Outline for Constitutional Law II (14th Amendment)

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Standards of Review

Strict Scrutiny

- Strict Scrutiny: necessary to achieve a compelling State interest
    - the law or regulation is necessary to achieve a "compelling state interest"
    - the law must be "narrowly tailored" to achieve purpose using the "least restrictive means"
- Burden of proof is on the GOVERNMENT
- Groups Receiving Strict
    - Focus on violation of a fundamental right (below)
    - STATES can create suspect classes pursuant to their own statutes, as long as they are not repugnant to FEDERAL suspect classes - *San Antonio v Rodriguez*
    - All racial classifications receive strict scrutiny regardless if they are made by a State or Federal entity - *Adarand*
    - Footnote 4 Groups – *Carolene Products*
        - Facially violates a provision of the US Constitution, especially the Bill of Rights,
        - restricts the political process, such as restricting voting rights, organizing, disseminating information, etc., or
        - discriminates against "discrete and insular" minorities, includes: racial, religious, and national minorities, and particularly those who lack sufficient numbers or power to seek redress through the political process.
            - Exception to national minorities. State may place limitations legal US migrants if they have significant discretion in the direction and enforcement of the law (e.g. excluding legal migrants from the enforcement of law) – *Bernal v Fisher*
            - Exception to national minorities: migrants must have lawful status in the country to gain this protection (i.e. does not cover those who have not entered the country legally) – *Bernal v Fisher*
                - Children of Aliens not admitted lawfully receive intermediate scrutiny – *Plyler v Doe*
    - Someone subject to forced sterilization (fundamental right) - *Skinner v Oklahoma*
        - Cannot be reversed, injury is irreparable
        - Procreation is a fundamental basic right
    - Alienage Receives strict scrutiny - *Bernal v Fainter; Graham v Richardson; Carolene Products*
        - Exceptions noted above - positions intimately related to the process of democratic self-governance. Look for differentiation based on ministerial roles v discretion in enforcement of the law – *Bernal v Fainter*
        - Test for Determination
            - Is the classification substantially over inclusive or underinclusive?
            - Does the person hold a non-elective position that participates directly in the formulation, execution, or reviews of public policy?
        - If so, do they perform functions at the heart of representative govt.
            - Non-ministerial (strict scrutiny) - Teachers, judges, police officers
            - Ministerial (rational basis) – notary, civil engineer, member of the bar, clerk, members of the civil service administering housing relief

Intermediate Scrutiny

- Intermediate Scrutiny: substantially related to an important state interest
    - the law being challenged furthers an important government interest

    - law must achieve purpose by means that are substantially related to that interest
- Burden of proof is on the GOVERNMENT
- Groups receiving Intermediate scrutiny
    - Sex (women and men) – *Craig v Boren*
    - Illegitimate children.
    - Children of illegal migrants – *Plyler v Doe*
- Administrative convenience is not a compelling government interest. Might be a rational government interest for rational basis review. – *Frontiero v Richardson; Shapiro v Thompson*

Rational Basis

- Lowest tier of scrutiny. Basically, anything goes under any conceivable rational basis that the court can come up with of (*Lee Optical*). Has more aggressive bite in some cases (*Romer v Evans*)
    - My interpretation: If something will fail rational basis the court will dig into why the governments logic is not rational.
- Two prongs:
    - Action must relate to a legitimate state interest,
    - There must be a rational connection between the statute's/ordinance's means and goals.
- Actions cannot be irrational or arbitrary
- Animus against a politically unpopular group is not a legitimate state interest - *Romer v Evans*
    - Reliance upon an irrational prejudice, or the desire to harm a politically unpopular group, rather than a legitimate govt purpose, will fail rational basis review - *Cleburne v Cleburne Living*
- Administrative convenience is not a compelling government interest. Might be a rational government interest but this is unclear. – *Frontiero v Richardson*
- What kind of rights get this?
    - Economic Rights in the post-*Lochner* era
    - Any right that is not fundamental or having received higher scrutiny through precedent.

Fundamental / Enumerated Rights

- A **positive right** is something that people need to ensure their well-being, such as a right to food, education, medical care, housing, employment
- A **negative right** is the right NOT to be subjected to the action of another, such as government intrusion, e.g. the right NOT to be killed, or NOT to be taxed, or NOT be told what vocation they will work in.

Incomplete list of Fundamental Rights

- Prohibition on the free exercise of religion (1)
- Establishment of a religion (1)
- Abridging the freedom of speech and the press (1)
    - First amendment free speech protections do not extend to "clear and present dangers" or fundamental evils (Holmes argues there should be an immanency requirement to clear and present danger) - *Schenck v United States*
    - Free speech protections do not protect those advocating the violent overthrow of the govt - *Gitlow v NY*
    - Determinations come from the incitement of "imminent lawless action" from the direct language of the actor – *Brandenburg v Ohio*
- Right to peacefully assemble (1)
    - Time, place, manner restrictions on freedom of assembly can be put in place
    - Three prong test from *Ward v Rock Against Racism*
        - Restriction must be <u>content neutral</u>
        - Restriction must be <u>narrowly tailored</u> to serve a significant govt interest

        - Restriction must leave open ample alternate channels for communication
- Petition the govt for redress of grievances (1)
    - Includes travel to the seat of government for redress
- Keep and bear arms (2)
- Quartering soldiers without owner consent (3)
    - Has not been incorporated against the states via Due Process (14). Hasn't come up yet
- Secure in persons, houses, papers, and effects against unreasonable search (4)
    - Above applies to search and seizure without warrant
- Held to stand trial without grand jury indictment (5)
    - Exception to above, land and naval forces during war time
    - Not yet incorporated against the states
- Cannot be tried twice for the same crime (5)
- Deprivation of life, liberty, or property without due process of law (5)
    - Can serve as an "equal protection" right against federal govt through reverse incorporation – *Bolling v Sharpe*
- Public takings require just compensation (5)
- Speedy trial and public trial by an impartial jury (6)
    - Informed of the nature of the offense (6)
    - Confront witnesses (6)
    - Have assistance of counsel (6)
    - Right for a jury to be selected from location of the crime (6)
        - Jury selection based on location not yet incorporated
- Trial by jury in any suit of $20 or more (7)
    - Has not been incorporated against the states
- No excessive bail, fines, or cruel and unusual punishment (8)
- Enumerated rights shall not be read to eliminate other rights retained by the people (9)
    - This is our path to unenumerated rights
- Prohibition on slavery and involuntary servitude except as criminal punishment (13)
- Prohibition on abridging the privileges or immunities of citizens (14)
- No state shall deprive ANY PERSON of life, liberty, or property without due process (14)
- No state shall deny ANY PERSON the equal protection of laws (14)
- The right to vote shall not be abridged based on race, color, or previous servitude (15)
- Rights from *Corfield v Coryell* (WASHINGTON opinion)
    - Protection by the Government, the enjoyment of life and liberty, the right to acquire and possess property of every kind, the right to pursue and obtain happiness and safety; subject nevertheless to such restraints as the Government must justly prescribe for the general good of the whole.
    - The right of a citizen of one State to pass through (travel), or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise;
    - Right to claim the benefits of the writ of habeas corpus;
    - Right to institute and maintain actions of any kind in the courts of the State;
    - Right to take, hold and dispose of property, either real or personal;
    - Right not to pay higher taxes or impositions than are paid by the other citizens of the State…
- The RIGHT TO WORK is fundamental (distinction from *Slaughter-house* is that *Slaughter-house* applies to all persons and the state is remedying a public health issue when creating a state licensed monopoly) – *Yick Wo*
- State must provide fair compensation for seizing private property - *Chicago, Burlington & Quincy RR v. Chicago (1897)*

    - This is to ensure Due Process rights have been met. Similar to (5)
- The Freedom to contract - *Lochner v NY* (1905)
    - Court originally presumed against regulation of contracts (striking down minimum wage laws and yellow dog union agreements). After *West Coast Hotel v Parrish*, rational basis. Cant be arbitrary.
- The RIGHT TO ACQUIRE and DISPOSE of PROPERTY under Due Process – *Buchanan v Warley*
    - The Court will not enforce racially motivated housing covenants which restrict the ability to acquire and dispose of property - *Shelly v Kramer*
    - These rights are subject to limitations under standard police powers like zoning, but these limitations cannot be race based in the outright prohibition of sale – *Buchanan v Warley*
        - TEST for when can the court interfere with the state's police power?
            - Legislation is not within the scope of legislative power
            - Means don't reasonably tend to accomplish a lawful purpose
              OR
              Legislation runs counter to limits of the constitution.
- The state has an interest in protecting Women's health - *Muller v Oregon / West Coast Hotel v Parrish*
    - This is not fundamental
- There exist recognized Liberty rights beyond freedom from bodily restraint – *Meyer v Nebraska*
    - Parents have the right to raise (and educate) their children as they see fit. – *Meyer v Nebraska*
    - Right to contract – *Meyer v Nebraska*
    - Engage in the common occupations of life – *Meyer v Nebraska*
    - Acquire useful knowledge – *Meyer v Nebraska*
    - To marry – *Meyer v Nebraska*
    - Establish a home and bring up children – *Meyer v Nebraska*
    - Worship god according to the dictates of one's own conscious – *Meyer v Nebraska*
    - Generally, to enjoy those privileges long recognized in common law as essential to the orderly pursuit of happiness by "free men" – *Meyer v Nebraska*
- Deeper on parental right to raise your children as you see fit - *Meyer v Nebraska*
    - Language and manner of religious education - *Meyer v Nebraska*
    - Home / public / private schooling venue. The state cannot compel attendance at a PUBLIC school - *Pierce v Society of Sisters*
        - Note, this does not undermine the State's ability to regulate things like curricula, etc.
    - Parents have the right to control a child's upbringing - *Troxel v Granville*
    - States cannot arbitrarily interfere with factors like visitation – *Troxel v Granville*
        - A freestanding "best interest of the child" statute for visitation rights violates due process rights of parents
- Procreation - *Skinner v Oklahoma*
- Marriage is a fundamental right - *Skinner v Oklahoma, Loving v Virginia*
    - Anti-miscegenation laws serve no legitimate government purpose – *Loving v Virginia*
    - Marriage is within traditional STATE police powers but constitutionally repugnant restrictions cannot be placed on the institution – *Loving v Virginia*
    - The Right to Marriage is fundamental for all consenting persons - *Obergefell v Hodges*
- Right to an education is IMPORTANT (not fundamental) if the state offers one - *Brown v Board*
    - Access to an equal education is not a fundamental right - *San Antonio v Rodriguez*
    - The state interest in promoting continued national progress through education is an important interest and will pass intermediate scrutiny for groups – *Plyler v Doe*
- There is no fundamental right to physician assisted suicide - *Washington v Glucksberg*
- There is a fundamental right to be taken off life support - *Cruzan v Missouri Health*
    - This is foundationally about physical battery of the incapacitated patient
- The right to travel is a fundamental right - *Crandall v Nevada*

- administrative convenience is not a compelling state interest - *Shapiro v Thompson*

Rights not Recognized by the Court as Fundamental

- P | I do not protect the right to ply YOUR specific trade (e.g. butcher) – *Slaughter-House*
- Privileges or Immunities do not protect the right to practice a specific profession - *Bradwell v. Illinois*
  - Note tension with the *Meyer* rules on engaging with common occupations of life
- Privileges or Immunities to not provide protection based on gender - *Bradwell v. Illinois*
- The right to access public accommodations is a privilege, but Congress cannot forbid private discrimination via private persons pursuant to (14). It can simply bar state action. *Civil Rights Cases*
  - This is eventually done and held up under Commerce – *Heart of Atlanta Motel, Ollie's BBQ*
- Riding on public transit is not a fundamental right – *Plessy v Ferguson*
- Corporations are not entitled to the P&I of individuals, and states can withhold privileges from corporations in ways it cannot do to individuals – *Berea College*
- There is a right to a living wage, but it is not fundamental - *Adkins v Children's Hospital*

List of Suspect Classes

- State cannot discriminate based on alienage or national origin if the person has entered the country via legal channels – *Yick Wo*
- Statute which discriminate against "discrete and insular" minorities, especially racial, religious, and national minorities and particularly those who lack sufficient numbers or power to seek redress through the political process. – *Carolene Products*
- NON-SUSPECT CLASSES
  - Ready to wear eyeglass sellers do not get additional protections under equal protection - *Williamson v Lee Optical*
  - The wealthy and the poor – *San Antonio v Rodriguez*
  - Age, disability, wealth, political preference, political affiliation, felons
  - Patients seeking physician assisted suicide - *Washington v Glucksberg*
  - There are more… Its basically everyone not protected above or inferable from Footnote 4

Personal Notes on Presumption of Constitutionality vs Presumption of Liberty (Economic Rights)

- Strongest Argument for liberty
  - Lassie Faire argument, markets are efficient. We need to protect the liberties of non-majoritarian characters. Elections are not a carte blanch permission to do all things to all persons who are willing to work for a wage
    - Freedom to contract
    - Buck v Bell
    - Protect Minority rights
    - Government can carry burden
- Strongest Argument for constitutionality
  - Things are going through the political process, there's a reason people care. We should let the political process work, and we know negotiating bodies in an economic framework have heterogeneous bargaining power. People elect representatives to advocate for them.
    - Judicial restraint
    - Respect for legislative and political process
    - Historic police power
    - Permits proactive and flexible rule making

History Prior to 13, 14, 15.

- Bill of rights initially did not apply to the states - *Barron v Baltimore.*
  - This has changed through the process of selective incorporation via Due Process (14).

Incorporation is both substantive and procedural (e.g. *Gitlow*). Exceptions to incorporation are amendments 3, 7, 9, and 10.
    - (5) has been partially incorporated (indictment by grand jury not incorporated)
    - (7) has been partially incorporated (The right to a jury selected from residents of crime location not incorporated)
- *Dred Scott* holding: slaves cannot be US citizens and cannot enjoy P&I. This is directly overturned by the civil war amendments
    - 13 outlaws slavery
    - 14 gives us citizenship, P | I, due process, equal protection
    - 15 establishes voting rights which cannot be abridged based on race

State Action Limitation

- The 14th amendment is not rights creating. It simply bars prohibitions by the state. *Civil Rights Cases*
    - 14 cannot be used to regulate or bar the behavior of private parties (*Civil Rights Cases*)
    - Courts (under equal protection) will not enforce racially restrictive language in private contracts (e.g. racially restrictive housing covenants – *Shelley v Kramer*)
    - Congress eventually does bar certain private behaviors via commerce powers rather than via (14) (*Heart of Atlanta Motel, Ollie's BBQ)*

Privileges or Immunities

There is almost nothing that is protected under P|I.

- P|I does not protect rights that are not enumerated (e.g. those in Coryell) – *Slaughter-House*
- P|I does not protect unenumerated rights - *Bradwell v. Illinois*
- Under P|I Congress can act to PREVENT STATES from denying people rights, but Congress CANNOT ACT to prevent PRIVATE PARTIES from acting – *US v Cruikshank*
    - This is state action limitation
- P | I do not protect the rights in the Bill of Rights (*US v Cruickshank*)
- P | I only protect a limited set of rights of US citizenship (e.g. petition the government / travel / habeas corpus / access to government institution / protection on the high seas / protection received from treaties / access to courts / use of navigable waters) (*Corfield*)

THOMAS arguments for incorporation under P|I

- There is general disagreement among scholars about the correct route for incorporation
- THOMAS, argues for P|I (14)
    - "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
    - In *Saenz v. Roe* (1999), THOMAS argues that English common law, at the time of the founding, referred to 'privileges' and 'immunities' as fundamental rights and liberties specifically enjoyed by English citizens [and all persons]." At the time of (14), adopters "understood that 'privileges or immunities of citizens' were fundamental rights."
    - THOMAS rejects the *Slaughter-House* conclusion that P|I protects only rights "which owe their existence to the Federal government, its National character, its Constitution, or its laws." This renders the clause toothless when coupled with *Cruikshank*
- So, *Slaughter-House* gets things wrong, says THOMAS, because it overlooks the history of (14)
    - Thus, fundamental rights do not "owe their existence to the Federal government." The pre-exist and the government exist to secure them
- Why is Due Process an odd choice for incorporation?
    - Plain text is about the process for taking away a life, liberty, or property, it isn't a prohibition on the state's ability to take away rights once there is due process.
    - There are knocks on substantive due process from SCALIA, which bear note because

substantive due process is the process of imbuing rights via the liberty provision of Due Process.
    - THOMAS knocks substantive due process in dissent in *Troxel v. Granville* (2000): "substantive due process cases were wrongly decided and that the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision."
- So, THOMAS has been riding the P|I bandwagon for a while. Cases include *Saenz, Troxel, McDonald, Timbs,* and most recently *Ramos.*
    - The critical argument is that P|I is more faithful to the original text, will preserve enumerated rights from the Constitution, and is more grounded in history than substantive due process (that he argues lacks "a guiding principle to distinguish 'fundamental' rights that warrant protection from non-fundamental rights that do not.")

Due Process and the Regulatory State

Background

- Two Sources. (5) and (14)
    - Due Process Clause of Five: "No person shall…be deprived of life, liberty, or property, without due process of law."
    - Due Process Clause of Fourteen: "No State shall…deprive any person of life, liberty, or property, without due process of law."
        - These rights provisions prevent the federal government, and the state governments, respectively, from "depriving any person of life, liberty, or property, without due process of law."
    - *Londoner v Bi-Metallic* holds that this is action on an individual (i.e. enforcing each case on individual grounds), the Constitution does not require due process for the establishment of laws themselves.
- There are two ways to approach these provisions.
    - The first is "procedural," and focuses on the language "without due process of law." On this reading, the government may deprive a person of "life, liberty, or property," but only after having provided that person with "due process of law."
    - The second way to read this provision is as a "substantive" restriction, by focusing on the word "liberty."
- At a minimum, there should be notice, opportunity to be heard, and interpretation by a neutral decision maker
    - There are then procedural issues (representation by counsel, evidence).
- During the Progressive Era, the Court considered a right to economic freedom—that is, a right to make contracts—among the "liberties" protected by the Due Process Clauses. (e.g. *Lochner*)
    - This is where substantive due process emerges. This review dies during the New Deal

Questions to Ask

- Are we dealing with procedural due process or substantive due process?
    - If it is procedural there should be notice, opportunity to be heard, and interpretation by a neutral decision maker
    - If it is substantive we are talking about liberties, and the process of identifying rights activated by the liberty clause in the 14th amendment
- Is there interference with the right to contract (buy and sell labor?) – Interpretation depends on what era we are in. Starting with the *Lochner* era…
    - We are in due process when contracts are interfered with… *Lochner, Buchanan v Warley*
    - Cannot limit employee working hours for bakers (distinguished from miners, which is dangerous). *Lochner*
    - Cannot be arbitrary. State must produce evidence that it is remedying a harm, and the act

must have a direct relation as a means to an appropriate end
    - Are we dealing with a morality issue (prostitution or booze)?
        - Well within state police powers under *Lochner*
    - *Lochner* - presumption against regulatory action of the state.
        - TEST - The *Lochner* Era freedom to contract is not absolute, but only exceptional circumstances allow it to be curbed - *Adkins v Childrens Hospital*
        - Valid restrictions on the right to contract involve from *Adkins*
            - Businesses that serve some public interest
            - Contracts relating the performance of public works
            - Regulation about method and time of payment
            - Caps on hours worked in certain occupations (e.g. dangerous jobs)
                - Does not include BLANKET minimum wage laws
        - This era ends with a presumption of constitutionality stemming from *West Coast Hotel v Parrish* and *Williamson v Lee Optical*
    - *West Coast Hotel v Parrish* – Rational Basis Era
        - State can set rates for the production and sale of goods that affect the public interest (e.g. Milk, wages, insurance rates) - *Nebbia v NY, West Coast Hotel, O'Gorman & Young v Hartford Fire*
            - States can heterogeneously set minimum wage laws for men and women to protect the interests of women – *West Coast Hotel v Parrish*
        - CHALLENGER is the one who must show this is unreasonable - *Nebbia*
            - TEST: Does the law have a "reasonable relation" to a proper legislative purpose? (This is a means-end fit)
                - Is the statute neither arbitrary or discriminatory?
                    - Controlling prices is a proper legislative purpose?
                    - Going through the legislative process is *prima facie* evidence of things not being arbitrary - *Nebbia v NY*
        - TEST Under *West Coast Hotel:*
            - Laws must have a reasonable relation to is subject (means-end fit)
                - the protection of women is a legitimate end under *West Coast*. Thus, a minimum wage to protect the means of existence is legitimate
            - Adopted in the interests of the community
                - The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well-being, but casts a direct burden for their support upon the community.
        - FINAL TEST under *Williamson v Lee Optical* – Rational Basis – There is a presumption of constitutionality for economic regulation.
            - Legislation cant be arbitrary
            - Legislation must have a rational connection (reasonable) to the objective
            - Legislation cant discriminate between similarly situated groups
                - You can single out a group that is rationally related to the public group, but it cannot be arbitrary of capricious
                - See Footnote Four for protected groups
                - Presumption of constitutionality comes from *Carolene Products,* also known as minimum rationality
        - NOTE: Individual must have the opportunity to rebut (*CBQ RR v McGuire*) even if the constitutionality is presumed (*Carolene Products*)
- Are we in the post *Lochner* era (i.e. post *West Coast Hotel v Parrish*)?

