. Mainly, disproportionate loss faced by widows more often.

b) Disproportionate Opportunities = Not Similarly Situated - Schlesinger v. Ballard- policy giving women more time to advance in rank before mandatory discharge rather than men was upheld on the basis it was a not similarly situated for the fact women had fewer opportunities for advancement in Navy.

c) Mere Invocation of Benign Purpose Claim Insufficient- Weinberger v. Wisenfeld- court invalidated a benefit plan that gave benefits to surviving spouse and children for males, but only to children in females. The court focused its disapproval on discrimination of the benefits to women wage earner, rather than the male beneficiary. Benign purpose was rejected because there was no illustration of intent.

d) Remedy History of Discrimination = Important Government Objective- Califano v. Webster- in per curium, court upheld SSA scheme that compensated male and female wage earners differently (women got more). Here the court found that statute was not enacted based on stereotypes, but rather the permissible ends of remedying past discrimination.

e) Legislative History Reveal Not Compensatory = Not OK - Califano v. Goldfarb- court struck down scheme that paid widow benefits of deceased husband, but only paid widower where need was demonstrated. Focused on discrimination of the benefits to the women wage earner (ie her beneficiary would not be automatically entitled to benefits unlike male’s spouse.)

f) Means Scrutiny- Orr v. Orr- alimony restriction to wives only struck down by the court. The court found the ends of the statute sufficient, helping dependant women. The court found that there was already a less discriminatory means to achieve ends-financial hearing already part of proceeding- need easily determined. Men are unnecessarily burdened.

g) Administrative Convenience = Insufficient End- Wengler v. Druggist Mutual Ins.- here the court found the law discriminated against both men and women. Widow would get death benefits, again widower would have to prove need. The mere fact that more women than men may be dependant did not justify treating them different to save administrative effort.

8. “As Applied” Also may be Invalidated- JEB v. Alabama- the court extended Batson’s ban on using race as a proxy for juror competence or impartiality to sex. Here note that the allowance was discriminatory as applied (i.e. by law anyone could be struck, but here was being to strike women because of gender).

a) Rule- preemptory challenges of potential jurors could be used to strike solely on the basis of sex. (struck down)

b) Classification- Men and Women

c) Ends- allow impartial jury to be chosen by parties.
d) Scrutiny- ‘exceedingly persuasive justification’ level of means ends scrutiny was applied. The court also found such a classification reinforced stereotypes. No legitimate state interest is furthered.

e) Concurring-(O'Connor)- would allow sex as legitimate proxy- would not bar challenge as a matter of law.

f) Dissent- (Scalia)- would avoid scrutiny all together- found men and women were not similarly situated with respect to law here.

9. Note Cases- Pre-VMI- a number cases have been upheld where the court determined that the classification did in fact treat all those similarly situated similarly with respect to the law. Scrutiny was avoided by determining that classification was based on

a) Selective Service Upheld- Rokster v. Goldberg- the court upheld the requirement for men and not women to register for selective service. Court didn’t apply any level of scrutiny – found men and women were not similarly situated with respect to the statute (men could go in combat, women couldn’t). Dissent disagreed – pointed to the high number of non-combat positions that would be needed in a draft.

b) Pregnancy Classification Upheld- Geduldig v. Aiello- the court also found that a statute that provided benefits to pregnant women as opposed to all others was not even considered to be based on sex- all those similarly situated were treated similarly (pregnant persons)

c) Preferred Parent Struck Down- Caban V. Mohammed- (statute gave mothers easier ability to challenge adoption of illegitimate child than fathers) the court found that statute was using sex as an impermissible proxy for interest in the child’s upbringing. The court found that the statute was not substantially related to the state’s ends of promoting the interest of the child.

d) Wrongful Death Limit Upheld- Parham v. Huhes- (GA statute would only allow father who had legitimated children to have a cause for wrongful death, no such restriction on mother). The court upheld the law on that basis that the mothers and father were not similarly situated with respect to the law (no problem figuring out who mom is).

10. Genuine Governmental End Requirement- US v. Virginia (VMI Case) (96)- the court applied Craig test as modified by MUW (Ginsberg, Stevens, O’Connor, Kennedy, Souter & Breyer). The court found here the rule was based on stereotypes and faulty generalizations. Additionally, the court found no evidence of the government’s end of diversity in education- therefore there was no genuine rather than hypothesized justification.

a) Rule- only men can attend VMI, alternate program for women (stuck down)

b) Classification- men and women

c) Ends- diversity in education – integrity of VMI curriculum.
d) Scrutiny- the court applied “skeptical scrutiny” of the classification based on the requirement of a genuine governmental end as opposed to a hypothetical one- court here disapproved of all offer ends.

e) Concurring (Rehnquist)- disapproved of incorporation of MUW’s exceedingly pervasive ends analysis- sees it as clouding. Would also require purpose to be actual.

f) Dissent (Scalia)- disapproved of court’s test – saw it as in effect strict scrutiny.

D. Alienage- citizenship as a basis for classification has also been the source of enhanced scrutiny by the court. This is based on the court’s recognition of aliens as a discrete and insular minority specifically because they have no access to the political process since they have no franchise rights. As a result such, state classifications are subject to strict scrutiny. Additionally, aliens have been historically discriminated against. Questions of federalism- preemption of states arise as Congress is given power to regulate aliens by the constitution. Questions of reviewability arise as such power is usually considered to be plenary.