- At this point there is a presumption of constitutionality on Due Process (14) restrictions, especially restrictions on economic rights. *Carolene Products*
- Statutes limiting the right to contract are valid exercises of the police power unless facts demonstrate that they are unreasonable - *O'Gorman & Young v Hartford Fire*
    - Courts must PRESUME constitutionality unless there is a FACTUAL foundation that the provision is not an appropriate remedy - *O'Gorman & Young v Hartford Fire*
        - This presumption is REBUTTABLE though and there must be an opportunity to rebut them (*CBQ RR v Chicago, Carolene Products*)
- If there is evidence to support economic or social legislation, the judiciary should not second guess the legislature. - *US v Carolene Products*
    - Absent evidence, supportive facts should be presumed- *US v Carolene Products*
    - It is the obligation of the challenger to challenge facts - *US v Carolene Products*
- As the presumption of constitutionality is REBUTTABLE. It can be rebutted in three ways - *Carolene Products*
    - Facts could change
    - Facts are wrong as applied or irrational as applied
    - Facts never existed
        - Example of one getting struck down (*Milnot v Richardson*). Facts have changed. Filled Milk Act inappropriately distinguishes between Milnot and other products which are shown to be healthy and are currently for sale
- Conditions under which there is no presumption of constitutionality – Footnote 4 - *Carolene*
    - Statute facially violates a provision of the Constitution, especially the Bill of Rights,
    - Statute restricts the political process that could repeal an undesirable law, such as restricting voting rights, organizing, disseminating information etc., or
    - Statute discriminates against "discrete and insular" minorities, especially racial, religious, and national minorities (particularly those who lack sufficient numbers or power to seek redress through the political process).
- REITERATE: Individual must have the opportunity to rebut (*CBQ RR v McGuire*) even if the constitutionality is presumed (*Carolene Products*)
- State laws regulating business are subject to only rational basis review, and the Court need not contemplate all possible reasons for legislation. - *Williamson v Lee Optical*
    - Legislatures seeking to resolve societal problems can deal with problems "one step at a time" - *Williamson v Lee Optical*
    - "There needs to be an evil to be corrected" and "it might be thought that this is rational"
- SCOTUS can even come up with their own reasons for creating a law under rational basis - *Williamson v Lee Optical*
    - This presumably changes under "rational basis with bite" – *Romer v Evans*
- Examples of Appropriate Legislation in this era
    - States can set rates and limit commissions because if affects the price of goods because it affects a public interest (e.g. insurance rates). - *O'Gorman & Young v Hartford Fire*
    - State can set rates for the production and sale of goods that affect the public interest (e.g. Milk) - *Nebbia v NY*
    - Laws suppressing "imminent lawless action" - *Brandenburg v Ohio*
    - Regulation on the interstate shipment of filled milk – *Carolene Products*
        - Note that this was federal and not state so we are Due Process (5)
    - State legislatures can setup rules regarding public health and who can fit glasses (even require new prescriptions) – *Williamson v Lee Optical*
- Unsupported Legislation
    - Hatch Act - Federal law cannot completely prevent people (e.g. federal employees)

from participating in the political process in the form of handing out fliers or being part of a campaign - *United Public Workers v Mitchell*
        - Filled Milk Act – EVENTUALLY – Facts sufficiently changed and "filled milk" as defined was being inappropriately singled out when essentially identical products were permitted for sale – *Milnot v Richardson*
            - Note that the Filled Milk Act is federal so we are under Due Process (5)
- Is there a limitation on speech created by a statute?
    - Statutes only be declared unconstitutional if they are arbitrary and capricious - *Gitlow v NY*
    - Thus, the govt can suppress or punish speech that advocates unlawful conduct
        - Clear and Present danger test - *Schenck v United States*
        - This includes yelling fire in a movie theatre - *Gitlow v NY*
        - Later "imminent lawless action" (direct language of incitement) - *Brandenburg v Ohio*
    - Keep in mind the rules set out in *Rock Against Racism* if the limitation is based on permitting
- Was property seized?
    - Was there a procedure for hearing the complaint and a determination of fair compensation?
    - Due Process for the purpose of state property seizure requires both formal administrative process (i.e. not arbitrary) and just compensation. Just compensation may end up being small though. RR only got $1.00 from a jury in *Chicago, Burlington & Quincy RR v. Chicago (1897)*
- Are limitations on the right to contract being applied heterogeneously across sex or age?
    - Valid police power, subject to rational basis review - *Muller v Oregon*
    - Heterogeneous limits on working hours are permissible based on sex if they are based on protecting women's health and bargaining status - *Muller v Oregon; West Coast Hotel*
    - The federal govt may also set minimum wages for women. But these must be targeted and shown to achieve some protection of women's health. In *Adkins* the minimum wage laws set for women were struck down as over broad and unnecessary because of (19) – *Adkins v Children's Hospital*
    - There is no *Lochner Era* determination on setting minimum wages for children - *Adkins v Childrens Hospital*
    - In the post *Lochner Era* heterogeneous restrictions are not a violation of Due Process – *West Coast Hotel v Parrish*
        - Note these would be subject to Intermediate Scrutiny under Equal Protection (14)
- Are state police powers being enacted under the safeguard of public health?
    - Compulsory sterilization is permissible as long as the affected party can arguably harm the population through procreation – *Buck v Bell*
        - Sterilized party must be afforded the opportunity to present evidence in process
        - Note carveouts from *Skinner v Oklahoma*
            - Not hereditary… Applied to petty theft but not to white collar criminals…
    - Public health police powers expand in scope under the condition of emergency
        - Example: Compulsory vaccination under smallpox epidemic – *Jacobson v Massachusetts*
- Is a person trying to dispose of / sell / buy property?
    - Bans on sale of property based on race violate freedom to contract (14) - *Buchanan v Warley*
    - A statute that prohibits the ability to dispose of property is immediately suspect - *Buchanan v Warley*
        - There is a constitutional limit on restrictions on PROPERTY rights
        - TEST for when the Court can interfere with the state's police power?
            - Legislation is not within the scope of legislative power
            - Means don't reasonably tend to accomplish a lawful purpose

                OR

            - Legislation runs counter to limits of the constitution.

- Is a person being compelled to labor for another private party to pay a debt or face being charged as a criminal?
    - This is likely a violation of (13) if there is no diagnosis of intent or employees are prohibited from providing testimony about their motives / intent - *Bailey v Alabama*
    - When would this be valid? "To justify conviction, it was necessary that this intent should be established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise" *Ex Parte Riley*
        - There is an open question of if this violates due process (14), but following *Ex Parte Riley* we can reasonably surmise that it would
- Is the state interfering with how parents wish to raise their children?
    - States do have the power to regulate schools (minimum curricula, attendance requirements, etc.) - *Pierce v Society of Sisters*
    - Parents have the right to direct the education of their children based on venue (public, private, home) - *Pierce v Society of Sisters*
    - The state cannot prohibit education in certain languages - *Meyer v Nebraska*
        - *Meyer* is centered on religious education... implications?
        - *Meyer* may go another way during war time (context was post WWII teaching of German to Lutheran children)
- Is the entity being regulated a PERSON or a CORPORATION?
    - Corporations are not entitled to due process protections under (14)
    - Corporations may be receive first amendment protections (*Hobby Lobby, Citizens United*)
    - Corporations may be subject to changes in chartering rules at the state level – *Berea College*

Equal Protection – Early On

Questions to Ask

- Who are the groups receiving unequal protection?
    - Look for groups that that can be defined with clear edges…
        - Race, alienage, gender – Clear Edges
        - Relative wealth – Unclear – *San Antonio v Rodriguez*
- Is the State regulating the behavior of a corporation or a private individual?
    - Corporations are not entitled to the P&I of individuals, and states can withhold privileges from corporations in ways it cannot do to individuals – *Berea College*
        - States can legally prohibit private educational institutions chartered as corporations from admitting both black and white students. – *Berea College*
            - This wouldn't fly today I am guessing – *United States v Virginia*
- Is the State acting NEGATIVELY to deny a persons their rights?
    - State law PROHIBITING Black persons from serving on juries violates equal protection *Strauder v West Virginia*
- Is the law facially neutral?
    - Racially discriminatory application of facially neutral laws violates Equal Protect – *Yick Wo*
        - Cannot discriminate unequally based on alienage – *Yick Wo*
    - TEST from *Yick Wo*
        - If the law is fair on its face, if it is applied in an unequal way to make discriminations between persons in similar circumstances, the denial of equal justice is prohibited
        - We determine this based on the culmination of facts
        - Means and end fit
- Is the law not facially neutral?
    - States can segregate based on race as long as the provision of state services is not outright prohibited (separate but equal) – *Plessy v Ferguson*

        - "Separate but equal" provision of services mandated by state government does not violate equal protection – *Plessy v Ferguson*
            - Partially overturned by *Brown v Board* (education)
            - Provision of separate but equal higher education (as well as other services) still constitutionally permissible but they must be truly equal – *United States v Virginia*
            - Separate but equal is on the ragged edge of justification, but there are cases where it is permissible (e.g. restrooms, locker rooms).
- Are we dealing explicitly with property rights?
    - If so, we are likely in due process land - *Buchanan v Warley*
- Are we dealing with freedom to contract?
    - If so, we are likely in due process land… *Lochner, Buchanan v Warley*

Equal Protection

Tiers of Scrutiny

- Groups getting Strict Scrutiny
    - Footnote 4 Groups – *Carolene Products*
        - Appears on its face to violate a provision of the US Constitution, especially in the Bill of Rights,
        - restricts the political process that could repeal an undesirable law, such as restricting voting rights, organizing, disseminating information etc., or
        - discriminates against "discrete and insular" minorities, especially racial, religious, and national minorities and particularly those who lack sufficient numbers or power to seek redress through the political process.
            - Exception to national minorities. State may place limitations legal US migrants if they have significant discretion in the direction and enforcement of the law – *Bernal v Fainter*
            - Exception to national immigrants who have not entered the nation through lawful channels → No protections
    - Someone subject to forced sterilization (fundamental right) - *Skinner v Oklahoma*
        - Cannot be reversed, injury is irreparable
        - Procreation is a fundamental basic right
    - Alienage Receives strict scrutiny - *Bernal v Fainter; Graham v Richardson; Carolene Products*
        - Exceptions - positions intimately related to the process of democratic self-governance. Look for differentiation based on ministerial roles v discretion in enforcement of the law
        - Test for Determination:
            - Is the classification substantially over inclusive or underinclusive?
            - Does the person hold a non-elective position that participates directly in the formulation, execution, or reviews of public policy?
            - If so, they perform functions at the heart of representative govt.
                - Non-ministerial - Teachers, judges, police officers
                - Ministerial – notary, civil engineer, member of the bar, clerk, members of the civil service administering housing relief
- Groups Getting Intermediate Scrutiny
    - Women (sex v gender distinction has *de minimis* establishment by the court)
        - Previously, Rational basis - *Goeseart v Cleary*
        - Increased in scrutiny first by *Reed v Reed* and then *Craig v Boren*
    - Children of undocumented immigrants – *Plyler v Doe*

    - Illegitimate Children – [Source?]
- Groups getting rational basis
    - Everyone else
    - Candidates to become river board apprentices (nepotism in *Koch v Board of River Port Comms*)
    - WEALTH is not a suspect class - *San Antonio v Rodriguez*
    - Age, disability, wealth, political preference, political affiliation, or felons
- Indicators that Equal Protection will fail under strict scrutiny
    - State does not indicate a compelling state interest
        - Larceny is not hereditary – *Skinner*
    - Separating School children based on race
        - States cannot separate children based on race – *Brown v Board I and II, Cooper v Aaron*
        - Feds (DC) cannot separate children based on race – *Bolling v Sharpe*
    - State does not delineate between the groups
        - State did not differentiate between white collar theft and regular theft and why that requires sterilization – *Skinner v Oklahoma*
        - Research indicates that delineation between groups (notably suspect classes) fosters or perpetuates status differences
            - Social science research in - *Brown v Board I*
    - If it is challenging to draw the line between the groups scrutiny may fail
        - Example: who is "property wealthy" and indigent based on property holdings - *San Antonio v Rodriguez*
    - STATE violates principles of one person one vote by not allocating districts based on population – *Reynolds v Sims*
    - STATE does not accomplish the task through the least restrictive means (such as setting quotas or providing mechanical benefits to some group) – *Bakke, Gratz v Bollinger*
    - STATE fails to identify a compelling interest
        - Remedying the harms of past discrimination is only going to fly when that particular institution has been involved in discrimination
            - Works for police departments if they have engaged in discrimination – *United States v Paradise*
            - Could be a valid interest for schools (primary or higher education) but is not as applied within case (door open) – *Involved Parents v Seattle, Bakke*

Questions to Ask

- Who are the two groups? Do these groups get differing protection?
    - laws perpetually have heterogeneous effects on people, this doesn't mean everyone gets heightened scrutiny - *Koch v River Port Pilot*
    - Separating white and black children serves no reasonable government purpose - *Bolling v Sharpe*
    - If it is challenging to create a hard line between the two groups it is more likely that the challenge will fail – *San Antonio v Rodriguez*
        - *San Antonio v Rodriguez* was about what constitutes wealth and poverty.
- Does the infringed protection relate to voting rights?
    - We will apply strict scrutiny in such cases - *Carolene Products*
    - Redistricting in states is a judiciable issue - *Baker v Carr*
    - STATE house and senate districts must have roughly equal populations - *Reynolds v Sims*
    - STATE house and senate districts cannot "automatically" get one rep - *Reynolds v Sims*
    - FEDERAL districts need not apply this way (Art 1 Sec 3) (viz. the senate)
- Is the state infringing on the right to marry?
    - If the state is sterilizing someone, there are due process issues – *Skinner v Oklahoma*
    - Barring marriage based on race violates equal protection – *Loving v Virginia*

- Does a facially neutral statute / rule violate equal protection?
    - Is the statute applied in an unequal way to make discriminations between persons in similar circumstances? Such denial of equal justice is prohibited. This is determined based on the culmination of facts - *Yick Wo*
        - *Yick Wo* deals with an arbitrary enforcement. Keep going if there is a test people need to take or some kind of hearing.
    - Discriminatory impact is NOT ENOUGH! Must have a discriminatory purpose and discriminatory impact - *Washington v Davis; Village of Arlington v MHDC*
        - DISCRIMINATORY INTENT is prioritized over DISCRIMINATORY IMPACT when deciding 14th amendment issues. - *Village of Arlington v MHDC*
        - Discriminatory purpose is based on the totality of the facts - *Washington v Davis*
        - Test for discriminatory intent is culmination of facts based on - *Village of Arlington v MHDC:*
            - Look for discriminatory impact (affects one race more than another)
            - Historical context of the action (pattern of behavior)
            - Unusual departures from prior decision making
            - Legislative and administrative history
                - BURDEN OF PROOF IS ON PLAINTIFF
    - Absent discriminatory impact AND discriminatory purpose we apply rational basis review - *Washington v Davis; Village of Arlington v MHDC*
        - In *Washington v Davis* the issue at hand was that WHITE police candidates were far more likely to pass Test 21 than BLACK police candidates, but there was no evidence that Test 21 intended to discriminate
        - In *Village of Arlington v MHDC* the issue was the building of low income residencies. This required a rezoning of single family units. The unwillingness to rezone resulted in a violation of equal protection (14) because rezoning was usually granted and legislative history indicated clear racial animus
- Does the statute involve admission to institutions of higher education?
    - See below for the application in the context of Sex (e.g. VMI in *US v Virginia*)
    - It is permissible for public institutional of higher education to make admissions decisions based on race subject to strict scrutiny - *Regents v Bakke, Grutter v Bollinger, Fisher I & II*
        - Racial quotas are impermissible – *Bakke, Richmond v Croson*
        - Mechanical benefits (automatic 20 points) are not permissible - *Gratz v Bollinger*
    - Potential compelling state interests
        - Remedying past discrimination is not a compelling government interest in the context of education - *Bakke*
        - Counteracting societal discrimination is not compelling in the context of education - *Bakke*
        - Facilitating health services and proliferating the number of minority physicians is compelling – *Bakke*
            - This is not pursued after *Bakke*
        - Creating a racially diverse student body is compelling - *Bakke, Grutter v Bollinger*
            - In subsequent cases there is deference given to the claim that this is a compelling state interest - [*Grutter, Gratz, Fisher I & II*]
            - Racial diversity to promote the destruction of stereotypes based on cross racial understanding is legitimate without a numerical quota and receives some deference - *Fisher II*
- Means to achieve a racially diverse student body in higher education…
    - Racial quotas are an impermissible way to achieve the benefits of diversity because they are not the least restrictive means - *Bakke, Grutter v Bollinger*

    - Race can be used as an individual plus but it cannot be a mechanical benefit - *Bakke*
    - If a school is using race as a factor in fostering diversity it must be one of several factors that are taken into consideration - *Grutter v Bollinger*
    - Race can be a plus factor as long as the benefit is non-mechanical (automatic 5 pts) - *Grutter*
    - Race cannot be the defining feature of an application, there must be other things - *Fisher I*
    - UT Austin Top 10% rule is a permissible means of promoting racial diversity - *Fisher II*
        - Top 10% of Texas high school graduating classes are guaranteed admission to any public Texas university
        - Remaining class is filled out with a mix of academic test scores and personal achievement indices. This is a holistic review of [extracurriculars, work, community, leadership, home and socioeconomic factors, and race (favoring Black and Latino candidates)]
- Challenges under Title VI of the Civil Rights Act for education are coterminous with Equal Protection (14) and apply to private institution as well - *Grutter v Bollinger*
- Evaluating Strict Scrutiny Individual prongs for Higher Education. *Fisher I* set forth three controlling principles for assessing the constitutionality of a public university's affirmative-action program.
    - First, "[r]ace may not be considered [by a university] unless the admissions process can withstand strict scrutiny," *Fisher I*
    - Second, "the decision to pursue 'the educational benefits that flow from student body diversity'…is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." (Flows from *Bakke*)
    - Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. The university bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but you cant mail it in
- Compelling Interest Prong for higher education - Burden is on the state.
    - See above, benefits that flow from diversity is a compelling interest
    - Some deference to the university is given for creating a diverse student body - *Grutter v Bollinger*
- Narrow Tailoring Prong for higher ed - fit should be narrowly tailored via least restrictive means.
    - Michigan law program passes because there are many aspects of diversity and many factors (beyond race) are being considered - *Grutter v Bollinger*
        - Same with UT Austin Top 10% program, lots of factors – *Fisher II*
    - The deference that the university may receive in the compelling interest prong does not extend to the narrow tailoring prong - *Fisher I*
    - Do Race Neutral alternatives exist?
        - If race neutral options exist then it undermines narrow tailoring - *Grutter*
        - Narrow tailoring does not require the complete exhaustion of all alternatives, but does require a good faith effort (SDOC in *Grutter*)
        - The school need not consider every conceivable option, but you will fail narrow tailoring if "there is a non-racial approach that would promote the substantial level about as well and at tolerable administrative expense" - *Fisher I*
- Catch-22s for evaluating higher education issue
    - Catch-22 1: How much of an effect of the program is enough?
        - KENNEDY says the limited effect of the 10% plan evidenced constitutionality in *Fisher II*. ALITO says if this doesnt do enough, why use it at all?
    - Catch-22: Conclusion of the program?
        - Achieving a "critical mass" acceptable because it is not a set number - *Grutter*
        - Recall, quotas are not permissible - *Bakke, City of Richmond v Croson*
            - Think *Fisher II* - ALITO wants SMART (measurable) goals, but this raises

quota issues (balance based on the court) - *Fisher II*
    - Prognostication, this is going to get shot down by the Court
- Does the statute involve admissions to primary school institutions (High School)?
    - Be cognizant of a COMPLETE deprivation of rights as opposed to heterogeneous quality of education – *Plyler v Doe*
        - Prohibiting undocumented children from accessing public education is impermissible under intermediate scrutiny because it prevents these children from contributing to continued national progress - *Plyler v Doe*
    - *Grutter* and *Gratz* are NOT binding in the case of the public school system! *Parents v Seattle Schools*
    - Achieving the benefits of racial diversity might be a compelling state interest for the public school system but not as applied (door is cracked, undecided) – *Involved Parents v Seattle Schools*
        - Narrow tailoring fails in *Involved Parents* because there is a racial balancing issue (60/40 with a 10% margin of error)
        - Remedying the effects of past discrimination is NOT a compelling interest when schools have already been ordered to be integrated - *Involved Parents*
    - Public primary schools (High Schools) making admission decisions based on race violates equal protection (14) - *Involved Parents v Seattle Schools*
        - Seattle made race binary, which is an issue
    - Parents trying to access public education on behalf of their children have standing - *Involved Parents v Seattle Schools*
    - Distinguishing between documented and undocumented children in the provision of free public education is a violation of equal protection - *Plyler v Doe*
        - Undocumented children receive intermediate scrutiny because they cannot control parental migration decisions or change their migratory status - *Plyler v Doe*
- Does the statute involve the funding of primary schools?
    - Heterogeneous funding of schools based on property taxes does not violate equal protection - *San Antonio v Rodriguez*
    - Granting Local control over school funding dollars is a legitimate state interest - *San Antonio v Rodriguez*
    - Reconciling *Plyler with Rodriguez* - *Plyler* is about complete deprivation of ecudation v the quality of educations which arise in *Rodriguez*. *Plyler* has an easy to define set of groups while the *Rodriguez* wealth standard is challenging.
- Is the statute or action taken delineating between groups based on animus or political unpopularity?
    - Reliance upon an irrational prejudice, or the desire to harm a politically unpopular group, rather than a legitimate govt purpose, will fail rational basis review - *Cleburne v Cleburne Living, Romer v Evans*
        - *Cleburne* - Living center required special permitting which was denied. Look to prior action. Zoning exceptions had been made to flood plane rules for hospitals, fraternities, dorms, etc. These groups got it but the Living Center was denied
        - *Romer* - CO passes constitutional amendment to prohibit local cities from creating official protections for the LGBT community
    - Animus against a politically unpopular group is not a legitimate state interest - *Romer v Evans*
- Is there a delineation based on LGBT status?
    - Here we will see rational basis with bite – *Romer v Evans*
- Is there a delineation based on sex or gender?
    - Sex v Gender has not been resolved by the court as it relates to Equal Protection
    - Evolution of sex scrutiny
        - *Goesart v Cleary* → Rational basis
        - *Reed v Reed* → Rational relationship + bite
        - *Frontiero v Richardson* → Plurality applies strict scrutiny

        - *Craig v Boren* → Majority applies intermediate scrutiny
        - *US v Virginia* → Intermediate Scrutiny + exceedingly persuasive justification
    - Here we will be dealing with Intermediate Scrutiny – *Craig v Boren*
        - Requires exceedingly persuasive justification post *US v Virginia*
    - Laws discriminating on the basis of sex in an arbitrary fashion violate equal protection (14) - *Reed v Reed*
        - Administrators of an estate cannot be named in a way that discriminates between the sexes - *Reed v Reed*
    - Statutes which distinguish based on sex for administrative convenience, and command different treatment of men and women, is arbitrary and a violation of due process (5). - *Frontiero v Richardson*
        - NOTE THAT FRONTIERO IS A DUE PROCESS ISSUE
        - *Frontiero* calls for this to be treated with strict scrutiny
        - Heterogeneous treatment of men and women for administrative convenience would fail rational basis under the Reed standard as well - *Frontier*
    - To regulate heterogeneously based on sex the GOVT must show its use of sex is substantially related to achieving an important government interest - *Craig v Boren*
        - The sale of different degrees of intoxicating beer based on gender is an arbitrary violation of equal protection under intermediate scrutiny - *Craig v Boren*
        - Promoting traffic safety is an important government interest - *Craig v Boren*
        - Delineating based on gender in the sale of alcohol has not been shown in the governments analysis to be substantially related to increasing traffic safety because the cited studies are not about low ABV beer and there's no evidence that the STATUTE (age restriction) has influenced drunk driving deaths - *Craig v Boren*
    - The commonwealth of VA's exclusion of women is a violation of equal protection (14) because it is not related to an important government function with an exceedingly persuasive justification - *US v Virginia*
        - A strong historical record of the need for a male only institution might float this - *US v Virginia*
            - This might work for a Wellesley or a Holyoke which was founded on this
        - Rejecting women because the admission of women for physical reasons is impermissible because SOME women might meet the threshold - *US v Virginia*
        - Rejecting women because of the need to build administrative accommodations (e.g. dorms, bathrooms) is impermissible - *US v Virginia*
        - Offering a separate but equal option in the Women's academy doesn't work due to lack of actual equality between the institutions - *US v Virginia*
            - Might fly if the institutions are ACTUALLY EQUAL
            - Asked KAVANAUGH in class if this would fly. He was skeptical.
- Has the court imposed affirmative action relief (e.g. employment at state agencies)?
    - Court imposed relief for historic violations of equal protection receive some deference under strict scrutiny. Five factors to consider for validity - *United States v Paradise*
        - necessity of the relief
        - efficacy of alternative remedies
        - flexibility and duration of the relief (availability of waivers)
        - relationship of the numerical goals to the relevant labor market
        - impact of the relief on third parties.
    - Additional facts from *US v Paradise* that bear note.
        - the court doesnt apply strict scrutiny, but indicates the plan would pass strict scrutiny even though some deference is given to the lower court.
        - Addressing the lower court's 1:1 hiring scheme. Conditions
            - if qualified Black applicants are available

            - if less than 25% of the people in the position are Black
            - and if the department fails to come up with a court approved plan w/o adverse racial effects on that rank
        - Compelling govt interest
            - remedying the effects of past discrimination (different from *Bakke* because the Department is engaged in this discrimination)
            - expeditiously implementing promotion procedures without adversely impacting officers
            - eliminating the effects of the department's prior delays (decades!)
        - Narrow tailoring Analysis
            - Alternate remedies? The department did a garbage job to date
            - Flexibility and duration? waivers are there, Alabama can submit a new plan
            - Relationship of numerical goals to the job market?
            - Impact on third parties? Passes because there is no prohibition on promoting white officers
- Is the government attempting to promote minority owned businesses?
    - Prior to *Adarand, Metro Broadcasting* held that "benign" racial classifications would only receive intermediate scrutiny. Overturned by *Adarand*
    - Compensation patterns based on other disadvantages, i.e. not race, receive lower scrutiny. Race is insufficient for favored treatment and proof of past injury does not necessarily establish future injury - *Adarand*
    - *Adarand* holds this through reverse incorporation under (5). State governments this applies to under (14). Equal protection analysis is consistent in both cases as strict
        - Skepticism – skeptical any time the govt applies race (strict scrutiny)
        - Consistency – same standard no matter who is burdened or benefitted
        - Congruence – Equal protection analysis is the same in 14th equal protection and 5th due process
- Legitimate State Interests for Rational Basis
    - Occupational Licensing for safety - *Koch v Port Commissioners*
    - Regulation of licensing for navigable water ways - *Koch v Port Commissioners*
    - The regulation of moral issues like the sale of liquor - *Goeseart v Cleary*
    - The regulation of who may sell things like liquor - *Goeseart v Cleary*
        - Delineation based on sex now fails - *Craig v Boren*
    - Anti-miscegenation laws SERVE NO LEGITIMATE state interest – *Loving v Virginia*
- Things Passing Rational Connection
    - Have things been historically regulated in the way that they are currently being regulated - *Koch v Port Commissioners*
    - Permitting established pilots to choose their own apprentices (even if this is done nepotistically) - *Koch v Port Commissioners*
    - Licensing rules based on sex – *Goeseart v Cleary*
        - Not likely to succeed anymore – *Craig v Boren*
- Is there a private restriction based on race, that the STATE must enforce?
    - This is different from State restrictions on property sales, which have been overturned based on due process - *Buchanan v Warley*
    - The court will not enforce racially restrictive housing covenants - *Shelley v Kraemer*
    - These are divorced from the considerations in higher education because a University is enacting them, as opposed to asking a Court to - *Bakke*
- Are the actions violating equal protection are due to federal rules (instead of state)?
    - For federal action, reverse incorporation doctrine permits us to imbue the principals of equal protection (14) into liberty guarantees of (5) - *Bolling v Sharpe*

        - This is similar to the liberty arguments in *Meyer v Nebraska,* for fundamental rights equal protection can be enforced through "liberty" protections of Due Process (5)
- Is the STATE delaying the grant of constitutional rights, or permit them to be temporarily abridged?
    - Constitutional Rights cannot be abridged because a STATE governor or legislature want to disobey an order of the court - *Cooper v Aaron*
        - Heckler's veto rules – They are the one's stirring up trouble
        - [personal note] Unclear if this would carry the day based on unincited unrest…
    - KOOB hot take on the situation in *Cooper*
        - States cannot create rules which circumvent protections which stem from Due Process (14) or Equal Protection (14) - *Article VI: Supremacy Clause*
        - It is the province of the judiciary to determine what the law is - *Marbury v Madison*
        - From this, it is clear that SCOTUS makes this determination. Arkansas cant amend its constitution to get around this
- Is a restriction being placed on PEOPLE travelling, migrating, or moving generally?
    - You can always go to dormant commerce clause if you want to.
        - A state may not prohibit or place barriers to articles of commerce entering or exiting its boundaries without express Congressional authorization or a compelling state interest – *City of Philadelphia v New Jersey*
    - Bear in mind the difference between restricting the movement of goods (can be regulated federally under Commerce powers) and restricting the movement of people (which is a fundamental right) – *Crandall v Nevada*
    - The right to travel is a fundamental right - *Crandall v Nevada*
    - A state may not impose a tax on a person for the "privilege" of passing through it. - *Crandall v Nevada*
        - In *Crandall* the state is imposing a $1 tax on all persons leaving via hired transit (train, boat, stagecoach) but leaving alone people personally walking or on a horse
        - Setting a toll on people leaving the state does not violate the article I prohibition on laying duties (section 9) because people are not goods
        - Taxing departure undermines the right to travel, conduct business, or go and petition the government. This is also a fundamental part of federalism
    - Hindrance of people moving (state to state migration) is the same thing has hindering the right to travel - S*hapiro v Thompson*
    - Residency requirements on welfare programs is a violation of the right to travel (equal protection) - *Shapiro v Thompson*
        - In *Shapiro,* the state claimed a one year moratorium on welfare benefits facilitates budget planning, encourages people to enter the workforce, deters fraud, and is authorized by congress. Court rejects this argument.
            - Congress cant violate rights through statute and these might be compelling interests, but could be accomplished with more narrow tailoring
            - Administrative convenience is not a compelling state interest - *Shapiro v Thompson*
    - Limitation on the benefits a person can receive in the first year of state citizenship is a violation of equal protection (14) under the right to travel - *Saenz v Roe*
        - In *Saenz,* California restricts welfare dollars for year one to the welfare dollars you would have received in your origin state (could be more, could be less)
    - There are three fundamental protections under travel – *Saenz v Roe*
        - Allowing citizens to move freely between states (enter and leave) - *Saenz v Roe, Crandall v Nevada*
        - Securing the right to be treated equally in all states when visiting (notion of the welcome visitor) - *Privileges and Immunities (Article 4).*

            - This is not absolute. People can be treated differently (hunting licenses, enrolling in a university) especially if the state is acting as an economic actor - *Garcia v. SAMTA*
        - The right of new citizens to be treated as long-term citizens (treated as all other citizens regardless of duration) – *Slaughter-house, Saenz v Roe*
            - The right to travel is recognized even by *Slaughter-house.*
            - Right to use navigable waters is baked in here
    - Some limitations on the right to travel
        - States can restrict subsidies so they only go to their citizens (e.g. Tuition)
        - Completely internal issues (emphasis on completely)
        - Issues of health and safety like quarantine laws (*SC Highway Department*)
        - Movement of goods are not about travel, but movement of goods raises Commerce Clause issues (Dormant or otherwise), cannot be overly restrictive, and requires evidence (*Kassel v CF Freight*)
        - States can charge airlines for their use of airports (*Northwest Airlines v Kent County*)
        - There are also carveouts for prisoners and laws like banishment

Substantive Due Process

- Substantive due process is the incorporation of unenumerated personal rights into the constitution via the liberty clause in Due Process (14)
    - Also through reverse incorporation in (5) – *Bolling v Sharpe*

Questions to Ask

- Is the state interfering with how parents wish to raise their children?
    - Parents have a fundamental right to direct a child's upbringing – *Pierce, Meyer, Troxel v Granville*
    - States do have the power to regulate schools (minimum curricula, attendance requirements, etc) - *Pierce v Society of Sisters*
    - Parents have the right to direct the education of their children based on venue (public, private, home) - *Pierce v Society of Sisters*
    - The state cannot prohibit education in certain languages - *Meyer v Nebraska*
        - *Meyer* is centered on religious education... implications?
    - *Meyer* may go another way during war time (context was post WWII teaching of German to Lutheran children)
- Is the state undermining a right to privacy in decision making?
    - A right to privacy can be inferred from several amendments in the Bill of Rights, and this right prevents states from making the use of contraception by married couples illegal. - *Griswold*
    - Deriving the penumbra of privacy can be derived from numerous places
        - Right to assemble (1)
        - Quartering soldiers (3)
        - Secure in persons, houses, papers, and effects against unreasonable search (4)
        - Self incrimination (5)
        - 9th amendment, because why not, 9 isnt doing anything else… ever…
    - There is a constitutional right to privacy from the penumbra of rights of privacy - *Griswold*
- Is the state regulating LGBTQ+ behavior and the behavior of consenting adults?
    - There is a right to personal privacy in behavior – *Griswold*
    - There is no fundamental right for homosexuals to engage in sodomy - *Bowers v Hardwick*

        - State laws classifying homosexual intercourse as illegal are within police powers under due process. - *Bowers v Hardwick*
            - *Bowers* is about the right to privacy in ones home, *Griswold* holds that a right to privacy is implicit in Due Process (14). *Bowers* holds that this right did not extend to private, consensual sexual conduct, at least insofar as it involved homosexual sex, because there is no "fundamental right to engage in homosexual sodomy." It is not "deeply rooted in the nation's history"
            - Overruled in *Lawrence v Texas*
    - Changes stemming from *Lawrence v Texas*
        - Decided under due process. Anti-sodomy laws targeted at homosexuals violate due process (14). The Texas statute is applicable to all persons. KENNEDY deliberately authors the case under Due Process (14) to avoid an equal protection SNAFU. Changing the law might pass constitutional muster under equal pro (14)
        - Texas statute which criminalizes sodomy furthers no legitimate government purpose - *Lawrence v Texas*
        - Due process (14) liberty guarantees extend to intimate acts between consenting adults that occur in private
        - Does not cast private acts as fundamental rights, instead they receive the heightened rational basis review (with bite) and the court concludes there is no legitimate government interest - *Lawrence v Texas*
    - Changes stemming from *Obergefell v. Hodges*
        - First major case after *US v Windsor*. In *Windsor,* DOMA was struck down as a violation of Due Process (5) due to the tax implications of the government not recognizing marriages recognized by states.
            - Denial of due process comes from denial of legal protections that other legally married persons receive in their states. Purpose of the legislation is to "disadvantage, a separate status, and so [to place] a stigma" upon same-sex partners. Animus is not a legitimate government interest.
        - Under both due process (14) and equal protection (14), states are required to issue license marriage between two people of the same-sex and recognize lawfully performed out of state marriage. – *Obergefell v Hodges*
        - The Right to Marriage is fundamental - *Obergefell v Hodges*
            - *Loving v Virginia*, interracial marriage bans are unconstitutional
            - *Zablocki v Redhail*, marriage bans for father's delinquent on child support are unconstitutional
        - There are four principals behind the right to marry that are the same across all couples - *Obergefell*
            - The right to choose whom to marry is inherent in individual autonomy
            - The right protects the intimate relationship between two people
            - The right protects children and families by giving legal protection to homebuilding and the raising of children
            - Marriage is a keystone of the social order, and the foundation of families in the US. There are tax benefits, inheritance rules, evidentiary privilege, and medical decision making authority
- Is the state interfering with reproductions (the decision / ability to conceive or abort a pregnancy)?
    - Top line stuff about sterilization – *Buck v Bell; Oklahoma v Skinner*

- PRIVACY rights in the context of reproductive health are fundamental subject to certain conditions - *Griswold, Roe*
  - The Constitution protect the right of marital privacy against state restrictions on a couple's ability to be counseled in the use of contraceptives - *Griswold v Connecticut*
  - Restrictions on unmarried persons access to contraception is a violation of equal protection (NOTE NOT PRIVACY) – *Eisenstadt v Baird*
    - Rational basis with bite appears applied. All state interests (deterring fornication, grounds of health, and general morality) are dismissed
  - The trimester framework and notion of a fundamental right begins to get abandoned in *Planned Parenthood v Casey*
- There is a right to terminate a pregnancy via abortion *Roe v Wade*
  - This right is not absolute and must be balanced against the governments interest in protecting prenatal life and the life of the mother – *Roe v Wade*
- Trimester balancing test
  - First Trimester – health risks low – privacy outweighs any competing state interest
    - at this point the fetus lacks "personhood" so 14 and "takings" dont apply
  - Second Trimester – states interest in protecting a woman's health, and the increased personhood of the fetus, grow and can justify increased regulation
  - Third Trimester - At viability, the state's interest is compelling to support a ban
- The right at stake in Roe is the FUNDAMENTAL, so during first trimester strict scrutiny applies to protecting the health of the mother (protecting health becomes compelling when the procedure is more dangerous) and protecting prenatal life (compelling at viability) – *Roe*
- Next, states have a legitimate interest in protecting a woman's life and fetal life - *Casey*
  - State interest in fetal life only becomes compelling after viability - *Roe*
  - Then, state interest in protecting fetal life is important at all times under *Casey*
    - Casey tosses the trimester framework out, rational basis from undue burden is in
    - *Casey* creates the undue burden test when creating restrictions on abortion - *Planned Parenthood v Casey*
- An abortion restriction is an undue burden if a woman seeks to abort a non-viable fetus if the regulation has the "purpose or effect of putting a substantial obstacle in her path" – *Planned Parenthood v Casey*
  - Due Process (14) prevents states from unduly interfering with the decision to abort a non-viable fetus - *Planned Parenthood v Casey*
    - Spousal awareness is an undue burden
    - Parental consent, informed consent and a 24 hour waiting period, state published abortion content, and the keeping of records are not an undue burden
    - There must be exceptions for pregnancies that endanger the mothers life - *Casey*
- Partial birth abortion ban on dilation and extraction for late term abortions does not constitute an undue burden - *Carhart v Gonzalez*
  - This is distinguished from a D&E abortion from earlier in the pregnancy
  - Govt has legitimate and substantial interest in fetal life from conception
  - Govt may not prohibit termination of pregnancy before viability
  - Govt may not put an undue burden on a woman seeking an abortion before the fetus attains viability