1. “Strict Scrutiny”- Graham v. Richardson- the court applied a close scrutiny standard to classifications based on citizenship. Based on aliens status as a discrete and insular minority.

   a) Rule- aliens must live in state for 15 years to be eligible for welfare; no requirement for citizens. (struck down)

   b) Classification- aliens and citizens

   c) Ends- favor citizens in distribution of state resources.

   d) Scrutiny- court applied close scrutiny based on the fact that aliens are discrete and insular minorities. Found state ‘conservation’ ends as not compelling since aliens also pay taxes- making them similarly situated as well.

2. Exception- “Heart of Representative Democracy”- Sugarman v. Dougall- court invalidated a general prohibition on all public employment by aliens as being impermissibly over-inclusive, but that a state may have lower level of scrutiny in restricting aliens form offices who participate direct in formulation, execution, or review of broad public policy.

   a) Rule- only US citizens could hold NY state jobs. (struck down)

   b) Classification- aliens and non-aliens

   c) Ends- avoiding employees with ‘divided loyalty’

   d) Scrutiny- the court applied strict scrutiny

   e) Exception- the court articulated that a restrictions on aliens v. citizens would be permissible where the state could said to have a compelling end in preserving the functions that go to the heart of representative government” the court enumerated these as including:
1) Right to Vote

2) Hold Elected or High Non-Elected Office

3) ‘Officers who participate directly in formulation, execution or review of broad public policy functions’

f) Dissent (Rehnquist) - claimed that aliens had not been subject to historical discrimination and that there were sufficient grounds in the constitution to justify treating them separately.

3. Applying the Sugarman Exception - the broad application of the Sugarman exception allowing restriction has all but swallowed the decision (i.e. the exception has really become the rule). In the presence of an exception the court will apply the rational relation test rather than strict scrutiny.

a) Lawyers Exclusion Struck (woohoo!)- In re Griffiths- decided pre-Sugarman, and affirmed as part of the decision was an aliens right to practice law.

b) State Trooper Exclusion Upheld- Foley v. Connelie- a subsequent statute excluding aliens from being employed as state troopers – based on their discretionary decision making and execution of policy role.

c) Public Teacher Exclusion Upheld- Amback v. Norwick – court found being a teacher was bound up with the operation of the state as a governmental entity and allowed the exclusion under the exception.

d) Notary Exclusion Struck- Bernal v. Fainter- the court found the duties of the notary to be essentially clerical and ministerial rather than determinative of policy and therefore subjected the statute to strict scrutiny.

4. Test for Alienage Classification - the test therefore for an overt alien classification can be best stated as:

a) Over-inclusive/Under-Inclusive - look to the inclusiveness in the statute – the less of a fit, the more likely to undercut any claim of legitimate ends.

b) Tailored to Exception - is the statute tailored to the political functions bared by Sugarman and progeny. If so, apply the rational basis test.

c) If Not = Strict Scrutiny - if it doesn’t fall within the Sugarman exception, the strict scrutiny would apply.

5. Federal Restrictions = Greater Deference - because of congresses explicit power to regulate aliens from the constitution, the court is willing to cast greater deference to decisions regulating aliens as a class. Challenges to federal action are made under the 5th rather than 14th amendment protections.

a) Administrative Action Reviewable- Hampton v. Mow Sun Wong- the court struck down the restriction of aliens from civil service employment by the Civil Service Commission. The court reasoned that the Civil Service Commission was invoking congressional power/executive power to regulate aliens. The court also reasoned
where a policy is not enacted by the agency in charge of it (CSC doesn’t regulate aliens) the less likely the statute is to be upheld.

b) Congress = Political Question- Matthews v. Diaz- the court upheld a restriction on aliens’ ability to receive Medicaid (residency requirement of 5 years). Recognized congress has plenary power over alien regulation and as such the court is reluctant to review exercise of that power on political question ground.

E. Illegitimacy- legitimacy has be afforded intermediate scrutiny as a quasi-suspect classification, this is based on the fact that it is not an imputable and readily identifiable quality, nor have illegitimates necessarily be historically subject to discrimination, nor are they a discrete and insular minority with respect to the political process. Clark v. Jeter- invokes a standard of substantial relation to an important governmental objective for the determination of validity.

F. Mental Retardation- has been rejected by the court and is not a suspect classification. Classifications may be based on a mere rationality test. In Cleburne v. Cleburne Living Center- (court struck requirement for permit for mental group homes that was not required for other group residences). Note thought that merely rational test was used here and the statute was still invalidated.

1. Basis for Non-suspect- the court held that Mental impairment/illness was not a suspect class on the basis that:

a) Avoid Judicial Second Guessing of Legislature

b) Benevolent Purpose of Regulation

c) Not Politically Powerless

d) If created new ‘suspect’ class- no end to suspect analysis- Slippery Slope

2. Concurring- (Stevens, Berger) – would use rational basis for all suspect classes- would invalidate any classification based on race as irrational.

3. Dissent (3 dead guys)- Would treat suspect- based on lengthy tragic history of discrimination would treat suspect.

G. Sexual Orientation- (Romer v. Evans)- the court invalidated a state amendment preventing the enactment of local or state statutes for the protection of persons based on sexual orientation. The court claimed to have applied a mere rationality test but still found the amendment invalid. The court probably does not see gays as a ‘suspect classification’.