        - BUT creating a mechanism for govt to show profound respect for fetal life prior to viability is ok if it doesn't create an undue burden
            - "where it has been a "rational basis to act" and "does not impose an undue burden" the state may bar certain procedures and substitute others in furtherance of "legitimate interests" in regulating the medical profession
    - Prep *Stenberg* decision for deeper understanding of current abortion holdings
    - Statutes requiring admitting privileges and building surgical standards to the same level as ambulatory surgical clinics constitutes and undue burden for - *Whole Womens Health v Hellerstedt*
        - Look for evidence of MEDICAL benefits of restrictions being placed to protect the helath of the mother, none exist in current case (balancing test?)
        - El Paso Question from Ginsburg - Texas AG responds that persons near the Texas border can go to New Mexico, which doesn't have the 30 mile admitting privilege rule, suggesting admitting privileges aren't really about safety
    - TEST after *Whole Women's Health*
        - Two factors
            - Undue burden standard continues but trimester framework is gone
            - Analysis is like an economic inquiry with some heightened rational basis
                - Heightened rational basis is the air / gone after *June Medical*
        - Three key inquiries from Casey / Whole Women's health
            - Law must actually further a valid state interest (see above)
            - The burden a law imposes on access must be considered together with the benefits the law confers
            - Evidentiary Requirement: govt has a duty to review factual findings where constitutional (note not fundamental) rights are at stake. There must be a problem that the restriction is resolving
    - Reaffirmed - admitting privileges in a 30 mile radius constitute an undue burden - *June Medical v Russo*
    - Notes, factors for decisions when overruling a prior decision - e.g. *Roe*
        - Established framework is unworkable
        - Principals of law have changed
        - The facts have changed
    - The above is completely wiped out in *Dobbs v. Jackson Women's Health Organization*. The question of abortion is returned to the states. *Roe* and *Casey* are no longer good law.
- Is the court being asked to recognize a new right?
    - The fundamental analysis for a new right comes from *Washington v Glucksberg*
        - If the right is recognized as fundamental → Strict Scrutiny
        - If the right is not fundamental → Rational basis
    - You do not need to go through a *Glucksberg* analysis if the right has already been observed and recognized by the court - *Troxel v Granville*
        - Examples, direct the raising of children (*Meyer*), abortion (*Roe*)
    - Two-part analysis for determining a NEW fundamental right from *Glucksberg*. Is the right:
        - Prong 1:
            - a) deeply rooted in the nation's history and traditions and
            - b) "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if it were all sacrificed"?
        - Prong 2 :

- Is the right sufficiently particular (careful description)?
    - *Glucksberg* describes their case as the right to die. This is misleading. It is insufficiently specific. Instead the right is "to assisted suicide"
    - There is a right to be taken off life support if a person is in a persistent vegetative state *Cruzan v Missouri Health*. Cruzan does not recognize the right to die. It is instead the right to deny life-saving medical treatment.
- PERSONAL NOTE, IF YOU WANT THIS TEST TO FAIL YOU WANT TO MAKE THINGS SUPER SPECIFIC, IF YOU WANT THE TEST TO SUCCEED MAKE IT BROADER
    - The Court habitually makes this very narrow

Case Law

Barron v Baltimore (1833)

- PARTIES
    - Barron – Man with a wharf who doesn't care for all this silt up in his business
    - Baltimore – Tier II city with a Tier III harbor that's just gotta make new streets!
- FACTS
    - Regulations of the city of Baltimore are going to deposit a ton of silt next to Barron's Wharf in Baltimore Harbor. This will make it significantly less profitable
    - Barron sues the city alleging a taking of his property under 5.
- ISSUE
    - Does (5)'s guarantee of just compensation for takings apply to state govt takings? NO!!!
- HOLDING
    - State governments are not bound by the bill of rights
- TAKEAWAY
    - Bill of Rights don't apply to the states until 14th amendment comes down the pike. And even then it doesn't really get going for a while (Not applied in *Slaughter-house*, *Cruickshank*)

Dred Scott v Sandford (1857);

- PARTIES
    - Scott – Former slave petitioning for freedom
    - Sandford – Supposed slaveholder although there is a lot of contention about the transfer
- FACTS
    - Scott was a slave in servitude to an army officer in Missouri. In 1834, he was taken to Illinois and other states (Minnesota) where slavery had been abolished
    - Returns to Missouri. When Emerson (owner) died, inheritance goes to his wife (Sandford). Scott attempted to purchase his freedom and was denied. Suit
- ISSUE
    - Are slaves and their descendants citizens? NO!!
    - Was the Missouri compromise constitutional? NO!!
- HOLDING
    - Slaves (and Black persons generally) are not citizens and therefore can't bring suit.
- TAKEAWAY
    - Divides citizenship into State and Federal. Slaves cannot be US citizens, and even if they receive State citizenship they don't enjoy P&I
    - Overturned by citizenship clause (14 Sec 1)
    - National low point. Good job Taney

Privileges or Immunities

Slaughter-House Cases (1873);

- PARTIES
  - Butchers who want to cut up some meat
  - Louisiana who says no, and creates a monopoly of butchering
- FACTS
  - Louisiana passed a law granting a 25 year monopoly to a Louisiana slaughterhouse in response to ongoing public health management problems. This meant that all butchers in the area either had to work for the monopoly or could not work.
- ARGUMENTS
  - Butchers argue their rights are being deprived of them, violating 13 and 14
  - 13 – if they want to ply their trade they must work for the state. This is involuntary servitude
  - 14 – individuals included in the monopoly are treated differently (no due process)
- ISSUE
  - Does the 13th amendment apply to state monopolies? NO!!!
  - Does the 14th amendment (equal protections / privileges and immunities) apply to individuals who were not freed slaves / descendants? NO!!!
- HOLDING
  - 14 only protects the privileges and immunities pertaining to citizenship of the United States, not those that pertain to state citizenship.
    - 14th exclusively protects against racial discrimination by the state
- TAKEAWAY:
  - P&I does not protect rights that are not enumerated (those in *Coryell*)

Bradwell v. Illinois (1873)

- PARTIES
  - Bradwell – woman with a law degree that wanted to practice that law, and practice hard
  - Illinois –state that produced Ditka, the Bears, and no female attorneys
- FACTS
  - Bradwell (female attorney) passed the bar exam but was denied her application for admission by Illinois bar despite being qualified. The state rejected her application because she was a married woman, and could not adequately serve clients (women were prohibited from being bound by contracts without spousal approval)
- ISSUE
  - Does P | I (14) include the right to practice a profession? NO!!!
- HOLDING
  - The state can deny law licenses to women, because the right to practice law is not a P|I specifically granted under (14).
- REASONING
  - MILLER states that the ability to earn a living is not a Privilege or Immunity. There are citizens and non-citizens that have been successful lawyers. Citizenship is not at issue
    - Earning a living is not a right of citizenship
    - The only rights you get are those that pertain to US citizenship
  - Licensure for practice is properly regulable by states. This is wheelhouse *Slaughter-house*
- TAKEAWAY
  - *Bradwell v. Illinois* Privileges or Immunities do not protect the right to practice a profession
  - They do not apply to Privileges and Immunity based on gender
  - THE PRIVILEGES OR IMMUNITIES CLAUSE 14TH AMENDMENT DOES NOT PROTECT UNENUMERATED RIGHTS

US v Cruikshank (1875)

- PARTIES
  - US – Country trying to do the right thing. Good for them. Something new
  - Cruickshank – Klannist and white supremacist. Probably had a moustache
- FACTS
  - Post Civil War, the congressional drafters of (14) wanted to protect the privileges and immunities of all citizens. 14 is ratified in 1868. Congress passes an enforcement act in 1970 which prohibits banding together to threaten and intimidated people from exercising rights
  - On Easter, 1973, a group of white supremacists murdered Black militia members in the Colfax Massacre. The militia members were former Union regulators occupying a church during a disputed election
  - Cruickshank is indicted for his part in the mass murder. The indictment echoed the enforcement acts language about people banding together for intimidation
- ISSUE
  - Was the conspiracy to prevent the freed men's right to freely assemble and their right to keep and bear arms a violation of the law? NO!!!
  - Does Congress have the authority to pass such a statute under 14? NO!!!
- HOLDING
  - The First Amendment right to assembly and the Second Amendment apply only to the federal government, not the states or private actors. (recall *Barron v Baltimore*)
- TAKEAWAY
  - This is the completion of the gutting of privileges and immunities. Dead end
  - Congress can act to PREVENT STATES from denying people rights, but Congress CANNOT ACT to prevent PRIVATE PARTIES from acting
  - 14th Amendment only protects citizens against the actions of STATES against citizens.

Revisiting Privileges or Immunities

Recall for Privileges or Immunities

- Recall the holdings in *Slaughter-house* and *Bradwell v Illinois*
  - In *Slaughter-House,* the state shuts down slaughterhouses and licenses a select number of licensed ones. This was deemed constitutional, and privileges or immunities doesn't protect unenumerated rights
  - *Bradwell* supports this, Bradwell is denied admittance to the bar because married women cannot execute contracts in Illinois. This was deemed constitutional
  - *Cruikshank* – Colfax massacre, Privileges or Immunities don't protect enumerated rights against the action of private citizens seeking to deny other private citizens their rights
- So what does P or I cover?
  - Access to govt institutions, petition the government (protection of the govt on high seas, access to the courts, citizen ship of the state, petition the government, use of navigable waterways, a few other things, travel)
- P|I basically goes silent from there for fifty years or so
- In 1947, *Adamson v California* pops up. BLACK argues that incorporation should happen via P or I
- *Saenz v Roe* (travel case under equal protection) is the first time we see P or I, because it is about travel and becoming a citizen of a state
- *McDonald* is where this stuff about begins again (push by THOMAS)

McDonald v. City of Chicago (2010)

- PARTIES
  - McDonald – Janitor in a bad part of town, but what part of Chicago is good?
  - Chicago – City which banned handguns for all intents and purposes

- FACTS
    - The second amendment says "a well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed"
    - In 2008, *Heller* struck down the DC handgun ban. But DC is federal
    - Thus, we are in incorporation lane. Incorporation happens through Due Process (14)
- ISSUE
    - Does the second amendment apply to the states? YES!!!
- HOLDING
    - The right to keep and bear arms for self-defense of the home is protected and incorporated
    - Four justices say yes under Due Process (14). THOMAS says yes under P|I
- REASONING
    - ALITO writes that rights that are "fundamental to the Nation's scheme of ordered liberty" or that are "deeply rooted in this Nation's history and tradition" are appropriately applied to the states through Due Process (14) (*Glucksberg* test)
    - *Heller* recognizes the right to self-defense was one such "fundamental" and "deeply rooted" right. Thus, the Second Amendment applied to the states.
    - Court remands the case to the Seventh Circuit to determine whether Chicago's handgun ban violated an individual's right to keep and bear arms for self-defense.
    - ALITO rejects THOMAS's argument that incorporation should happen through P or I
    - BREYER dissents, argues that there is nothing in the Second Amendment's "text, history, or underlying rationale" that characterizes it as a "fundamental right" warranting incorporation through Due Process (14).
- TAKEAWAY
    - Second amendment is incorporated against the states via due process (14)
        - Basic *Washington v Glucksberg* argument
    - THOMAS wants this done under P|I but appears to have few allies

Timbs v. Indiana (2019)

- PARTIES
    - Tyson Timbs: Drug dealer with a beautiful car he bought with non-drug dollars
    - Indiana: Normally boring state which is making very aggro civil forfeitures
- FACTS
    - Timbs pleads guilty in Indiana to dealing in a controlled substance and conspiracy
    - At the time, the police seized a Land Rover valued at $42,000 and purchased with money he received from an insurance policy when his father died.
    - Indiana sought civil forfeiture of the vehicle because the SUV had transported heroin.
    - As Timbs had purchased the vehicle for more than four times the maximum $10,000 fine, the court denied this request. Grossly disproportionate to the gravity of Timbs's offense
- ISSUE
    - Is civil forfeiture a fine? YES!
    - Has the 8th amendment been incorporated against the states? It is now
- HOLDING
    - The 8th amendment's excessive fines clause is incorporated against the states.
- REASONING
    - Starts with a GINSBURG history lesson from the Magna Carta forward.
    - In *Austin v. United States*, the Court held that civil in rem forfeitures fall within the Excessive Fines Clause's protection when they are at least partially punitive.
    - To prevail, Indiana must persuade us either to overrule our decision in *Austin* or to hold that, in light of *Austin*, the Excessive Fines Clause is not incorporated because the Clause's application to civil in rem forfeitures is neither fundamental nor deeply rooted.

    - We wont overturn *Austin*, and an avoidance of excessive fines is deeply rooted. The Clause is incorporated against the state.
    - GORSUCH concurs in judgement
        - Argues that the appropriate vehicle may actually be P|I, but using due process is faithful to precedent.
    - THOMAS concurs
        - Asserts that this SHOULD be done via P|I
        - Substantive due process arose because P|I was gutted
    - DIFFERENCES between THOMAS and GINSBURG
        - THOMAS cares about what this happens at the time of the 14
        - GINSBURG cares about deeply rooted traditions
- TAKEAWAY
    - Incorporation generally means that the right is held against the state and the federal government equally
    - Once again, we are incorporate using the due process clause (14) but there's a P|I rally

Ramos v. Louisiana (2020)

- PARTIES
    - Ramos – Sort of guilty man, but not guilty enough for the feds!
    - Louisiana – State allowing you to get 10 of 12, and calling it a day
- FACTS
    - Two states, Oregon and Louisiana, permitted convictions of criminals with 2 no jury votes
    - Ramos was charged with second-degree murder and had a jury trial.
    - 10 of the twelve jurors found that the prosecution had proven its case against Ramos beyond a reasonable doubt, while two jurors reached the opposite conclusion. Sentenced to life
    - Wrinkle, *Apodaca v Oregon* holds that there is a right to a unanimous jury in federal court but not in states. Another fractured opinion with Powell in the middle of a 4 v 4
- ISSUE
    - Does 6 guarantee unanimous verdicts through Due Process (14)? YES!!!
- HOLDING
    - (6) requires unanimous jury verdicts to convict defendants in STATE courts.
- REASONING
    - The sixth amendment protects the right to a trial by jury. This requires unanimous guilty
    - This has been consistent since 14th century Britain. This is also the case for early states
        - Blackstone is our lode star once again
        - THIS IS FUNDAMENTAL
    - Thus, the framers likely also considered unanimous verdicts necessary
    - The origin of letting 10 go is probably racism since black jurors need to be included
        - White jurors could outvote Black jurors
    - Obstacle: *Apodaca v Oregon:* decision from 1972. This is overturned 6-3. Distinguished
    - Note, they don't actually say what part of the 14th amendment, but they just say the 14th amendment. This is presumably through due process
    - THOMAS Concurrence in Judgement
        - This is bad! Its vague! The court isn't saying what clause its using!
- TAKEAWAY
    - Incorporates (6) against the states

State Action Limitation

Civil Rights Act of 1875

- Congress passes the Civil Rights Act of 1875, which was sweeping and was meant to protect ALL citizens CIVIL and LEGAL rights
- Law provided that all persons within the US would be entitled to the full accommodation of accommodations, public conveyances, water, theatres, etc. regardless of prior servitude
- Congress enacts this under the enforcement powers of the 13th amendment (sec 2, badges of slavery argument) and enforcement of the 14th amendment

Civil Rights Cases (1883)

- *Slaughter-house* is about rights you do or do not have under the 13th and 14th amendment.
- These cases are about Congressional ability to regulate public accommodation
- FACTS
    - Several consolidated cases. (14) Sec 1 prohibits states from abridging the privileges or immunities of US citizenship, denying equal protection, and due process
- ISSUE
    - Does the 14th amendment empower congress to regulate public accommodation? NO!!!
- HOLDING
    - Congress cannot use its enforcement power under the 13th and 14th amendments to prohibit racial discrimination by private persons in public accommodations
    - Public accommodation is a privilege
        - You cannot do this under 13 because public accommodation under slavery
        - You cannot do this under 14 because 14 does not apply to PRIVATE action
- REASONING
    - Look at the text of 14. It says "NO STATE SHALL"
- TAKEAWAY
    - The 14th amendment is not rights creating. It simply bars prohibitions by the state
    - Congressional action cannot create new rights. It can simply bar state action.
        - This remains the legal baseline to this day, but it is excessively complicated.

Due Process and the Regulatory State

Lochner v. NY (1905)

- PARTIES
    - Lochner – Baker who works those bakers hard
    - New York – State that doesn't realize how long the bulk fermentation of sourdough takes.
- FACTS
    - In the late 1800s, states began passing worker protection laws. (14) was generally seen as a limit on state action
    - In 1897, NY state passed the Bakeshop Act capped the number of hours bakers could work per day and per week. Lochner was cited for twice allowing employees to exceed limits
    - Lochner argues for unconstitutionality of the Bake Shop Act as illegitimate use of police powers. The act interferes with the ability to contract for labor, violates Due Process (14)
- ISSUE
    - Is a statute limiting employee hours a legitimate exercise of state police powers? NO!!!!
- HOLDING
    - Regulation of the working hours of bakers was not a justifiable restriction on the right of freedom of contract under the Fourteenth Amendment's guarantee of liberty.
- REASONING

    - PECKHAM, this interferes with the ability to buy and sell labor, which is a protected interest under (14). There is a right to contract. You cant undermine this without a valid police power.
    - For it to be valid it cannot be an arbitrary interference with an individual liberty.
    - TEST for Constitutionality
        - State must produce EVIDENCE that it is remedying a harm.
        - The act must have a direct relation as a means to an appropriate and legitimate end
- DISSENT
    - HOLMES, "so long as a fundamental right was not violated, the majority's will should not be struck down." The majority goes too far in applying economic theory
        - "I think that the word liberty, in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law"
- TAKEAWAY
    - What HARLAN and PECKHAM disagree about is whether the presumption goes for or against health. They agree that this is an invasion of rights, but to what degree?
    - The LOCHNER era court ends up turning down a bunch of statutes based on due process. The court takes the view that it limits the ability of states to exercise police powers in a way that interferes with individual liberties (e.g. right to contract)
    - This is the beginning of Substantive Due Process.
        - Most of the current substantive due process claims are about personal liberties rather than economic liberties, at least later on
    - Lochner is overturned in West Coast Hotel v Parrish
        - We now apply rational basis review to economic restrictions.
    - This case is vilified for reasons of judicial activism. HOLMES criticizes the reading of economic values into statute, and judges shouldn't be reading things with an ideology
        - The constitution doesn't presume an economic theory. We shouldn't put one in

Bailey v Alabama (1911)

- PARTIES
    - Bailey – man who wanted to work, but then not so much
    - Alabama – state that wasn't going to let people walk off the job without jail time
- FACTS
    - (13) prevents slavery, but how does this apply to other forms of involuntary servitude?
    - Bailey and Co agreed to work for Riverside for one year as a farmhand
    - He received $15.00 up front and was entitled to a monthly wage
    - After a month, Bailey quits. AL statute had made it a crime for employees to breach written contracts under some circumstances. This included entering an agreement with intent to fail to perform or intent to defraud
        - A failure to perform or return money was *prima facie* evidence
        - Employees were prohibited from testifying as to their motives or intent
- ISSUE
    - Is the Thirteenth Amendment violated by a state statute that compels a person to do labor for another in payment of a debt and punishes him as a criminal if he does not comply?
        - YES!!!!!!
- HOLDING
    - A state statute that compels a person to do labor for another person in payment of a debt and that punishes that person as a criminal if he does not comply violates 13.
- REASONING

    - Peonage act of 1967 abolishes peonage (being compelled to work to pay off your debt).
    - Following *Ex Parte Riley:* "To justify conviction, it was necessary that this intent should be established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise"
    - A contract may expose a debtor as responsible for a debt, BUT NOT ENFORCE LABOR
- TAKEAWAY
    - This effectively ends forced Peonage in Alabama. Significantly stymies things, but it doesn't end issues at all.
    - Compulsory labor for a private party to avoid criminal charge is a violation of (13), but there is no issue under (14) unless there is an explicit invocation of race or a protected class

Buchanan v Warley (1917)

- PARTIES
    - Buchanan – Man who wants to get rid of property
    - Warley – Man who wants to acquire property
- FACTS
    - Louisville KY created an ordinate which prohibited Black persons from buying property in white neighborhoods (and vice versa)
    - Government claims this is part of the police power. Separating races ensures the peace
    - Buchanan tried to sell his home to a Black man and was stopped. Challenges under (14)
- ISSUE
    - Does an ordinance which inhibits the purchase and sale of property based on race violate due process (14)? YES!!!
- HOLDING
    - Bans on the sale of real estate based on race violates due process freedom of contract (14)
- REASONING
    - An ordinance that is not merely regulatory to business, but removes the right to acquire, enjoy, and dispose of property is immediately suspect (honing in on due process)
    - This interferes with the right to the right to DISPOSE of property?
    - Ignoring the racism, does this fall outside legislative power?
        - No, zoning is an issue that clearly falls in, but this is a PROHIBITION
    - (14) protects the ability to ACQUIRE property and DISPOSE of property…
- TAKEAWAY
    - There is a constitutional limit on placing restrictions on PROPERTY rights
    - TEST for when the Court can interfere with the state's police power?
        - Legislation is not within the scope of legislative power
        - Means don't reasonably tend to accomplish a lawful purpose
          OR
          Legislation runs counter to limits of the constitution.

Chicago, Burlington & Quincy RR v. Chicago (1897) – aka CBQ, RR

- PARTIES
    - Chicago, Burlington & Quincy RR – Railroad that needs to abbreviate
    - Chicago – city always there in a pinch when Louisiana or Arizona haven't violated rights
- FACTS
    - In 1880, the city of Chicago connected two disconnected sections of Rockwell street.
    - (5) says there will be no taking without compensation, but this is municipal, not federal, so we are up against *Baron v Baltimore*
    - The unconnected area was private property and contained a right of way owned by the RR
    - Chicago petitioned the court to have the property condemned. The property owners were compensated, and the RR was given $1.00

- ISSUE
    - Does "due process of law" require compensation to be made or secured to the owner of private property taken for public use? SORT OF!!!
- HOLDING
    - There is no due process violation here. But the $1.00 is enough
    - The 14th Amendment's due process clause requires that states provide fair compensation for seizing private property.
- TAKEAWAY
    - DUE PROCESS for the purpose of state property seizure requires both formal administrative process (i.e. not arbitrary) and just compensation. Just compensation may end up being small though. In this case the administrative process was a hearing and a jury awarded the $1.00.
    - This does not DIRECTLY lead to incorporation of (5), but generally is treated as such

Muller v Oregon (1908)

- PARTIES
    - Muller – Laundry owner who had to make those clothes clean with limited workers
    - Oregon – Northwest state who wasn't going to let women work for too long.
- FACTS
    - Follow on from *Lochner*. Generally viewed as a freeing from economic regulations
    - Oregon passed statute limiting women from working more than 10 hours per day
    - Muller owned a laundry for requiring women to work more than that quota
- ISSUE
    - Do state restriction on women's working hours violate due process (14)? NO!!!
- HOLDING
    - Unanimous holding based on the differences between the sexes.
    - Oregon's limit on the working hours of women was constitutional under due process (14), the strong state interest in protecting women's health. Supreme Court of Oregon affirmed.
- TAKEAWAY
    - Distinctions based on SEX in the workplace are still viable exercise of police powers
    - This will start to be earnestly rolled back by *Reed, Frontiero,* and *Craig v Boren*

Adkins v. Children's Hospital (1918)

- PARTIES
    - Adkins – Horrid bureaucrat who wants to pay women money for services rendered
    - Childrens Hospital – victimized 303 bed hospital under assault on all sides.
- FACTS
    - Case considers setting minimum wage laws for women set forth by Congress in DC
    - In 1918 Congress set the DC minimum wage protect female workers health and morals.
    - This was executed after a board investigated an occupation and made a recommendation
        - Reasons: money received in the occupation was too low to maintain good staff
        - There was public notice and hearing (and exceptions could be made)
    - Two parties sued the minimum wage board (Atkins), Children's Hospital of DC, and a woman who lost her job
- ISSUE
    - Does a law establishing a minimum wage for women unconstitutionally interfere with freedom to contract? YES!!!!
        - Note that this is under 5, not 14, because we are dealing federally.
        - Note that the court does not address the children's minimum wage
- HOLDING

    - Setting a minimum wage for women and children violates the freedom to contract
    - The freedom to contract is not absolute, but only exceptional circumstances permit curbing
- REASONING
    - Valid restrictions on the right to contract involve
        - Businesses that serve some public interest
        - Contracts relating the performance of public works
        - Regulation about method and time of payment
        - Caps on hours worked in certain occupations
    - The general rule is that freedom to contract exists, and restraint is the exception
        - To abridge it you have to HAVE SOME EXTREME EXCEPTION
    - Previously supported laws were targeted. This applies to ALL workers regardless of field
    - There is a lack of restriction, this makes the law arbitrary and it has no reasonable basis
    - The basis of the minimum wage is not the value of the work performed. It is health and morals, and there is no evidence that it improves women's conditions
    - Court distinguishes *Muller v Oregon*. Muller reasoned about differences between the sexes. But the adoption of the 19th amendment eliminated those differences
    - Why is the law bad? According to the court
        - Women used to be different, but we had 19, so that's not an issue anymore
        - The law is not confined to large firms, it can affect any firm (large and small)
        - Violates the rights of a person to work and the rights of managers to bargain
        - More invasive than an hours cap (this is such a dumb argument for weekly wages)
    - Note that the court recognizes the right to a living wage, but this is rendering equivalence across all employees.
- TAKEAWAY
    - OVERTURNED in *West Coast Hotel v Parrish* which ends the Lochner era
    - Majority says there is a clear right to contract, it can only abridge that right in the face of something terrible
    - NOTE THAT THE MINIMUM WAGES WERE DIFFERENT ACROSS PROFESSION. The Court basically ignores this
    - Today I learned that the 19th Amendment made women equal forever and ever.

Meyer v. Nebraska (1923)

- Reproduced under standard due process as well
- PARTIES
    - Meyer – Teacher at a grammar school, who was speaking in TONGUES. German tongues!
    - Nebraska – State that wasn't going to have children speaking any of that Esperanto stuff!
- FACTS
    - In 1920, Meyer was a teacher at a parochial school operated by Lutherans, taught religion
    - Following the parent's requests, he taught some religious stuff in German, not English
    - One day, a local prosecutor witnessed him speaking German and filed suit under a state law which prohibited the use of foreign languages in schools for any student below the 9th grade
- ISSUE
    - Does the Nebraska statute violate Due Process (14)? YES!!!
- HOLDING
    - A 1919 Nebraska law prohibiting the teaching of modern foreign languages to grade-school children violated Due Process (14)
- REASONING
    - Liberty means freedom from bodily restraint, but it also means parents have the right to raise their children as they see fit. There are common items which this includes: Right to contract, Engage in the common occupations of life, Acquire useful knowledge, To marry, Establish a home and bring up children, Worship god according to the dictates of his own conscious,

Generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free persons
    - The state may have a legitimate interest in encouraging the growth of a student body that can engage in civil and civic discourse, but this is excessive.
    - Under Wartime circumstances we might go another way
- TAKEAWAY
    - This and *Pierce* is the start of substantive due process in the area of personal liberties
    - This incorporates unenumerated personal rights into the constitution

Pierce v. Society of Sisters (1925)

- Reproduced under standard due process as well
- PARTIES
    - Pierce – governor guilty of the crime of governing
    - Society of Sisters – nuns who aren't going to take nun of this… habitually bad to do
- FACTS
    - Parents generally assume they can send their kids to any school, or no school at all
    - Society of Sisters had operated orphanages and schools in Oregon since the 1800s
    - Schools taught all state mandated subjects as well as religious education (this suit is co-filed with Hill Military Academy, private military academy for boys)
    - In 1922, Oregon passes the Compulsory Education Act which mandated children between 8 and 18 attend PUBLIC school
        - Purpose was to compel attendance. Failure to send your kids was a misdemeanor
    - Schools sue the governor, arguing that the law violates (1) and unduly prevents the sisters from engaging in business. They also argue that passage of the law will cause economic harm
- ISSUE
    - Does the statute violate the right of parents to direct the education of their children? YES!!!!
    - To the schools themselves have property interests subject to due process? Sort of..
- HOLDING
    - The Oregon Compulsory Education Act that required attendance at public schools, forbidding private school attendance, is unconstitutional under Due Process (14)
- REASONING
    - Children are not mere creatures of the state, parents and guardians have the right to make decisions. There is a liberty argument to be had here for the parents.
    - The state can regulate and inspect schools, require attendance, that sort of stuff
    - TEST - Constitutional rights can't be abridged by legislation which
        - (i) has no reasonable relation to
        - (ii) some purpose within the competency of the State
    - There's no emergency that justifies this
    - Appellees are corporations, and therefore, it is said, they cannot claim (14) protections, but they have business and property which they wish to protect, so it could be a taking
    - How do we square this with *Berea College*?
        - This is a general rule, Berea was targeted as a corporate structure
    - The state clearly has the power to regulate schools and set minimum curriculum
- TAKEAWAY
    - This, with Meyer, is the start of the application of substantive due process to personal liberties

Buck v. Bell (1927)

- PARTIES
  - Buck – Woman to be sterilized for not being smart
  - Bell – Man who wants to sterilize his wards, mostly for not being smart
- FACTS
  - Enthusiasm for eugenics is growing in the United States, specifically compulsory sterilization
  - Buck is an "imbecile" who becomes a ward of the state and is living in a State Colony, as did her mother, and had given birth to a child who was supposedly handicapped
  - Virginia statute permitted that Buck be sterilized because she represented a "genetic threat to society." Her mother was known for prostitution, immorality, and cavorting with men.
  - Sterilization could happen if she could be safe to society and released upon sterilization.
- ISSUE
  - Does an order of forced sterilization by the state violate due process? NO!!!!!
- HOLDING
  - Compulsory sterilization of the mentally ill is valid exercise of state police powers
    - "protection and health of the state"
- REASONING
  - The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. *Jacobson v. Massachusetts*. There is a procedural due process that is met here. Evidence is presented, things can be appealed
  - She has rights, but it went through a due process. There is no substantive right to be free of sterilization under all circumstances, even if Jacobson is done under emergency powers
- TAKEAWAY
  - Technically still good law. HOLMES was apparently quite chuffed with himself over the opinion, ghastly as it is.

Gitlow v. New York, 268 U.S. 652 (1925)

- PARTIES
  - Gitlow – Communist on the move, who wasn't going to take this capitalism sitting down
  - NY – state that's being all New York and uptight about socialism (this is pre-AOC)
- FACTS
  - The free speech (1) only applies to the federal government, not the states (pre-incorporation)
  - In 1919, Gitlow was a leader of the socialist party. His section of the party held a conference in NY where they adopted the "left wing manifesto," which generally advocated for communism, proletariat revolt, industrial revolt, a capitalist overthrow, mass hysteria
  - Specific concern is that it called for mass strikes by workers, revolutionary action, etc in a party newspaper. Gitlow arranged for the printing
- ISSUE
  - Does Due Process (14) incorporate the first amendment? YES!!!
    - Free speech clause and freedom of the press
  - Does that incorporation prevent first Amendment prevent a state from punishing political speech that directly advocates the government's violent overthrow? NO!!!!
- HOLDING
  - Due process (14) prohibits states from infringing free speech, but the defendant was properly convicted because he advocated the violent overthrow of the govt via newspaper
- REASONING
  - Statutes can only be declared unconstitutional if they are arbitrary and capricious
    - Prevention of a violent overthrow of the government is not arbitrary
  - Does the court care if this speech is likely to incite a revolution?
    - NO. Deference to the state is given. Question is if they meet the presumption rules

    - The court held that Gitlow was rightly convicted and that the government may suppress or punish speech that advocates unlawful overflow
        - Clear and present danger test - *Schenck v United States*
        - Later replaced with *Brandenburg v. Ohio*'s "imminent lawless action" test.
- TAKEAWAY
    - Leads to incorporation against the states (1). Still there are limits.
    - The CLEAR AND PRESENT DANGER test does not apply to pure speech
    - Presumption is in favor of the statute when it comes to speech

O'Gorman & Young v. Hartford Fire Ins. (1931)

- PARTIES
    - O'Gorman – a broker who wants to avoid going broke selling insurance
    - Hartford Fire – Big Fire and Company, coming to burn it all down
- FACTS
    - Under NJ law, commissions on the sale of fire insurance were required to be reasonable
        - Statute dictates that you can only pay a minimum local average rate
    - O'Gorman was an out of state broker who sold fire insurance and demanded a commission of 25%, which was negotiated in text. Only received 20%. Files suit for breach of contract
    - The court finds that a 25% commission is unreasonable.
    - O'Gorman appeals, arguing enforcement deprived him of property without the due process
- ISSUE
    - Was NJ statute, which regulated fire insurance commission rates, invalid for violating Due Process (14) for depriving the plaintiff of property? NO!!!
    - Do the NJ rules on commission rates violate the right to contract??? NO!!!
- HOLDING
    - State statutes limiting commissions of insurance sale is a valid exercise of the police power in the absence of facts showing it to be unreasonable.
- REASONING
    - State can set rates and limit commissions because if affects the price of goods.
    - Courts must PRESUME constitutionality unless there is a FACTUAL FOUNDATION that the provision is not an appropriate remedy
    - Because the business of insurance was affected with a public interest, a state may regulate the rates, and likewise, the relations of those engaged in the business.
- TAKEAWAY
    - NOTE THAT THE PRESUMPTION IS REBUTTABLE
    - Presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute

Nebbia v. NY (1934)

- PARTIES
    - Nebbia – Grocer who has the goods to get you those rock bottom prices
    - NY – powerful state who wants to prevent a single loaf of bread going for free
- FACTS
    - Depression causes a host of issues for everyone, including dairy farmers
    - As the dairy industry craters, NY imposed the NY Milk Control Law. This set the minimum price to consumers $0.09 a quart. This ensured a "fair price" to encourage production
    - Biggest beneficiaries were direct delivery milk firms, who could cut out intermediaries
    - Trying to remain competitive, Nebbia offered two quarts of milk and a loaf of bread for $0.18. Nebbia is convicted of violating the milk control law. Fined $25.00

- ISSUE
  - Did the regulation violate Due Process (14)? NO!!!
- HOLDING
  - The Constitution does not prohibit states to regulate the price of milk for dairy farmers, dealers, and retailers.
- REASONING
  - Milk prices significantly influences production. Although there is typically a right to make private contracts and remain free of interference, this right is not absolute
  - States can regulate business affecting the public interest (which includes grocery stores)
  - There is a presumption of constitutionality from *O'Gorman*. Under this approach: a state can adopt whatever approach is necessary to reasonably promote the public welfare. The requirements of due process are satisfied because there was a lengthy legislative process.
    - "A reasonable relation to a proper legislative purpose that is neither arbitrary nor discriminatory"
  - TEST: Does the law have a "reasonable relation" to a proper legislative purpose?
    - Is the state action neither arbitrary nor discriminatory?
      - Legislatures decide if things are reasonable. Those things are not discriminatory *prima facie* because they went through a legislative process
- TAKEAWAY
  - PRESUMPTION is that the challenger of the law has to show it isn't constitutional

West Coast Hotel v. Parrish (1937)

- PARTIES
  - Parrish – Maid, not from Manhattan, who was going to get PAID!
  - West Coast Hotel – Hotel who keeps rates low the only way it knows how, Maid salaries!
- FACTS
  - Depression is raging and there is an attempt to regulate our way out of it. This is against the specter of Lochner, which said the government violates the freedom to contract whenever they start passing minimum wage laws or regulating working conditions
  - State of Washington has passed a law setting a minimum wage for female employees
  - From 1933-1935, Elsie Parrish was employed as a maid by the West Coast Hotel Company
    - They refused to pay her the female minimum wage.
  - This is setup exactly the same as *Adkins*
- ISSUE
  - Does a minimum wage law for women violate Due Process of (5 or 14)? NO!!!!!
- HOLDING
  - Washington's minimum wage law for women was a valid regulation of the right to contract freely because of the state's special interest in protecting women's health.
- REASONING
  - HUGHES opinion, the principal is about the due process, and *Adkins* is the governing rule for congress. The constitution only recognizes the deprivation of liberty.
  - The Constitution does not speak of freedom of contract.
  - Liberty under the constitution is subject to the restraints of due process, there is a presumption of constitutionality. It is a qualified, and not absolute, right
  - The guarantee of liberty does not withdraw legislative supervision (*CBQ RR v McGuire*)
  - Reasons for overturning *Adkins*
    - We are changing economic models
    - Changing the reasonable presumption of constitutionality
    - A slew of cases have hollowed the Lochner Era (*Nebbia, O'Gorman*)
    - More states are regulating the wages of women

        - Bring back *Muller v Oregon*, (we need to protect women, argument)
        - *Adkins* was a close vote, and minimum wage == maximum hours in context
- TAKEAWAY
    - End of Lochner! Hooray! End of Adkins! Hooray!
    - TEST
        - Laws must have a reasonable relation to is subject
            - the protection of women is a legitimate end, how can it be said that a minimum wage to protect the means of existence is not legitimate means
        - Adopted in the interests of the community is Due Process
            - The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community.
            - Protecting women from unscrupulous employers, gotta help the ladies
    - Note that no evidence is presented here – underscores shift towards presumption of constitutionality.