1. Intent to Harm Unpopular = Impermissible End- the court characterized the CO measure as a “unprecedented action” of “broad and undifferentiated disability on a single named group.” The court believes the act was passed for an insidious purpose – animosity toward gays. The court invalidated the law for being enacted based on an impermissible end.

2. Forbidding Safeguards Violates Equal Protection- the court found that preventing a group from seeking protection by means of the political process denied them a right available to anyone else and was a violation of equal protection. The law created classes that were similarly situated but not treated similarly.
3. **Protections of Others Rational Rejected** - the CO claim that the act protected others from having to accept homosexuality (right to discriminate). This was rejected based on a poor means/ends fit - amendment was too far removed from this for it to be an end.

4. **Dissent (Lil' Nino, Rehnquist, Thomas)** - act only prevents preferential treatment - not equal treatment. Regulating based on sexual morality is ok - from Bowers v. Hardwick.

**VI. Equal Protection - De Facto Discrimination** - statutes may not create an impermissible classification by their own language (neutral language statutes), however the way the statute is applied may in a discriminatory manner and be a violation of equal protection creating a non-overt classification. Additionally, a statute with otherwise neutral language may be found discriminatory as a result of disproportionate effect on classification. Such invalidation is based on de facto discrimination.

**A. Overview - Proving Non-Overt Discrimination**

1. Not Subject to Heightened Scrutiny

2. Must Demonstrate De Facto = Heightened Scrutiny

3. Proving De Facto Discrimination
   a) ‘As Applied’
   b) Disproportionate Impact

**B. “As Applied”** - where a statute uses neutral language but is applied in a discriminatory manner is will create a de facto rather than a de jure classification. It is the plaintiff’s burden to establish that the statute is being applied/enforced in a discriminatory fashion.

1. **Discriminatory Administration = Violation of Equal Protection** - Yik Wo v. Hopkins - (law invalidated the required laundries be in stone buildings - 69-70 stone were white owned, all Chinese laundries were wooden) - court held this was a violation of equal protection because it was administered with an “evil eye and unequal hand.”

2. **Difficult to Determine Sole Motivating Purpose** - Palmer v. Thomas - (decision closing previously segregated pools after desegregation ordered upheld) - where the Court cannot always, in fact in most instances determine with certainty the motivation in enactment of laws.

**C. Disproportionate Impact** - a law that is neutral by its terms and enforcement may still be shown to be de facto discrimination. This can be done when the plaintiff proves a disproportionate impact as well as purposeful discrimination.

1. **Intent to Discriminate Required** - Washington v. Davis - (qualifying test for DC cops upheld; test was failed by 4x as many blacks as whites) - for the first time the court made clear that disproportionate impact alone would be insufficient to prove a de facto violation of equal protections. Must show racially discriminative purpose or intent.
a) **Prima Facie Requirement of Intent to Discriminate**- simply showing disproportionate effect not enough, need to show a racially discriminative purpose or intent.

b) **Refuse to Apply Title VII’s ‘No Intent’ Standard**- the court refused to apply to ‘no intent’ standard established by Title VII as the standard for the equal protection class.

c) **Disproportionate Adverse Impact = Evidence of Intent**- the fact that the law has a disproportionate impact may be used as evidence of it discriminatory in effect, but is not alone dispositive.

d) **Here Upheld**- the court upheld the statute finding:

   1) Neutral on Face
   2) Rational Relation to State End
   3) No Bad Purpose- the court found no bad purpose in the law. Police department was actively recruiting Blacks as members

2. Proving Intent- “Motivating Factor”- Arlington Heights v. Metropolitan Housing Corp.- the plaintiff will not have to demonstrate that the law sole or even a ‘dominate’ or ‘primary’ motivation in being adopted was discriminatory, merely that discriminating was a motivating factor. (village refused to rezone are from single to multi-family homes- upheld).

   a) **Plaintiff Burden = Show Discriminatory Purpose**- the court reaffirmed the standard of Washington requiring purposeful discrimination. The plaintiff has the burden to establish a discriminatory motive to trigger strict scrutiny.

   b) “Sole Purpose” not required- it is not required by the quote that the sole motivation of the legislature had to be a discriminatory purpose. Merely that the discriminatory purpose was a motivating factor of the legislature in enacting the law.

   c) **If Discrim Purpose shown, Government – Burden Must show Would have Enacted Anyway** once the a potential intent to discriminate is demonstrated, the burden passes to the government to demonstrate that absent the discriminatory purpose, the law would have been enacted anyway. Essentially, But for the discriminatory purpose, the state still would have been enacted.

   d) **Factors to Show Purpose of Law**- the following factor may be used to demonstrate a law was acted for a discriminatory purpose.

      1) Disproportionate Impact
      2) Historical Background
      3) Sequence of Events
      4) Legislative/Administrative History
5) Departure from Normal Procedural Sequence

3. “Because Of” - Personal Adm. of Mass v. Feeney - in order to prove discrimination nature of the statute, plaintiff must show that law was passed because of the discriminatory effect it would have, and not that it was passed in spite of it. (MA statute giving veterans absolute hiring preference in Civil Service jobs, 98% of veterans were men, upheld)

   a) More than Awareness of Consequences - essentially the because of / in spite of distinction can be drawn based on that more than just the awareness that a law will have a discriminatory effect is required to prove intentional discrimination.

   b) Criticism - furthered prior discrimination - the opinion here as been criticized for perpetrating existing government since only 2% of jobs in the military were available to women.

4. Inferred Discrimination - Voting Rights - Rogers v. Lodge - the court as acted to redress discrimination where is it demonstrated through circumstantial evidence. (bd. of commissioners - at large system, slight white majority - no black members on board ever - court find discriminatory)

   a) Purposeful Device to Further Discrimination - Maintaining for purpose - court didn’t necessarily find that there was a discriminatory intent in adoption of the scheme, but found one in its continued use.

   b) Factors in Determining - in invalidating the voting arrangement the court -

      1) Disproportionate effect - blacks never elected

      2) Historical - blacks disenfranchised, denied party membership, no education, in past.
5. ‘But For’ Test Affirmed- Hunter v. Underwood- the court here applied the Arlington test. the plaintiff introduced evidence of discriminatory purpose and government was unable to justify that the statute would have been enacted w/o the discriminatory intent- (moral turpitude disenfranchise provision invalidated – affected 10x as many blacks as whites.)

a) Equal Opportunity Discrimination – Doesn’t Protect Statute- the state claim that the statute also was enact to and did discriminated against poor white is not compelling to the court. Again the discrimination on racial grounds need not be sole motivating factor.

D. Remedying De Facto Discrimination- Implementing Brown- the elimination of de jure segregation created a new problem of de facto segregation in public schools. These problem stemmed from two areas: districts that continued to discriminate on a non-overt level, and those where de jure left districts in a state of segregation. Solutions to the problems were equally difficult as they by definition require drawing new lines based on race. Brown II’s requirement that remedy to discrimination be implemented with all deliberate speed exacerbated the problem and created lawsuits galore!

1. Deliberate Speed Upheld- Cooper v. Aaron- court reaffirmed Brown and refused to grant stays on desegregation plans.

2. Can’t Close Schools- Griffen v. County Sch. Bd. - the court invalidated the attempts by some school districts to close all public schools rather than integrate. Court invalidated a plan to close the schools and fund private white schools as being adopted for an unconstitutional purpose.

3. “Freedom of Choice” Not Adequate- Green v. Cnty. Sch. Bd.- the court rejected the adoption of plans that allowed for the freedom of children to pick a school, on the basis that such systems failed to dis-establish the dual-school system in favor of a unitary system. Schools had affirmative duty to establish unitary system. (most children stayed segregated).

4. Busing OK- Swann v. Charlotte-Mecklenberg Bd. of Ed.- the supreme court finally gave school districts clear guidance in a number of areas regarding the requirement of Brown.

a) Must Dis-establish “Dual System”- the court reiterated that a school district has an affirmative duty to remedy a ‘dual system’ of education to achieve a unitary system.

b) Must Have Had De Jure Segregation- the court doesn’t require a remedy for school districts that are segregated, unless the segregation was the product of de jure segregation- i.e. not a natural distribution of children.

c) One Race School May be OK- the court stated that single-race school were not per se against Brown- again as long as unitary school system achieved.

d) District Gerrymandering Allowed- where de jure segregation was in existence, the court explicitly allow busing and district reorganization as a measure to integrate districts.

e) Doesn’t Have to Match Population Exactly- the court didn’t required that racial make of the schools exactly match up the areas.
f) No Year to Year Adjustments- the court seemed to adopt the standard that once a unitary district had been achieved, all past discrimination would seem to be remedied and no future adjustments would be ordered by the court.


a) Intention = De Jure- the court will take a demonstration of discriminative intent even where segregation was never legally mandated, the court will be willing to institute the requirement of a remedy based on finding of ‘dual class’ school system.

b) Where Part Intentional = Flip Burden- the court also adopted that where a plaintiff can show that part of a school district is drawn based on racial lines, that other racial inequities will presumed to be intentional rather than coincidental.

6. Limits on Remedy – some states have passed laws and even constitutional amendments to limit the ability of courts to order busing as a remedy.

a) Struck- Washington v. Seattle Sch. Dist.- the court invalidated a law that moved control of busing to state level, while leaving all other controls over schools with local school districts. This was based on the tradition of local control of schools and the perceived notion that the move of control was racially based. (note that this case invokes Romer doctrine of invalidating laws that prevent remedy).

b) Upheld- Crawford v. LA Bd. of Ed.- a California amendment barred de facto as well as de jure segregation. The amendment also limited courts to federally available remedies for discrimination. Amendment upheld on basis of no discriminator purpose.

7. Remedies Based on Race are OK- NC St. Bd. of Ed. V. Swann- court invalidated state statute prevent the use of race as a criteria for assigning pupils to schools- court explicitly allowed remedies from Brown that take race into account.

VII. Equal Protection- Benevolent Classifications- the issue of benign classifications has become more intense. Such benign classifications include governmental programs

A. Overview- the modern court will likely apply strict scrutiny to any benevolent classification and will require the demonstration of specific past discrimination to be remedied, rather than societal as a whole. The means used to effectuate these end must be narrowly tailored and if possible not racially based.