U.S. v. Carolene Products (1938)

- PARTIES
    - United States – Autocracy trying to preserve the purity of the skimmed milk name
    - Carolene Products – Patriots who know the only thing that is worse than a liar is skimmed milk, which is water lying about being milk. They put the milk in the coconut.
- FACTS
    - The most important thing about this case is footnote 4, which foreshadows liberty cases
    - Footnote 4 – The court foreshadows its approach to future civil rights and liberties cases
    - The Filled Milk Act – prevents the interstate shipment of skimmed milk combined with non-milk fat or oil to resemble cream
        - This was passed after hearings and testimony about how unhealthy filled milk is
    - Carolene sold Milnot, which combined skimmed milk and coconut oil
- ISSUE
    - Does this law violate the commerce power? NO!!!
    - Does this law violate due process (5th amendment)? NO!!!
    - Does this violate equal protection? NO!!!
- HOLDING
    - If evidence exists in support of economic or social legislation, then it is not the place of the judiciary to second-guess the legislative reasoning. Even absent, supportive facts are presumed.
- REASONING
    - STONE opinion: Congress has the power to restrict milk substitutes selectively
    - There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments
    - Regulatory regulation affecting ordinary commercial transaction is not to be pronounced unconstitutional unless, in the light of the facts, it is made known that there is no rational basis for the decision on the mind of the legislators
        - Rational Basis: we know butter milk is better! Filled fat is bad!
        - But we don't need these findings, since it is presumed, you need to show that the law is completely irrational
- TAKEAWAY

- FOOTNOTE 4 - The court applies rational basis review to economic regulation. This is Dicta, but important Dicta. Starts economic liberties getting lower scrutiny
- Footnote Four describes certain legislative acts that may get a higher level of scrutiny
  - appears on its face to violate a provision of the US Constitution, especially in the Bill of Rights,
  - restricts the political process that could repeal an undesirable law, such as restricting voting rights, organizing, disseminating information etc., or
  - discriminates against "discrete and insular" minorities, especially racial, religious, and national minorities and particularly those who lack sufficient numbers or power to seek redress through the political process.
- The person challenging the law must be afforded the opportunity to show that this is irrational. IMPORTANT! REBUTTABLE PRESUMPTION
  - Facts could change
  - Facts are wrong applied challenge (irrational as applied) – not applicable
  - Facts never existed

United Public Workers v. Mitchell (1947)

- PARTIES
  - United Public Workers – proletariat workers who will make nation of America great!
  - Mitchell – underbelly president of the civil service commission, who says "no political campaign process for you"
- FACTS
  - Federal courts can only hear genuine cases and controversies. And judiciable cases require a concrete issue that a court can actually resolve
  - The Hatch Act – forbids federal employees from actively participating in political management or political campaigns. Penalty is termination
  - Poole et al (with the United Public Workers) brought suit against Mitchell, the president of the United States Civil Service Commission, seeking an injunction prohibiting enforcement
    - Seems like an *Ex Parte Young* sort of thing (my view)
- ISSUE
  - Is this issue case judiciable with only one employee charged? YES!!!
  - Does the Hatch Act unconstitutionally restrict the rights of federal employees? YES!!!
- HOLDING (Plurality)
  - The court can hear a case in time if dismissal procedures are not properly followed
  - The case is judiciable, but only for the appellant facing disciplinary action
  - Congress has the right to reasonably limit the political conduct of employees to promote the integrity of the civil service.
- REASONING
  - The fundamental rights to vote and participate in the political process are not absolute, we have requirements for age and residence.
  - We have an evil of political partisanship within the political apparatus, and there is a concern that employees of the federal government might undermine that
  - The 9th amendment doesn't provide a positive right, which means the government has the right to curtail it if so necessary
  - (9) was intended to signal the existence of federal constitutional rights beyond those enumerated in the Constitution is the only conclusion its language seems comfortably able to support. Unclear exactly what those rights are
- TAKEAWAY
  - There is something to the 9th amendment, but federal powers are subtracted out
  - *Griswold v Ct* Concurrence is the only place this really comes up afterwards

Williamson v Lee Optical (1955)

- PARTIES
  - Lee Optical – Bespoke and bespectacled spectacle sellers making a spectacle
  - Williams – Tyrannical autocrat intent on blinding the nation
- FACTS
  - States have historically had broad leeway in regulating occupations and setting up licensing
  - Oklahoma Law prevents opticians from making prescription eyeglasses without a valid prescription from an optometrist or ophthalmologist (no refitting)
    - The law prohibited opticians from soliciting the sale of frames, mountings, et al
    - Retailers also could not lease space to people providing visual care
    - The law did not apply to sellers of READY TO WEAR glasses
  - Lee optical brings suit. Argument is that violates equal protection and due process.
- ISSUE
  - Did these statutes violate equal protection and due process? NO!!!
- HOLDING
  - State laws regulating business are subject to only rational basis review, and the Court need not contemplate all possible reasons for legislation.
    - Real holding: Go to the polls for due process protection
- REASONING
  - Height of let it fly rational basis. The district court digs in and strikes all of the provisions set forth in the statute. SCOTUS clap backs and determines they are rational
  - The Court further held that there was no Equal Protection violation because legislatures were permitted to deal with problems "one step at a time"
  - Rational basis test
    - Legislation cant be arbitrary
    - Legislation must have a rational connection (reasonable)
    - Legislation cant discriminate between similarly situated groups
      - You can single out a group that is rationally related to the public group, but it cannot be arbitrary of capricious
  - "There needs to be an evil to be corrected" and "it might be thought that this is rational"
    - The distinction is that the Court can come up with reasons why it might be rational on its own. State doesn't need to provide them.
- TAKEAWAY
  - The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a school of thought.
    - You need to go to the polls, not the courts
    - This goes further than *Carolene* products because it looks at what the legislature MIGHT have intended. We are really loosening the presumption of refutability

Milnot v. Richardson (1972)

- PARTIES
  - Milnot Company – filled milk, returning with a vengeance against Big Milk
  - Richardson – Secretary of Health, Education, Welfare, and lining his own pockets with milk!
- FACTS
  - Plaintiff is a Michigan corporation which principally does business in Illinois
  - The substance involved in this case, Milnot, is a food product which is a blend of fat free milk and vegetable soya oil, to which are added vitamins A and D. In the production of this product cream is skimmed from whole fresh milk (wholesome and nutritious)

    - The Filled Milk act prohibits the interstate shipment of such things. The statute was held valid in *US v Carolene Products* (which subsequently changed its name to Milnot Company)
    - Further technical advances have permitted Milnot competitors to enter the market, ship goods interstate, and theres no material difference between them and Milnot
- ISSUE
    - Given revised evidence regarding filled milk, and the emergence of other products, is the Filled Milk act a violation of Due Process? YES!!!
- HOLDING
    - While Congress may select a particular evil and regulate it to the exclusion of other possible evils in the same industry, any distinction drawn must at least be rational.
- REASONING
    - Defendant wants the court to exercise discretion, but if there is a factual basis for review the court cannot shut its eyes in deference.
    - Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators
    - It is clear that certain imitation milk and dairy products are so similar to Milnot in composition, appearance, and use that different treatment as to interstate shipment caused by application of the Filled Milk Act to Milnot violates the due process
        - We are under 5, we only have due process, we don't have equal protection
        - This simply lends support to the argument that it is devoid of rationality
    - The fact that Milnot is on shelves in states where it is produced, and there is wide use of similar products everywhere, just shows that they are arbitrarily singled out
- TAKEAWAY
    - Regulatory legislation affecting ordinary commercial transactions should not be made unconstitutional unless, in light of the known facts, it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators

Early Equal Protection

Strauder v. West Virginia (1880)

- PARTIES
    - Strauder – Black man from WV who killed his wife
    - West Virginia – Free state that still didn't want anyone but white people on a jury
- FACTS
    - Criminal defendants are guaranteed the right to a jury of their peers (Magna Carta forward)
    - After the 14th amendment, this became an issue when Black persons were put on the trial
    - A grand jury indicted Strauder, who was Black, for murder. He pled not guilty
    - The jury is populated exclusively with white men, Strauder objects under the equal protection clause, arguing that black persons cannot be unilaterally barred
- ISSUE
    - Does the state law barring Black persons from jury service violate the Equal Protection Clause of the Fourteenth Amendment? YES
- HOLDING
    - To deny citizen participation in the administration of justice solely on racial grounds "is practically a brand upon them, affixed by law; an assertion of their inferiority, and a stimulant to that race prejudice"
        - Note, the WV law is not made unconstitutional. Instead, the court supports the ability of a defendant to remove such cases to federal court.
- TAKEAWAY
    - Look at action to NEGATIVELY deny based on race. These are violations of Equal Pro (14

Yick Wo v. Hopkins (1886)

- PARTIES
  - Yick Wo et al – Men from far away who cleaned clothes well
  - Hopkins – local sheriff with an unclean soul dedicated to an unclean shirt
- FACTS
  - Numerous statutes exist that are facially neutral but are applied differently based on race
  - Yick Wo and Wo Li were Chinese citizens living in San Francisco who ran laundries
  - In 1880 San Francisco passed an ordinance requiring laundry operators in wooden buildings to obtain permits from the fire warden to prevent building fires (basically all buildings)
  - Petitioners were initially granted licenses after being deemed safe. These buildings were maintained in similar conditions. The licenses of almost all Chinese operators were then revoked while non-Chinese operators were permitted to operate
- ISSUE
  - Does the constitution prevent the unequal application of facially neutral law? YES!
  - Does the equal protection clause prohibit application based on alienage or nationality? YES!
- HOLDING
  - Racially discriminatory application of a racially neutral statute violates Equal Protection
- REASONING
  - If the law is facially neutral, you need to show DISCRIMINATORY intent or impact. That's where we get the evil eye sort of thing (*Washington v Davis*)
  - TEST FOR APPLICATION OF DUE PROCESS
    - If the law is fair on its face, if it is applied in an unequal way to make discriminations between persons in similar circumstances, the denial of equal justice is prohibited
    - We determine this based on the culmination of facts
    - Means and end fit – HARLAN dissent in Plessy

Plessy v. Ferguson (1890)

- PARTIES
  - Plessy – mixed race man who wanted to go on a trip
  - Ferguson – carpet bagger from Martha's Vineyard who was super judgey
- FACTS
  - In 1892, Plessy took a trip. He bought a first-class ticket and sat in a car for white persons.
  - Conductor tells him to move to a different coach and he refused. He was immediately jailed.
  - LA state statute required LA railways to have "separate but equal" rail cars for black and white passengers. Anyone refusing to sit in the "correct" coach could be fined or jailed
  - Plessy argues that as he is 7/8th white, he can sit in the white coach.
- ISSUE
  - Is the LA law requiring segregated railway cars unconstitutional? NO!!!
- HOLDING
  - The "separate but equal" provision of services mandated by state government does not violate equal protection
- REASONING
  - Majority holds that 13 is irrelevant because the law does not deal with slavery and riding in a particular car does not constitute a "badge of inferiority"
  - Riding on public transit is a social right, not a civil right. This is different from Strauder, which was a political right
- TAKEAWAY
  - Fucking really?
  - Rise of separate but equal doctrine

Berea College v. Kentucky (1908)

- PARTIES
  - Berea College – Private School who wants to educate both races
  - KY – state who wasn't going to let them do it
- FACTS
  - Berea was and is a private liberal arts college in Kentucky. It was founded as desegregated and coeducational in 1855, admitting both white and black students
  - "Day Law" is passed in 1904, preventing any person, group, or corporation from teaching both races in a school or nearby branches to do so. This was clearly targeted at Berea
- ISSUE
  - Can states legally prohibit private schools from admitting both races? YES!!!
    - Note the extensive corporation v individual distinction
- HOLDING
  - States can legally prohibit private educational institutions chartered as corporations from admitting both black and white students.
- REASONING
  - BREWER argues that as a corporation is chartered under state law it is subject to state law
  - The state may not have the ability to affect private individual decisions, but the rights of individuals and corporations are not the same thing
  - Corporations are not entitled to the P&I of individuals, and states can withhold privileges from corporations in ways it cannot do to individuals
- TAKEAWAY
  - Major ruling for corporate personhood
  - States can enact non-facially neutral rules for corporations

Equal Protection

Skinner v. Oklahoma, 316 U.S. 535 (1942)

- PARTIES
  - Skinner – OK man who had stolen chickens one too many times
  - OK – state that is going to prevent breeding, as long as you don't steal in a super classy way
- FACTS
  - The Nazi's forcibly sterilized people it thought shouldn't have children during the third Reich. The US saw this behavior and thought, "what a great idea"
  - In 1927, Buck v Bell permitted the sterilization of the mentally handicapped if those disabilities might be "passed down." Present statute deals with the sterilization of repeat criminal offenders .
  - Jack Skinner was a lifelong criminal. Theft of chickens, armed robberies, etc.
  - While in jail (3rd trip), OK implements the Habitual Criminal Sterilization Act, provided that habitual criminals with at least three felonies involving moral turpitude could be sterilized
    - There was a clear carveout for white collar offenses (embezzlement, etc.)
- ISSUE
  - Does this act violate equal protection (14)? YES!!!
    - Due process is ignored by the majority
- HOLDING
  - Law that required sterilization of habitual criminals violated Equal Protection Clause of 14th Amendment where it was not applied to felons convicted of white-collar theft as state could not and did not demonstrate interest in making such distinction.
- REASONING
  - TWO GROUPS

        - White collar thieves and blue collar thieves
    - OK has made no attempt to demonstrate that larceny is hereditary
    - There is no attempt to delineate between white collar crimes and other forms of theft
    - The penalties are for all purposes identical, except for sterilization
    - STRICT SCRUTINY APPLIES FOR STERILIZATION
        - Cannot be reversed, injury is irreparable
        - Procreation is a fundamental basic right to the survival of humans.
        - Sub-point – invidious discrimination, you have two groups, but there is no reason to distinguish between these groups when both are creating equal harms
    - Return to Footnote 4
        - Not a abridgement of an enumerated right (but it is a fundamental right)
        - Not abridgement of a right related to a political process
        - Its not directed at a discrete or insular minority
            - So why is this unconstitutional?
                - *Corfield v Coryell* argument?
- TAKEAWAY
    - Marriage and Procreation are fundamental.
        - They probably don't go due process to avoid Buck v Bell

Kotch v. Board of River Port Pilot Commissioners, 330 U.S. 552 (1947)

- PARTIES
    - Kotch – Brash pilot who was not permitted to Huck Finn his way up the Mississippi
    - Commissioners – stuffed shirts who think their kids will do a better job of it.
- FACTS
    - Nepotism case! LA allowed family members to dominate the selection of riverboat pilots
    - New Orleans is about 100 miles upstream from the mouth of the Mississippi. Pilotage Law requires the navigation of the river be done by state appointed pilots. To obtain an appointment, pilots needed to meet statutory requirements including an apprenticeship
        - Pilots had discretion in choosing apprentices and typically chose friends / family
    - Kotch et al met the requirements but couldn't get an apprenticeship.
- ISSUE
    - Did the law which gives discretion to pilots (nepotism) violate equal protection? NO!!
- HOLDING
    - Although nepotism pops out here, the method adopted for selecting pilots was related to the objective of securing a safe pilotage system. There are clear advantages for allowing established pilots to perform this duty.
- REASONING
    - WHO ARE THE GROUPS?
        - Those trained under a captain v those not? Those who cannot train v those who do?
    - There is no precise formula for equal protection, and laws create adverse effects for groups
    - This does not necessarily violate 14. Its axiomatic that there are consequences of regulation
    - This will only violate constitutional safeguard if the discrimination rests wholly on factors irrelevant to the achievement of the regulation's objective or directly based on a suspect class (race, religion, etc)
- TAKEAWAY
    - Note that FOOTNOTE 4 from Carolene (due process) will start seeping everywhere.

Goeseart v. Cleary, 335 US 464 (1948)

- PARTIES
    - Goeseart – Woman of the age who intends to get the youth of Michigan tipsy

    - Cleary – Not Beverly, some Owen guy… seems like he isn't that much fun
- FACTS
    - Last of the old guard decisions regarding sex under fourteen.
    - Michigan passes statute that prevents women from being licensed as bartenders, unless they are the wife or the daughter of the bar owner (equal protection) and in towns with a no more than 50,000 people (Dearborn)
    - Intervening factor, 21st amendment. Ends prohibition and empowers states with regulatory authority over intoxicating beverages, the sale thereof, and the consumption thereof.
- ARGUMENT
    - An arbitrary standard of 50,000 was set as the population of any city to come under the act.
    - Women owners of bars were discriminated against.
    - Women bartenders were discriminated against.
    - There was a discrimination between daughters of male and female owners.
    - There was a discrimination between waitresses and female bartenders.
- ISSUE
    - Can a state deny female bartenders licenses based on their parentage or spouse? YES!!!
- HOLDING
    - A state law prohibiting a woman from being licensed as a bartender unless she was the wife or daughter of the bar owner did not violate the Equal Protection Clause (14)
- REASONING
    - WHO ARE THE GROUPS?
        - Men v women? Daughters of male / female owners? Daughters of barkeeps v non? Married ladies v Single Ladies?
    - FRANKFURTER – the fact that women have achieved the virtues men claimed as their own does not prevent the state from creating distinction (think Bradwell)
    - States can draw sharp lines between the sexes. The Michigan legislature determined that women tending bar could give rise to moral and social problems.
    - The court is in no position to cross examine Michigan legislators
    - DISSENTS – all focus on the equal protection preventing invidious discrimination and distinctions. This is a distinction based on stereotype rather than rational thought
        - If the equal protection clause exists to do anything its to prevent invidious classifications
    - The Constitution does not require legislatures to reflect sociological insight, or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards.
- TAKEAWAY
    - Overturned by *Craig v Boren*

Shelley v. Kraemer, 334 U. S. 1 (1948)

- PARTIES
    - Shellys – Black family who wanted to buy a home in a neighborhood with a covenant
    - Kraemer – White family who wanted to sell their home to a Black family
- FACTS
    - In 1945, the Kramers put their house up for sale in St Louis. The Shellys put in an offer which was accepted. Unbeknownst to the Shellys there was a restrictive covenant on the home that prevented the sale of homes in the neighborhood to Black or Mongolian persons
    - Local HOA brings suit to enforce the covenant and enjoin the Shellys
- ISSUE
    - Does the enforcement of racially restrictive housing covenants violate equal protection? YES
- HOLDING
    - (14) prohibits a state from enforcing restrictive covenants that would prohibit a person from owning or occupying property based on race

- REASONING
    - Private parties might abide by the terms of a covenant, but they cannot seek judicial enforcement because that is a state action. The fact that state courts might enforce restrictive covenants against white people is not a valid argument in favor of holding up the covenant
    - This is a property right. Basic right enumerated in 14. 14 and the civil rights act of 1866 specifically cite property
    - Court basically says you can have this kind of covenant, but the STATE will not enforce it
- TAKEAWAY
    - This is an extension of the state action doctrine extend to the Courts. This is the Court extending a private discriminatory rule into a state action. The court is affirming the right to private discrimination, but not through state action

Brown I - Brown v Board of Education of Topeka (1954)

- PARTIES
    - Brown – Little girl who walked a long way to school
    - Board – Administrators who were ok with that
- FACTS
    - The fundamental strategy pursued by Hamilton and Thurgood Marshall was to desegregate graduate schools before moving to primary education (costly to setup a new law school)
    - Three decades after the ratification of 14, the court sets the separate but equal doctrine in *Plessy* in motion. Govt can segregate public accommodations as long as there are no prohibitions on facility use (i.e. there are cars for multiple races).
    - NAACP challenges school segregation on KS, SC, VA, and DE, multiple reargued cases
    - Brown has to travel numerous miles each day to get to school even though she lived near a white school. Her family tried to enroll her in the white school but were denied
- ISSUE
    - Does the segregation of public education based solely on race violate the Equal Protection Clause of the Fourteenth Amendment? YES!!!
- HOLDING
    - Segregation of children in public schools based only on race deprives minority children equal educational opportunities
        - We do not overrule *Plessy*, but it is inconsistent with established knowledge. Separate becomes inherently unequal, and therefore violative of 14.
        - Essentially a narrow overrule of *Plessy* in context, but *Plessy* then gets distinguished into oblivion
- REASONING
    - WHAT ARE THE TWO GROUPS
        - White children and Black children
    - Education is the foundation of good citizenship, and social science research indicates separation creates feelings of inferiority, and subsequently violates equal protection
    - While states might have originally educated white children, they now educated all kids
    - Note that the 14 is only a restriction on State Power, not Federal power. 5 limits federal power ("no person shall be deprived of life liberty or property). DC still segregated
    - Court doesn't order immediate integration. Ordered re-argument how to do this (*Brown II*)
- NOTES
    - This is limited exclusively to STATE EDUCATION
    - NOTE: the court calls this an IMPORTANT right rather than a FUNDAMENTAL right
- TAKEAWAY
    - This is notable because it establishes that SEPARATION ALONE IS UNACCEPTABLE
    - All segregated states were required to submit desegregation plans
    - Hooray!