1. Modern Standard- Admissions- after Croson, a guess at what an admissions case would have to be demonstrate to be upheld:

a) Meet Strict Scrutiny- the court would apply strict scrutiny to the program.

b) Possibly Compelling Ends- the court may find the following ends compelling:

1) Findings of past and lingering discrimination
2) No Race-neutral alternative

3) Narrowly tailored means

c) Diversity purpose probably not compelling

2. Modern Standard- Set Asides- After Croson and Adarand, the court will apply strict scrutiny to any set-aside program whether state or federal.

   a) Past Societal Not Compelling- the program must alleviate specific practices of the entity or privates under its control, programs to alleviate societal discrimination will not be considered to have a compelling end.

   b) Racial Means Must Be Necessary- the entity must show that a racial classification is necessary to alleviate the discrimination.

   c) Local – Must Remedy Within Jurisdiction- note that any remedy must be tailored to effectuate a change only within the jurisdiction of entity- this is to prevent programs enacted to alleviate societal discrimination as a whole.

3. Modern Court- the following is an attempt to patch work the modern courts attempts to deal with benevolent race based classifications:

   a) Strict Scrutiny Applied to Benevolent Classifications- on the bench today, the following Justices would apply strict scrutiny: O’Connor, Thomas, Rehnquist, Kennedy, Scalia.

   b) Required Purpose- justices would allow benevolent classifications for the following purposes:

      1) Remedy Identified Discrimination- O’Connor, Rehnquist, Kennedy.

      2) Remedy Identified Discrimination by Government- Scalia

      3) No Race Based – Regardless of Purpose- Thomas

      4) Race Based but only for non-Remedial Purpose- Stevens (Crackpot) believes courts should be doing remedying

   c) Distinction between Congressional/State Action – can only the federal government act to remedy discrimination, since empowered by §5 of the 14th amend.?

      1) No Distinction- Kennedy (Croson), Thomas (Adarand) (they all suck)

      2) Yes in Croson, but no in Adarand- O’Connor, Rehnquist, Scalia

      3) Yes- maintain distinction- Stevens (freak), Souter, Ginsburg and Breyer in Adarand.
d) **Will Benign Non-Remedial Purpose Be Compelling interest?** no, probably such an interest will be insufficient to fulfill the compelling ends requirement of the strict scrutiny test.

**B. Education- U. of Cal. v. Bakke** (admissions program setting aside a certain number of seats for minorities; white guy, bitches, get in – set aside invalidated). Bakke is a complicated decision with 3 outcomes for certain: Bakke get in, “Davis” plan of admissions is bad, and *race differentiation for admission is ok*.

1. **Race Always = Strict Scrutiny- Powell- Tie Breaker**- this decision broke the 4-4 tie between those applying only intermediate scrutiny and those who invalidated the plan based on statutory grounds.

   a) **Any Racial Classification is subject to strict scrutiny**- would apply strict scrutiny to any class based on race regardless of the stated purpose of the statute would be subject. Should not base protection on determination that a group has become discrete and insular.

   b) **Problem with Benign Classifications**- noted are several reason why the use of benign

   1) Not Always Clear Benign

   2) May Reinforce Stereotypes

   3) Put Burden on those not responsible for discrimination
c) Require compelling Ends- under strict scrutiny, the gov’t must produce here finds four ends, only fourth is found compelling- desire for diverse environment.

d) Here-Invalid for Ends – Harvard plan of taking race of factor achieves same objective without the discrimination inherent in the Davis Plan.

2. Violates Title VI- Stevens (+3)- 4 justices invalidated the quota program established under the Davis plan on the basis that it violated Title VI and never reached the constitutional issue.

3. Dissent- Quota Plan OK- Intermediate Scrutiny- Brennan (+3)
   a) Only Violations of 14th Amend. Would Violation Title VI- the minority holds that only a violation of the 14th amendment would violate Title VI.
   b) Only Invidious Prohibited- only see invidious classification on race a being prohibited by 14th amendment.
   c) Whites Not Discrete & Insular Minority- doesn’t apply strict scrutiny since White are not a minority without a political remedy.
   d) Here apply Intermediate- (Craig)- would apply only intermediate level of scrutiny which says is met.
   e) ‘Harvard Plan’ Different on Surface Only- claims that Harvard plan achieve the same thing as the Davis plan, just though a different label, no constitutional difference.

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

1. Remedy ‘Societal Discrimination’ Not Compelling End - Wygant v. Jackson Bd. of Ed.- (scheme where must lay-off while keeping minority ratio invalidated- had effect of laying off more senior whites before less senior minorities). The court applied strict scrutiny to the plan and found that the state end of remedying societal discrimination was not a compelling end.
   a) No History of Discrimination by Actor- the court found that there was not history of discrimination in the hiring practices of the school district—essentially the policy was not enacted to remedy past discrimination by the employer.
   b) Societal Discrimination Remedy = Not a Compelling End- the court held that societal discrimination without more, is too amorphous a basis for imposing a racially classified remedy.

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

3. State Set-Aside Invalidated- (Richmond v. JA Croson)- (City plan to set aside 30% of construction contracts for minority owned businesses invalidated by
court) The court noted in the opinion that **Strict Scrutiny would apply for All Race Based Classifications.**

a) **Part I: No Evidence of Discrimination by City** - (O’Connor, Rehnquist, White, Stevens, Kennedy) while the board had evidence of disproportionate contracts—no evidence was found by majority to indicate city had discriminated in past.

b) **Part II: May Remedy Discrimination w/in Jurisdiction**- (O’Connor, Rehnquist, White) would allow the city to remedy public & private discrimination that occurred within its jurisdiction, but not societal as a whole.

c) **Part IIIA: Apply Strict Scrutiny** - (O’Connor, Rehnquist, White, Kennedy) the majority would apply strict scrutiny regardless of the intent of the statute as compensatory. This based on a belief that all programs carry a stigma, regardless of intent and unable to determine real purpose.

d) **Part IIIB: only identified discrimination is compelling end** - (O’Connor, Rehnquist, White, Stevens, Kennedy) only past or continuing identified discrimination is compelling end to justify a race based remedy. Here no Ident. Discrimination = scheme fails for failure to have compelling ends. This is more than just disproportionate numbers or statement of a remedial purpose.

e) **Part IV: Should Consider Non-Race Based Remedy**- (O’Connor, Rehnquist, White, Kennedy) the court, in dicta also said that the program may have failed on means based scrutiny based on the failure to consider alternatives to the race based classification.

f) **Part V: Highly Qualified Finding of Discrimination** - (O’Connor, Rehnquist, White, Kennedy) court requires evidence of systematic exclusions from contracts, etc. or statistical disparity.

g) **Concurring- Stevens**- feels all discrimination remedy should be left to court who is a more appropriate body for determining remedies than.

h) **Concurring – Scalia**- remedy should be limited to a compensatable victim—would only allow retro active rather than proactive remedy. Believes congress is empowered to do this by 14th §5.

4. **Federalizing Croson- Adarand Constructors v. Pena**- (federal plan to set aside contracts for minority business remanded for further consideration under strict scrutiny). **Strict scrutiny was also applied to Congressional compensatory purpose race-based classifications** (overrules metro broadcasting). (O’Connor, Rehnquist, Kennedy, Thomas)

a) **Strict Scrutiny Applied to Congressional Action**- the 14th and 5th amendment were determined to place the same burdens on the state and federal governments based on.

b) **Dissent**- (Stevens & Ginsberg) – congress has different standard- responsive to all politically – unlike local actions that may affect non-constituents who have no political recourse.

D. **Voting - Shaw v. Reno**- (NC district found to be gerrymandered on racial grounds- invalidated by court)(O’Connor, Rehnquist, Scalia, Kennedy, Thomas)- the
requirement of discriminatory intent is also required in non-overt classifications affecting voting rights (here congressional districts). The court will again apply strict scrutiny where a racial motivation/intent can be shown in the drawing of districts.

1. **Must Show “Racially Motivated” Purpose** - because of the non-overt nature, the plaintiff must establish that the decision to create the district primarily because of the racial make up, not simply in spite of. This intent could presumable be proven circumstantially as described in *Washington* supra.

2. **“Facial Irrationality” Enough** - the court found that the statute was “*on its face inexplicable on grounds other than race*”. The court cited the particularly bizarre shape of the district as evidence of this facial irrationality.

3. **Dissent** - (White Stevens, Souter, Blackmun)- claims majority wants to invalidate 'black' districts- if state were allowed to rebut presumption as allowed under *Arlington Heights*, may be able to claim another purpose (protect incumbents, etc.).

### VIII. Equal Protection -Fundamental Interests-

The fundamental interest strand of the 14th amendment is also subject to strict scrutiny by the court. This strict scrutiny is based not on the classification itself, but rather based on the right affected by the classification.

#### A. Overview

The court protects a discrete set of interests as fundamental under the equal protection clause, the *court is reluctant to expand these protections beyond those enumerated below.*

1. **Subject to Strict Scrutiny** - like suspect classifications, interests that are considered to be fundamental are subject to strict scrutiny requiring a compelling state interest and narrowly tailored means to effectuate those ends. As a result, like in other forms, strict scrutiny is often fatal to law judged by it.

2. **Separate From Due Process Liberties** - the liberties protected by the due process clause as applied by the court. While *all due process liberties* are incorporated, the fundamental interest strand has also been applied to the right to vote, freedom to travel, etc.

3. **Fundamental Interests** - The fundamental interest protected by the court can be summed up in the list below:

   a) **Voting** - the right to vote on an equal basis – i.e. your vote counts as much as the next persons.

   b) **Marriage** - the right to get married/divorced is based on the states monopoly of the means to do so.

   c) **Access to Ballots** - this is not the right to be a political candidate but rather to vote for a candidate of your choosing.

   d) **Access to Courts** - in a limited capacity the court has made attempts to assure equal access to courts for indigents.

   e) **Interstate Movement** - the court has invalidated some laws that place penalties based on the length of residence as impeding the ability to move from state to state.
B. **Voting**- the equal protection does not guarantee a right to vote in state elections (nothing in constitution protects election of state officials) but instead guarantees that where the right to vote is granted, a person has a *fundamental interest* that his vote will count the same as any other vote.