Bolling v Sharpe (1954)

- PARTIES
  - Bolling – Mom who wants to educate her kids
  - Sharpe – School board yahoo who isn't going to allow that sort of thing
- FACTS
  - Decided same day as *Brown v Board*. DC public schools at this point are segregated
  - This is federal, so equal protection (14) doesn't apply. Federal jurisdiction. So we turn to Due Process under (5),
  - Spotsworth Bolling's child was in DC attending a segregated school. Bolling attempts to enroll her child in a white school and is rejected
- ISSUE
  - Did the segregation of the public schools of Washington D.C. violate the Due Process Clause of (5)? YES!!!
- HOLDING
  - Segregated schools violate (5's) due process clause
  - The Fifth Amendment's guarantee of "liberty" protected by due process also guaranteed racial equality in public education in the District of Columbia.
- REASONING
  - This denies you due process of law. The 5th amendment doesn't have an equal protection clause. We therefore do this under liberty.
  - We flip back to *Caroleane* in reasoning, more exacting judicial scrutiny should be applied to legislation which: (restricts enumerated rights, abridges the political process, is directed at discrete and insular minorities)
  - Separating white and black kids achieves no reasonable governmental purpose (neither an appropriate means nor end).
  - Basically we run on reverse incorporation here. The concepts of equal protection and due process are not mutually exclusive.
- TAKEAWAY
  - For federal action, reverse incorporation doctrine permits us to imbue the principals of equal protection (14) into liberty guarantees of (5)

Brown II - Brown v Board of Education (1955)

- PARTIES
  - Same actors as before.
- FACTS
  - *Brown* I (1954) determines that the separate but equal doctrine is by construction unequal and racial segregation in public education is unconstitutional
  - As the court's decision was unprecedented in scope, there was continued resistance to *Brown* I. Anticipating this, the court set the case for re-argument to determine remedy
- ISSUE
  - What rules should the court set to make sure schools are desegregated?
  - What rules should the court set about WHEN schools had to desegregate?
  - If schools violate a Black student's rights by not following *Brown I*, what relief exists?
- HOLDING
  - Schools must obey the original *Brown* ruling and de-segregate, but not immediately. Federal courts will supervise de-segregation
- REASONING
  - The *Brown I* decision should be implemented with "all deliberate speed"

    - The responsibility for desegregation required local solutions. The court thus empowered local school authorities and the courts which heard local cases.
- NOTES
    - We go with the slow implementation of "all deliberate speed"
    - Logistically this thing is a complete nightmare. So let the district courts manage it
- TAKEAWAY
    - Not sure beyond all deliberate speed. No real new ground

Cooper v. Aaron (1958)

- PARTIES
    - Cooper – Represents the Little Rock school board
    - Aaron – first plaintiff of the Black students bringing suit for integrated district,
- FACTS:
    - Lower courts were ordered to start compliance towards Brown v Board via Brown II
    - In doing so, Courts often delayed when there was intense local resistance
    - Little Rock School district recognized they were compelled to follow the Brown decision and began to address the administrative issues. Plan was slow, challenged, and upheld
    - AK passed an amendment to the state constitution to oppose desegregation and did not compel students to attend racially mixed schools
    - The day before integration, the Governor of Arkansas dispatched the national guard to prevent students of color from entering.
    - The Board's petition to postpone is based on the Governor creating a riot and the Little Rock Police had to remove the students for their own safety
- ISSUE:
    - Can members of the Little Rock school board delay the implementation of desegregating schools because they are acting in good faith? What if the situation is dangerous? NO!!!
        - KOOB: Does the extension (30 month) contradict Brown? YES!!!
        - KOOB: Are lower courts bound by SCOTUS? YES!!!
- HOLDING:
    - Constitutional rights are not to be denied because the governor and the legislature of a state seek to disobey the orders of the court (Brown v. Board of Education (1954))
        - Its BECAUSE THE STATE IS CAUSING THE CHAOS! Hecklers Veto…
- REASONING:
    - 14th Amendment ensures equal protection under the law
    - Constitutional rights are not to be sacrificed because of the actions of local political actors
    - Controlling principal in the 14th amendment is that no "state" shall deny equal protection
    - The governor is bound by precedent
    - Article VI makes the constitution the supreme law – supremacy clause
    - Also, our interpretation is the most important, not the Arkansas Legislature
    - You can't fulfil your role as a legislator or executive if you deny this, because you defend the constitution in your oath is to do this
    - You can't nullify federal law with state laws, they are inferior.
    - While education is the responsibility of the state, such an activity can only occur if it is applied in a manner which is consistent with federal constitutional requirements.
    - HOT SUMMARY
        - Article VI: Supremacy Clause
        - *Marbury v Madison:* Judiciary decides what the law is
        - From this, it is clear that SCOTUS makes this determination. Arkansas cant amend its constitution to get around this
- TAKEAWAY
    - Reaffirms Brown, supremacy clause trumps state action

- Heckler's veto of Court holdings is not a valid basis for denying constitutional rights

Reynolds v. Sims, 377 U.S. 533 (1964)

- PARTIES
  - Sims – Alabama man who wanted his vote to like… matter
  - Reynolds – Election Official skeptical of this need
- FACTS
  - Alabama's state constitution set a cap of 35 senate members and 105 house members with each county entitled to at least one representative. Remaining apportioned by population
  - Reapportion would happen every decade based on the census, but this was not done
  - By 1960, the majority of the representatives represented only a ¼ of the population
  - Sims sues Reynolds (election official) regarding apportionment which was 60 years old
- ISSUE
  - Did Alabama's apportionment scheme violate Equal Protection (14) by mandating at least one representative per county and creating as many senatorial districts as there were senators, regardless of population variances? YES!!!
- HOLDING
  - State senate districts must have roughly equal populations based on the principle of "one person, one vote". THIS DOES NOT APPLY FEDERALLY
- REASONING
  - RIGHT AT ISSUE: Equal representation on an equal basis!
    - This is a fundamental right per Footnote 4→ Strict Scrutiny
    - TWO GROUPS: Those equally an unequally represented
  - Follows *Baker v Carr,* redistricting is a judiciable issue and not a pure political question
  - "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."
  - Majority denies the argument that states were permitted to base their apportionment structures upon the Constitution itself, which requires two senators from each state despite substantially unequal populations among the states.
- TAKEAWAY
  - *Baker v Carr* gets us justiciability. *Reynolds v Sims* gets us one person one vote, but only for states

Loving v. Virginia (1967)

- PARTIES
  - Loving – a loving man and wife
  - Virginia – commonwealth really getting up in everyone's business about being in love
- FACTS
  - Law enforcement enters the home of the Loving family and arrests them for miscegenation
  - This is violation of Commonwealth statute because the Lovings were of different races
  - Both plead guilty to violating the Racial Integrity Act, but rather than serving a year in prison, they accepted a suspended sentence and were banished from VA for 25 years
  - Two legal issues
    - Leaving the state to evade law (Lovings were married in DC and VA is punishing people for getting married out of state)
    - Punishment for interracial marriage
- ISSUE
  - Is a state law prohibiting marriage exclusively on the basis of race constitutional under equal protection? NO!!!
- HOLDING

    - Bans on interracial marriage violate Equal Protection (14) and Due Process (14)
- REASONING
    - WARREN writes that this violates equal protection and due process
    - Strict Scrutiny Test Racial classification must be (case for facial discrimination based on race)
        - Necessary to further a compelling state interest
        - Narrowly tailored to further that interest
    - Virginia argues that rational basis should apply because all races are affected equally (reject)
    - WARREN reasons that Anti-miscegenation law has no legitimate purpose (goal is white supremacy). Thus, restriction on the freedom to marry violates equal protection
    - Court reasons that these laws also violate due process. Marriage is a foundational right. The choice to marry cannot be invaded by the state based on race
- TAKEAWAY
    - STRICT SCRUTINY for FACIALLY RACIAL LINES

Washington v. Davis (1976)

- PARTIES
    - Washington – City with an exam that does not favor certain groups
    - Davis – Would be police officer who got clipped by Test 21
- FACTS
    - We are dealing with Test 21, an exam given to all police recruits in Washington DC
    - Issue is that there are significant cultural references which disqualified many black candidates
    - Disparate impact of the exam resulted in an 80% white force serving 70% Black population
    - In 1970, Davis is rejected and bring suit arguing that the recruiting procedures test irrelevant knowledge to policing that are more well known to white persons
        - Argument is that this violates Title VII of the CRA and Equal protection
- ISSUE
    - Is discriminatory impact enough to violate equal protection, or must there be discriminatory intent? Discriminatory impact alone isn't enough to invalidate
- HOLDING
    - To be unconstitutional, racial discrimination by the government must contain two elements: a discriminatory purpose and a discriminatory impact.
- REASONING
    - We do a *Bolling v Sharpe* and apply equal protection to the federal government (why not)
    - WHITE, writes the challenge must be motivated by invidious discrimination
    - The court doesn't strike laws based on impact, intent is critical, and impact can be illusory
    - No evidence of intent. Facially neutral test. DC police had tried to recruit black officers
    - Distinction from *Bolling*, this is facially neutral. *Bolling* is classifying on its face
    - Equal protection protects from laws that have DISCRIMINATORY purpose
        - Facial racial classification
        - Totality of the relevant facts
            - Might be heterogeneous impact, not necessarily enough
    - We don't end up in strict because it is facially neutral and the totality of the evidence isn't supportive of discriminatory INTENT. Facts might suggest otherwise (the DC police didn't make this test and there were efforts to recruit black officers).
- TAKEAWAY
    - Increases the bar for plaintiffs to bring discrimination suits
    - Must have PURPOSE and INTENT
    - STRICT SCRUTINY comes in when
        - Statute is racially discriminatory on its face; OR
        - Statute has racially discriminatory purpose

- Contrast with Yick Wo in your brain when thinking about this

Regents of the University of California v. Bakke (1978)

- PARTIES
  - Bakke – a man who wanted to be a doctor and get his degree from UC Davis.
  - Regents of CA – Folks who wanted a little bit more out of his application
- FACTS
  - When Bakke applied to medical school in 1973, Davis had two admission programs. A general program for most applicants and a special program for minorities and low SES
    - White students could apply to both, but no one had ever admitted.
    - 84% of seats were part of general admission. 16% for special admissions
  - Bakke's scores were higher than some in the special pool, but weren't enough for general
  - Bakke sues California alleging a violation of equal protection
- ISSUE
  - Does Equal Protection Clause (14) public institutions of higher education to make admission decisions based on race? YES!!!
- HOLDING
  - Universities may use race as a factor under some circumstances (or one of several factors) but racial quotas are impermissible. [Plurality]
- REASONING
  - POWELL WRITES the controlling opinion: racial classifications are subject to strict scrutiny (inherently suspect)
    - Fulfill a compelling state interest
    - Must apply the least-restrictive means available
  - State argues the admission program is compelling because it 1) remedies prior discrimination, 2) facilitates health services, and 3) increases academic diversity
    - Remedying past discrimination → is not compelling
    - Counteracting societal discrimination → is not compelling
    - Facilitating health services and the proliferation of minority physicians → compelling but not least restrictive by which this could be accomplished
    - Increasing diversity → compelling but not least restrictive
  - Narrow tailor doesn't fly because the school isn't looking at the applicants as individuals. Race can be a plus, but it shouldn't be a determining factor (deterministic?)
  - We end up with a quota system being unconstitutional. Quota for quotas sake don't jive
- NOTES
  - When a governmental decision touches on race of background, they are entitled to a judicial determination that the burden is precisely tailored to a compelling government interest
- TAKEAWAY
  - Huge affirmative action case
  - Racial quotas are invalidated.
  - This will probably be overturned by *SFFA v Harvard*

Grutter v Bollinger (2003)

- PARTIES
  - Grutter – woman who dreamed low, and didn't even get into Michigan…
  - Bollinger – President of Michigan, who failed up and got to Columbia
- FACTS
  - Grutter was denied admission to the U Michigan Law School. Grutter is white. Her GPA was high (as was her LSAT) but she is waitlisted and denied
  - Grutter files suit arguing that her denial was based on her race, and violates equal protection

    - Michigan policy for admission did consider race. Grutter argued this gave minority candidates an unfair advantage in the admission process
- ISSUE
    - May public school consider race as a factor in admission without violating equal protection? YES!!!!
    - There are also challenges under Title VI.
        - We read Title VI as co-terminus with equal protection
- HOLDING
    - An admissions program that gives special consideration for being a certain racial minority does not by construction violate (14).
        - Race may be considered as one factor among many
- REASONING
    - O'CONNER applies strict scrutiny
        - Compelling interest in classifying based on race / policy must be narrowly tailored
    - We follow *Bakke,* institutions of higher education have a compelling interest in cultivating racial diversity among their student bodies
    - Universities have determined that racial diversity adds quality to education (law)
    - The admission policy is narrowly tailored
    - In *Bakke,* you have quotas. There is no quota here. To fulfill this, race is a plus factor (i.e. one factor of many) that not every student got, but could nudge a candidate forward. It also vetted individual candidates, so the plus factor was non-mechanical
- NOTES:
    - Precisely tailored to serve a compelling governmental interest
        - "assembling a class that is qualified and diverse"
        - Promote cross racial understanding and break down barriers
    - Interest prong - The burden is on the state to show that you meet strict scrutiny. SDOC doesn't really put much of the burden on the state though. She shows some deference. This will whip back in Fisher. Shes assuming good faith on the part of the university
    - Narrow tailoring – the fit should should be narrowly tailored. Michigan program
        - Doesn't unduly burden others because there are many aspects of diversity. And there are MANY forms of diversity (beyond race) that are included
    - Critical mass is also ok, because it is vague. It is not a quota. Its not a set number.
        - To be narrowly tailored, a race-conscious admissions program cannot use a quota system—it cannot "insulat[e] each category of applicants with certain desired qualifications from competition with all other applicants."
    - What about the lack of end date?
        - SDOC argues that there should be an end date. Race conscious admission policies should ebb over time.
- TAKEAWAY
    - Confirms that race can be used in a non-mechanical way.
    - WEAKNESS – not really the strict scrutiny that we have seen before.

Gratz v Bollinger (2003)

- PARTIES
    - Gratz – young lady who could have studied harder and ended up on the bubble
    - Bollinger – Still don't know how you get from Michigan to Columbia
- FACTS
    - This is the undergraduate version of Grutter. We are still at Michigan
    - U Mich included a number of factors during their admission process. Race was one of many.
    - There was a point system associate with the factors. If you got to 100 points, youre in.

    - Michigan considered race, and race automatically gave 20 points, bar none
    - Gratz (white female) was denied admission despite being competitive (under 100 points). Claim is that we are violating Title VI of the CRA and Equal Protection (14)
- ISSUE
    - Does the use of strict racial preference violate Equal Protection? YES!
- HOLDING
    - The university's admission policy violates Equal Protection (14) because its ranking system gave automatic point increases to all minorities rather than individual determinations.
- REASONING
    - We are back at strict scrutiny. This is a mechanical quota
- GINSBURG DISSENT
    - Raises the issue of inclusion v exclusion. This is invidious v benign.
    - If you are excluding people, that requires suspicion. If you are trying to include, these are good things. This is where the line needs to be drawn.
    - What Ginsburg wants to do with affirmative policies is make sure they don't have an invidious persons or unduly trample on the opportunities of other (overtly).
    - As this is not invidious, and there is no evidence of a quota system, and there is no indication that this is trying to LIMIT the admittance of a particular group
    - Ginsburg also doesn't mention race as a government interest, she instead focuses on the scars of racism. Its colorblind at times, but its also extremely color conscious.
- TAKEAWAY
    - Mechanical point awarding is not permissible
    - GINSBURG dissent on the invidious v benign classification is insightful. This is what they do anyway, they might as well be honest about it.

Fisher v University of Texas (2013) – Fisher I

- PARTIES
    - Fisher – Ginger child who wanted to go to school with Bevo
    - UT Austin – School isn't going to let that happen
- FACTS
    - In Bakke, POWELL argues that affirmative action could be a constitutional means to promote diversity on campus. Grutter confirms this (holistic admissions plus factor)
    - UT Austin had a race conscious plan. It is one of a variety of factors in play.
    - Fisher sues after her application was rejected. She contends it is because she is white. Her argument is that the use of race violates equal protection.
    - There are three programs to evaluate students (historically)
        - Prior to 1997, numerical score + race (invalidated by *Hopwood*)
        - Numerical scores and holistic evaluation (included things correlated with race)
            - Texas Legislature put a 10% rule for all graduating seniors for admission
        - In 2004, we renew use of race, but use it as a non-trivial plus factor
    - Summary of what happens is that this is going to be kicked back because the Appellate court because they did not apply the correct level of scrutiny
- ISSUE
    - Does the equal protection clause permit the consideration of race? YES!!
- HOLDING
    - Only under strict scrutiny. Strict scrutiny applies to the government interest and the tailoring.
    - it was the duty of the reviewing court to "verify" that the University policy in question was necessary to achieve the benefits of diversity and that no race-neutral alternative would provide the same benefits.

    - "Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation."
        - The issue is that the lower courts presumed the university acted in good faith, and granted the university deference in narrow tailoring. This is at odds with *Grutter*
- REASONING
    - KENNEDY points out that the deference to the university is inconsistent with strict scrutiny. When the university established that is goal is consistent, it still must be narrowly tailored. The university does not receive deference in determining that tailoring
    - The university has the burden to demonstrate that each applicant is evaluated as an individual, and in a way that does not make race a defining feature of an application
    - Narrow tailoring requires that the court verify that it is necessary to use race.
        - Requires an inquiry into whether a university can achieve diversity without race
    - Strict scrutiny must not be "'strict in theory, but fatal in fact,'" Adarand. But the opposite is also true. Strict scrutiny must not be strict in theory but feeble in fact. In order for judicial review to be meaningful, a university must make a showing that its plan is narrowly tailored to achieve the only interest that this
- NOTES
    - There are two layers of strict scrutiny
        - Strict applies to the interest (we waive this through)
        - Strict applies to the tailoring (appeals gave deference for narrow tailoring)
    - What is the standard from *Grutter* for a compelling interest?
        - The compelling interest is a diverse student body and critical mass
        - We all agree this is a compelling interest, deference to academic judgement is reasonable. The court does request a reasonable statement though
            - Recall, the academic benefits are the end we want
            - A critical mass is sort of a means, but it is treated as an end (Koob)
    - The Court takes issue with narrow tailoring. Lower courts cannot give deference on this
        - University needs to show, extensive but not exhaustive, race neutral policies
        - Not every conceivable option,
        - You will fail the race control option if "there is a non-racial approach that would promote the substantial level about as well and at tolerable administrative expense"
- TAKEAWAY
    - Look above, little bit of deference on the end at least with education
    - NO DEFERENCE FOR NARROW TAILORING (MEANS)
    - How does she possibly have standing?