1. **Ways Vote Power May Be Offended**- where the state takes any of the following actions, the equal protection clause may be found to have been violated.

   a) *Selective Denial of Franchise*

   b) *Individual Vote Dilution (non-one person—one vote elections)*- this may be okay only in certain situation (acre per vote ok for water reclamation district)

   c) *Group Vote Dilution*- at-large or multi-member districts (supra)

   d) *Race Based Districting* (supra)

2. **Selective Denial of Franchise**- the court will often strike down provisions or restrictions that have the effect of selectively denying franchise to an individual

   a) *State Restriction of Qualifications- Poll Tax Invalid*- (Harper v. VA St. Bd.)- the court invalidated the requirement of a poll tax *not* on the basis of a constitutional right to vote in a state election, but rather an equal protection guarantee to have the equal ability to vote where granted.

   b) *Restrictions to Interested Voters Invalidated*- (Kramer v. Union Free SD)- the court will often invalidate election requirements that require property ownership, etc. to have voting rights. Such a restriction must be necessary to promote a compelling state interest.

C. **Marriage- Divorce**- the ability to get married is also considered a fundamental interest that is protected by the application of strict scrutiny. (Zablocki v. Redhail) The court invalidated a statute requiring an individual be current on all child payments prior to being able to marry as means that were inappropriate for the state’s ends.

D. **Access to Ballots**- the state may not put excessive constraints on a person or a parties ability to place a person’s name on the ballot. Specific measures that may be invalidated are the requirement of high ballot fees, the court is more willing to allow a signature requirement. The state interest of reducing voter confusion by limiting ballot access to ‘serious candidates’ must be weighed against the individuals right to be on the ballot.

E. **Access to Courts**- the court has been reluctant to establish a general right to access to the courts (specifically for civil matters) but where a person is subject to court process, the court may require the waiving of fees based on indigence to assure equal access to the person affected.

1. **Criminal Appeals Process**- note that there is no fundamental right to an appeal—the rights below are based on the assumption that where granted, the person has a fundamental interest in equal access to the appeals process.

   a) *Right to Transcript*- (Griffin v. Illinois)- where a person is entitled to an appeal he has a fundamental right to a trial transcript to facilitate the appeal.
b) Right to Council - First Appeal- (Douglas v. California)- also a right to council has been extended in criminal matter for the first appeal.

c) Second Appeal – No Right- (Ross v. Moffitt) I SAID ONE FREE APPEAL! Only the first one’s on the house, after that better take out some of that student loan money.

2. Civil Litigation- the doctrine has limited application in the civil sphere of litigation. Specifically, the court may guarantee access where the proceeding is a government monopoly and depriving a person access may also infringe due process guarantees.

   a) Applies to Divorce/Family Rights- the court has allowed for waiving of fees (court, attorney, investigation) where the matter is related to the family (marriage, divorce, child custody, parental rights (MLB v. SLJ), paternity)

   b) Doesn’t Apply to Bankruptcy- the court refused to extend such rights to bankruptcy on the basis that the government did not have a monopoly on the ability to resolve problems with the creditors.

F. Interstate Movement- the court will also apply strict scrutiny to law that have the effect of discouraging individuals from moving from one state to another. These regulation typically give a benefit to longer term residents or deny services to short term ones. The interests being balanced are the states in that it resources are used by its residents and the interest of citizens being free mobile.

1. 3 Types of Restrictions- these abridgements on the right to travel will normally take one of the following form, each more diabolical than the next!

   a) Duration Requirement- laws that specifically require someone to be a resident for a specific amount of time.

   b) Specific Event Requirements- law that limit eligibility based on being instate at a certain event – (birth, high-school graduation, etc.)

   c) Specific Date Requirements- laws that limit eligibility based on a persons residence as of a specific date such as 8/22/74.

2. Welfare – Vital Services – No Restriction- (Shapiro v. Thompson)- the court invalidated residential duration requirements for welfare benefits. This was based on the effect such laws would have to discourage persons from moving from place to place. Particularly because of the subsistence nature of welfare benefits.

3. Impose Penalty = Invalid- (Memorial Hospital v. Maricopa County)- (restriction on medical services for 1 year residence invalidated) where the rule abridges access to vital government benefits and privileges will be considered a penalty placed on persons for moving and will be invalid.

4. Some Services May Be Abridged- as a result of the modification in Memorial Hospital states may impose reasonable limits on services that are not vital on the basis they will not offend the right to travel.
a) Divorce (Sosna v. Iowa)- a one year requirement of residency to be eligible for divorce was upheld as reasonable. Didn’t offend vital right according to court- no adverse impact.

b) University Tuition- state may restrict the eligibility for instate tuition rates to a residency requirement.

G. Limits on Fundamental Interest-Education- San Antonio SD v. Rodriguez- (court upholds plan that allows for unequal distribution of money for education by Texas to local school districts- rich districts had consistently more money than poor) the court refused to extend fundamental interest protection to a right to education nor did it find a rich/poor breakdown to be a 'suspect classification.' The court therefore applied a rational relation standard.

1. No Requirement for ‘precise equality’- the court pointed that equal protection clause has never been applied to require precisely equal treatment by the government.

2. No Absolute Deprivation- the court rejected the claim citing that in no event was there a complete deprivation of education, as a result the court seems to leave open the possibility that if such a scheme resulted in total deprivation, the court may invalidate it.

IX. State Action- the application of the 14th and 5th amendment have been interpreted to apply only where the state acts in such a way as to violate the due process or equal protection. As a result, the issue of what exact conduct constitutes state action can be an issue that must be resolved.

A. Overview- the requirement of state action in order to prove a violation of 14th and 5th amendment. This based on the structure of the amendments as well as the rest of the Constitution which proscribe actions by government rather than private individuals. These cases are often vary fact dependant! Where state action is found a person may be held liable for damages under 18 USC 1983.

1. Requirement of State Action – Civil Rights Cases (1883)- (the court invalidated statutes which proscribed all persons from denying on the basis of race access to inns, public transportation, theaters and other public places.) The court held that the 14th amendment did not empower congress to enjoin solely private action.

a) Without State Action = No Power to Act- the clear holding of the case what that without action by the state, congress was powerless to enact legislation to remedy the discrimination under §5 of the amendment. (this is no longer true really – Civil Right Act, etc.)

b) Dissent- argued that the 13th amendment empower congress to remove badge or incidence of slavery which discrimination arguably was. The first sentence of the 14th amendment doesn’t contain any qualifiers of state action, but guarantees civil right = no requirement. Public function argument.

2. Why Have State Action Requirement- why is there a state action requirement, for these lovely reasons:
a) Allow Private Discrimination- the state action requirement perseveres a right to discriminate that is may do some good for private organization (religious school, etc.)

b) Textual Argument- the most obvious argument from the Civil Rights cases is that the text of the constitution requires it.

c) Federalism Concerns- again there may be a concern that if to much control of discrimination was passed to the federal government, the states would be out in the cold.

3. What Activities Are at Issue?- in general, whether conduct constitutes a state action will be at issue in the following contexts:

a) Private Performance of a Public Function-(Marsh)- the court has found state action where the actions performed by a private party are normally performed by the government.

b) Judicial Enforcement of a Private Agreement- (Shelly)- where the state court is used to enforce a private agreement- state action may also be found (note this is almost dead law because broad application would make almost any private agreement to be state action.)

c) Joint Actions between a Private and Public Party- where the government and a private party are found to be acting in a symbiotic fashion. (Burton v. Wilmington Parking Auth.- restraint in garage was deemed state action). (again probably restricted to fact in light of modern test)

d) State Endorsement of Private Conduct-(Flagg Bros.)- where the state is seen to aid or assist in the private conduct, the conduct as a whole may be claimed to be state action.

4. ‘Public Function’ Doctrine- first cited as a reason to find state action in the Civil Rights cases, the finding of state action based on the performance of a ‘public function’ once was more broadly applied, but the modern court (see Lugar infra) has essentially eliminated the doctrine by strictly limiting ‘public functions’

a) Parks- the Court found that operating a park constituted a public function that would be considered state action. (Evans v. Newton- private white only park subject to 14th)

b) Shopping Centers- initially the court extended the finding of state action in the modern shopping center, latter the court reversed this ruling in effect by narrowing the case to its facts.

c) Fall of the Doctrine- Exclusivity Requirement- Jackson v. Metro Electric- in Jackson the court put an end to the modern construction of the ‘public function’ doctrine where it refused to find state action in a utility company. The court narrowed ‘public functions’ to those traditionally and exclusively reserved to the state.

B. Modern Standard – “Action Fairly Attributable to the State”- the modern test for state action is based on the courts holding in Lugar finding a 2-part
test for a state actor performing a state policy- to determine what actions are ‘fairly attributable to the state’.

1. **Judicial enforcement not enough - Flagg Brothers v. Brooks-** the court again found that for state action, a party must show an activity that is *traditionally and exclusively* reserved to the state, specifically the court was reluctant state action based solely on judicial enforcement. *Mere acquiescence or permission is not enough.*

2. **Two Part Test Established- Lugar v. Edmondson Oil-** the court attempted to create a black letter test in Lugar. The facts between Lugar and Flagg Bros. are very similar, the only difference can be found in the *pre-hearing attachment by the sheriff*. The court found that the state was acting in concert- making the transaction a state action. The court established the following two fact inquiry:

   a) *State Policy* – deprivation is caused by the exercise of some right or privilege created by the state or some acting on its behalf.

   b) *State Actor* - the party charged with the deprivation must be a person who may fairly be said to be a state actor.

C. **Application of Lugar Test-** the test adopted by Lugar was used in two other cases decided on state action grounds on the same day. Both utilized the two-part requirement of a *state policy executed by a state actor* must be found in order for the action to be considered fairly attributable to the state.

1. **State Must be Responsible for Specific Conduct- Blum v. Yaretsky-** (decision to move patient to different medical clinic held not state action- made by doctor). Here state action was not found because the state had *no specific policy of transferring patients*, thus the doctors decision to do so was *not compelled* by the state.

2. **‘Traditional & Exclusive Prerogative of the State’- Rendell-Baker v. Kohn-** (publicly funded private school found not to be state action)- as part of the Lugar test the court has continued to apply the requirement that the a ‘public function’ be performed before a private entity can be held to have performed a state action- here it was held education is not in the traditionally exclusive prerogative of the state.

   a) *Funding Not Dispositive* - note that the school received almost 90% of its funding from the state but was still not considered to be a state actor. As a result, levels of funding cannot be used to create a presumption of state action.