Fisher v University of Texas (2016) – Fisher II

- PARTIES
    - Fisher – shes back and with a vengeance, even though she's all Geaux Tigers now
    - UT Austin – Still not letting her in. UT Austin is a much better school than LSU
- FACTS
    - We're back here. 5th circuit did not apply strict scrutiny well enough. Previously, the court vacated the Appellate decision for being overly deferential on "good-faith"
    - Fisher I set forth three controlling principles relevant to assessing the constitutionality of a public university's affirmative-action program.
        - First, "[r]ace may not be considered [by a university] unless the **admissions process can withstand strict scrutiny**," *Fisher I*
        - Second, "the decision to pursue 'the educational benefits that flow from student body diversity'…is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper." (Flows from *Bakke*)

        - Third, *Fisher I* clarified that no deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals. The university bears the burden of proving a "nonracial approach" would not promote its interest in the educational benefits of diversity. Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative, but you cant mail it in
- HOLDING
    - The race-conscious admissions program in use at the time of petitioner's application is lawful under Equal Protection (12).
    - The University of Texas' use of race as a consideration in the admissions process did not violate Equal Protection. University of Texas' use of race as a factor in the holistic review used to fill the spots remaining after the Top Ten Percent Plan is narrowly tailored
- REASONING
    - First, the Court upheld that the university's rationale for diversity-associated goals as "sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them,"[12] despite a lack of a numerical quota. The goals that the Court affirmed as sufficiently measurable included the "destruction of stereotypes," promotion of "cross-racial understanding," preparation of students for "an increasingly diverse workforce and society," and cultivation of "leaders with legitimacy in the eyes of the citizenry."
    - Second, the court found that the university presented sufficient evidence to show that in the seven years between the Hopwood decision and the implementation of the combined academic-holistic admissions process, race-neutral policies and increased outreach efforts were insufficient to achieve these goals. (Top 10% rules did the job)
    - Third, the court found that "consideration of race has had a meaningful, if still limited, effect on the diversity of the University's freshman class," and that such a limited effect "should be a hallmark of narrow tailoring, not evidence of unconstitutionality."
        - KENNEDY kicks back – shows narrow tailoring. This is a benefit. It isn't a seismic effect. ALITO is argues it doesn't matter, because it doesn't do enough
    - Finally, the court found that the petitioner failed "to offer any meaningful way in which the University could have improved upon" its prior race-neutral efforts to achieve diversity-associated goals, including expanding the Top Ten Percent rule, which would leave, as quoted from the Grutter decision, "a gap in an admissions process seeking to create the multidimensional diversity" envisioned by the Bakke decision.
        - Just keep using the top X% plan, why use the individual review. KENNEDY rejects because class rank does not perfectly predict who the university might want
    - In conclusion, the majority reiterated that the University has an ongoing obligation to use available data "to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary."
- NOTES
    - No deference in analyzing narrow tailoring. Same as *Fisher I*
    - ALITO DISSENT focuses on the narrow tailoring and the deference given to the university (compelling interest). He doesn't like the lack of clarity of the compelling interest
        - What will diversity accomplish? If you don't show what it will achieve how will you measure it?
        - Complains about critical mass. They don't define what critical mass.
            - Counter: if we define it then we have a quota
        - UT Austin also states the same goals as *Grutter* (eliminating bias, preparing for a diverse workforce). These aren't specific enough to be measurable. If they aren't measurable how do we tailor them.
            - Goals should be SMART! So says ALITO! Catch-22 seems obvious

        - ALITO is also annoyed about narrow tailoring. We cant tell if it is narrowly tailored, because we don't have measurable goals, and he believes it isn't meeting the goals. UT Austin's own data shows that it isn't changing the composition. And they keep using the SAT!
- TAKEAWAY
    - Top 10% plan work
    - Keep Catch-22 on the impact of the program in mind based on the court
    - Keep the Catch 22 on the conclusion of the program in mind based on the court

United States v. Paradise, 480 U.S. 149 (1987)

- PARTIES
    - United States – Country potentially on the right side of history this time
    - Paradise – Unfortunately, not the water colorist from Ontario Oregon.
- FACTS
    - In the 1970s the State of Alabama was required to implement a plan to promote more Black state troopers because there were none of higher rank. This goes horribly wrong for more than a decade. The state develops a test, but Black officers performed extremely poorly on it, and none were promoted.
    - In 1983, the District Court held that the test had an adverse impact on Black candidates and ordered the Department to submit a plan to promote at least 15 qualified candidates to corporal in a manner that would not have an adverse racial impact.
    - The Department proposed to promote 4 Black officers among the 15 new corporals, but the court rejected that proposal, it determined "for a period of time," at least 50% of those promoted to corporal must be Black, if qualified Black candidates were available, and imposed a 50% promotional requirement in the other upper ranks, but only if there were qualified Black candidates, if a particular rank were less than 25% Black, and if the Department had not developed and implemented a promotion plan without adverse impact for the relevant rank
- ISSUE
    - Did the one-black-for-one-white promotion scheme violate Equal Protection (14)? NO!!!!
- HOLDING
    - Under the equal protection (14), a one for one black white promotion is permissible and passes strict scrutiny
- REASONING
    - The scheme did not impose an "absolute bar" to white advancement, was narrowly drawn to include only specific ranks in the department, and, according to the four justices who voted to affirm it, was "required in light of the Department's long and shameful record of delay and resistance" in complying with past judicial decisions. [this is after 15 years of resistance]
    - In determining whether race-conscious remedies are appropriate, several factors matter:
        - The necessity for the relief
        - The efficacy of alternative remedies
        - Flexibility and duration of the relief, including the availability of waiver provisions;
        - Relationship of the numerical goals to the relevant labor market;
        - The impact of the relief on the rights of third parties.
- NOTES
    - Alabama department of public safety doesn't hire a single black officer for 30+ years
    - What level of scrutiny applies? The court declines to say if strict scrutiny is required for remedial government action, but say immediately that the district court would pass strict scrutiny
    - OCONNER Dissent
        - This should be strict scrutiny, regardless of benign or invidious discrimination

        - Theres clearly a compelling interest.
        - This plan would not be flexible if you were actually trying to remedy discrimination
            - The flexibility suggests that accelerating promotion decisions is the only actual goal
        - SDOC believes this also could have been done through fines
    - NOTE that it is interesting that SCOTUS gives the DISTRICT COURT DEFERENCE

Adarand Constructors, Inc. v. Peña (1995)

- PARTIES
    - Adarand – subs that bid low, but not low enough
    - Pena – Secretary of transportation that hands out contracts for roads and more!
- FACTS
    - There is heterogeneity in how different government's race-based classifications are examined by the court. State governments (strict). Federal Govt (intermediate)
    - Mountain Gravel construction got a contract for federal highway construction. It solicited bids from numerous subs to build the guard rails. Adarand submitted the lowest bid but Gonzalez received the contract. It did this because it received additional compensation for hiring subs which were minority or disadvantaged group owned. Included racial minorities
        - Small Business Administration provided block grants for minority owned businesses
    - Argument: provision in the statute for minority businesses violates Due Process (5)
- ISSUE
    - Does the presumption of disadvantage based on race alone, and consequent allocation of favored treatment, violate the equal protection principle in Due Process (5)? YES!
- HOLDING
    - All racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under a standard of "strict scrutiny,"
- NOTES
    - Reverse incorporation
    - The court specifically noted that *Metro Broadcasting* departed from prior cases by holding "benign" racial classifications need only satisfy intermediate scrutiny. Overturned.
    - Compensation programs truly based on disadvantage, rather than race, would be evaluated under lower equal protection standards.
    - Race is not a sufficient condition for a presumption of disadvantage and the award of favored treatment, all race-based classifications must be judged under the strict scrutiny
    - Proof of past injury does not in itself establish the suffering of present or future injury.
    - The Court remanded for a determination of whether the Transportation Department's program satisfied strict scrutiny.
    - There are three principle takeaways
        - Skepticism – skeptical any time the govt applies race (strict scrutiny)
        - Consistency – same standard no matter who is burdened or benefitted
        - Congruence – Equal protection analysis is the same in 14th equal protection and 5th due process
- TAKEAWAY
    - Strict scrutiny applies to all government action involving race

City of Richmond v Croson (1989)

- Racial quotas for the issuance of government contracts is not justified by statistical evidence of inequality
- Cities pursuing such approaches must investigate race-neutral methods to correct imbalances
- Targets like (30% contracts) do not correspond to any measured injury

Parents Involved v. Seattle School District 1 (2007)

- AKA PICS
- PARTIES
    - Parents Involved – Involved parents and involved they are
    - Seattle School District 1 – Oh those administrators are up to it again
- FACTS
    - Seattle decided to implement a choice policy for schools. Students could choose which schools they go to. As some schools might get overwhelmed, in those cases the district could determine which students would go to which of their choices.
    - The tiebreaker included a racially conscious admission system. The school district had a 40% white, 60% non-white population. Goal included (general) maintenance. Race is a tiebreaker
- ISSUE
    - Are the decisions in Grutter and Gratz binding public school systems? NO!
    - Is racial diversity a compelling state interest? YES!
    - Does the school district that denies admission on the basis of racial identity violate equal protection (14)? YES!
- HOLDING
    - Decisions in higher education (Grutter / Gratz) are not binding on public school systems.
        - Racial diversity is a compelling state interest.
    - In this case, the school district which implements a school choice program which denies on the basis of race, that's no good. Violates equal protection.
- REASONING
    - This is a KENNEDY 4-1-4. Joins ROBERTS for some and BREYER for some.
    - ROBERTS outlines first the standing argument. The parents have standing because their parents are trying to access public education.
    - Strict Scrutiny applies
    - The way in which the Seattle district tailored race conscious policy was overly broad. So you can have race conscious admission policy, but it must be narrowly tailored
    - Reasons Narrow tailoring fails
        - Treatment of race as binary (mentioned in passing)
        - Not making much of a difference at all. So you clearly don't need it. ← this is a stupid argument. Comes back to the catch 22.
    - ROBERTS also questions the value of racial diversity for the sake of racial diversity. You cant just consider race for the sake of race.
- TAKEAWAY
    - Finding a compelling interest is HARD. Majority rejects everything

San Antonio v. Rodriguez (1973)

- PARTIES
    - San Antonio – School system who believes school's value should be based on home value
    - Rodriguez – Family whose got the short end of the stick as a result of this philosophy
- FACTS
    - Local schools in San Antonio (and across Texas) are funded through property taxes.
    - Petitioners argument is that education is a fundamental right, and that the funding of schools through local property taxes violates the equal protection clause
    - This created a race correlated inequality functioning from inherited wealth. Wealth based inequality results heterogeneous access to quality of education
- ISSUE

    - Did Texas' public education finance system violate Equal Protection (14) by failing to distribute funding equally among its school districts? NO!!!
- HOLDING
    - San Antonios financing system of schools, based on local property taxes, is not a violation of the equal protection clause (14). Even if there are inter-district differences in funding, absolute equality in e
    - Granting local control over school dollars to a legitimate state interest.
- REASONING
    - Right to be educated (as a child of school age or an uneducated adult), is neither explicitly or implicitly textually found anywhere in the Constitution. It is therefore not protected
    - These decisions are not subject to strict scrutiny, they are only subject to rational basis, and using local property taxes to finance schools is completely rational.
    - POWELL classifies, this is not a suspect class because it isn't a definable category. Not black v. white. Male v. female. Previous treatment of poor persons is about COMPLETE deprivation of rights rather than a fuzzy qualification
    - POWELL rational basis. Wealth is not a suspect class. Theres no fundamental right to a high quality education. Theres no absolute deprivation. [not clear if this is "education" is not or "equal education"]. We haven't seen a case

Village of Arlington Heights v. Metropolitan Housing Development Corporation (1977)

- PARTIES
    - Village of Arlington – White people with the goal of not meeting non-white people
    - Metropolitan Housing – Evil corp with a plan to develop low-income housing
- FACTS
    - Brown v Board largely ended the separate but equal doctrine even without explicitly overturning it. But segregation persisted
    - Arlington Heights was a majority white suburb. In 1971, the MHDC wanted to build low income apartments in AH which would be racially integrated.
    - The plan intended to use land intended for single family homes, so rezoning was needed.
    - Numerous residents opposed the rezoning, and raised the issue of meeting rezoning reqs.
- ISSUE
    - Does government action violate equal protection (14) if it yields discriminatory results, even if there was no shown discriminatory intent? NO!!!!!
- HOLDING
    - Government action that yields discriminatory results does not violate 14 without intent.
        - KEY: Discrimination must be a "motivating factor"
- REASONING
    - POWELL: Govt action with discriminatory impact are not automatically unconstitutional
    - PLAINTIFF must show that discrimination **influenced** state's decision to stop the action
    - Test for disparate impact (*Washington v Davis*). Facially neutral law, two prongs. Discriminatory intent and Discriminatory impact
    - Creates test for determining discriminatory intent
        - Look for discriminatory impact (affects one race more than another)
        - Historical context of the action (pattern of behavior)
        - Unusual departures from prior decision making
        - Legislative and administrative history
    - Taken together, if these factors show the state action indicate discriminatory intent → then there is a violation of Equal Protection
- TAKEAWAY
    - DISCRIMINATORY INTENT is prioritized over DISCRIMINATORY IMPACT when deciding 14th amendment issues.

Bernal v. Fainter (1984)

- PARTIES
  - Bernal – Man from south of the border with dreams of being a Texas notary public
  - Fainter – Texas AG who will make sure only Americans from real America get that stamp
- FACTS
  - Equal protect prohibits from treating one classification of persons differently from others absent sufficient justification based on the level of review. This is about alienage
  - Bernal, Mexican citizen and a legal US resident, is a paralegal. He applied to be a notary public. This permitted some additional abilities (depositions, administer oaths, etc)
  - Texas statute stipulated that only US citizens in the state could be notaries
- ISSUE
  - Are statutes differentiating based on legal alienage subject to strict scrutiny? YES!!!
    - Exception for political function
- HOLDING
  - Texas statute requiring a notary public be a US citizen violates the Equal Protection (14)
- REASONING
  - MARSHALL follows *Graham v Richardson* and determines that legal alienage receives strict
  - The Court also recognized a "political function" exception that subjects alienage classification laws to a lower standard of review for "positions intimately related to the process of democratic self-governance."
  - The job of a notary is completely ministerial. There is no judgement or discretion. There is no characterization by which citizenship will help or hinder execution of the position
  - Unlike the role played by other individuals in who work in judicial systems, such as judges or police officer, where a locality may require police officers to be citizens because they act on behalf of the state and have considerable discretion in how the law is enforced
  - *Cabell* Test
    - Is the classification substantially over inclusive or underinclusive?
    - Does the person hold a non-elective position that participates directly in the formulation, execution, or reviews of public policy?
      - If so, they perform functions at the heart of representative govt.
    - Non-ministerial (strict scrutiny) - Teachers, judges, police officers
    - Ministerial (rational basis) – notary, civil engineer, member of the bar, clerk
  - APPLY CABELL TEST
- TAKEAWAY
  - Legal aliens are a SUSPECT CLASS (strict scrutiny) except when there is a political function
    - *Sugarman v Dougall* indicates that members of the civil service for the City of New York administering housing relief were protected under 14 as well.

Plyler v. Doe (1982)

- PARTIES
  - Plyler – school superintendent who claimed to be an educator, but only of US citizens
  - Doe – undocumented parents who wanted to get their kids that education
- FACTS
  - In 1975, Texas empowered local school districts to admit or deny undocumented children.
  - Legislature also withheld funding from districts that did not deny these children admittance
  - This resulted in undocumented children needing to pay for attending public schools
    - What is the extent of tax payment across similarly situated undocumented parents?
  - DIFFERENT GROUPS → undocumented v document children
- ISSUE

    - Is denying free education to undocumented children a violation of 14?
- HOLDING
    - Distinguishing between documented and undocumented children in the provision of free public education is a violation of equal protection
- REASONING
    - The 14th amendment acknowledges all people within a state's jurisdiction, regardless of immigration status. They receive the protections of due process for example
    - National origin for undocumented persons is NOT a suspect class, meaning rational basis applies. Still, UNDOCUMENTED CHILDREN are part of a special suspect group.
        - They have no control over parental migration or the ability to change their migration status.
    - Although access to education is NOT A FUNDAMENTAL right, denying this class of children would prevent them from contributing to continued national progress.
    - Because the children are blameless, and because education is important (albeit not fundamental), a heightened review is needed. Intermediate scrutiny
- TAKEAWAY
    - Plyler provides the constitutional basis for undocumented children receiving education
    - Establishes that undocumented children are a quasi-suspect class.
    - Reconcile Plyler with Rodrigues. This is about complete deprivation vs quality of education. The class is also very easy to define. Rodriguez, gets pretty hard to define the class of person not getting equal protection, what constitutes being poor

Cleburne v. Cleburne Living Center (1985)

- PARTIES
    - City of Cleburne – City that wanted no mentally handicapped people to be treated
    - Cleburne Living Center – Center that wanted to do just that, IN TOWN!
- FACTS
    - Case involving discrimination against the mentally disabled
    - Mental healthcare facilities in Cleburne required special zoning permits to treat mentally disabled persons ("the insane or feeble minded").
    - The center applied for a special use permit but was denied 3-1 in a public hearing
- ISSUE
    - Are the mentally disabled part of a quasi-suspect class? NO!
- HOLDING
    - Intellectual disability is not a quasi-suspect class and does not require heightened review
    - Double whammy → There was no rational basis for the zoning rules
- REASONING
    - WHITE writes that legislators, rather than judges, are in the best position to determine how the handicapped are treated under the law.
    - Federal law makers have enacted significant legislation to protect the disabled. This suggests that the mentally disabled are not without political influence, and are therefore not suspect
    - The disabled are still protected from invidious acts of discrimination under rational basis
    - Court finds that requiring a special use permit for the mentally handicapped relied on an **irrational prejudice** rather than a legitimate govt purpose
    - None of this is necessary, it fails rational basis.
- TAKEAWAY
    - Intellectual disability is not a suspect or quasi-suspect class → Rational basis
    - Look to similarly situated groups and how statute treats them when determining rationality
    - Extremely rare to strike down under rational basis
        - Note that in this case there is some digging in. There is a slightly more searching inquiry in rational basis as opposed to traditional means.

        - This makes little sense to me, because we if we are debunking rationality, we have to dig in and explain why something is dumb

Romer v. Evans (1996)

- PARTIES
    - Romer – Governor who wasn't going to allow his purple state to become rainbow
    - Evans – Gay man who wanted to be gay in peace, and go to public venues
- FACTS
    - Many CO cities passed ordinances in the 1990 to protect LGBT citizens from discrimination
    - CO voters added amendment 2 to the state constitution, repealing all such local ordinances and stating that no such ordinance may treat LGBT persons as protected
        - No evidence that LGBT folks were getting 50% off as a result or something
    - Members of the LGBT sue Romer to invalidate in federal court under equal protection (14)
    - The state argues that it is simply preventing LGBT persons from receiving special rights
- ISSUE
    - Does equal protection prevent a state from banning official protections from those who are discriminated against due to their sexual orientation? YES!!!
- HOLDING
    - The amendment violates equal protection (14) because it is not rationally related to a legitimate government interest.
- REASONING
    - KENNEDY posits that despite the stated goal to put LGBT people on the same footing, there is a clear removal of protections from persons and open the door to discrimination
    - According to Colorado, the purpose of this statute is to put everyone on equal footing. Local statutes are elevating LGBT persons, so state are putting all persons on a level field.
    - The court poo poos this. Doesn't say that this isn't a legitimate government action, but states that the means aren't rationally related to putting everyone on a playing field.
    - Court concludes this is a law based on animus. And animus isn't a legitimate state interest.
        - It concludes this because the means are SOOO overbroad
- TAKEAWAY
    - The level of scrutiny isn't determined in the case, but KENNEDY determines that it wouldn't meet rational basis
    - ANIMUS against a politically unpopular groups is not a legitimate state interest

Reed v. Reed (1971)

- Reminder – *Goesart v Cleary (1948)* – women cant be barmaids in towns larger than 50k people, but we defer to the STATE, even if a man doesn't need to be on site
- PARTIES
    - Reed – wants to be executor of their son's estate
    - Reed – wants to be executor of their son's estate
- FACTS
    - Note that this is all happening against the presumed passage of the equal rights amendment
    - After Sally and Cecil Reed divorced their son Richard committed suicide.
    - Richard had no will, and Sally petitioned to become the executor of his estate
    - Cecil files a competing claim, and Idaho statute indicates men must be appointed executors over similarly situated female petitioners. Probate court appoints Cecil
    - Note that there is *de minimis* justification for this delineation in the statute itself
- ISSUE
    - Does the statue's gender preference violate equal protection (14)? YES!!!
- HOLDING

    - Administrators of estates cannot be named in a way that discriminates between sexes.
- REASONING
    - Unanimous holding written by BERGER → The test applied is a heightened rational basis
        - The classification must be reasonable, not arbitrary, and must rely on fair and substantial relationship.
    - Holding is that the law is completely arbitrary. There might be reasons for distinguishing between the sexes, and in conditions those hold up, but no justification is made in probate
        - This is completely arbitrary. Sex is not predictive of ability to execute an estate
    - The court ignores MANY things in the decision and leaves the door open
        - No indication of what level of scrutiny should be used for sex or gender
    - "distinction solely on the basis of sex that has no justification" must be struck down
    - Ends up negating lots of statutes in this probate setting
- TAKEAWAY
    - This is the first application based on sex, also the first RBG case argued in front of SCOTUS
    - This is the first case where we strike down a case based on sex using something other than basic strict scrutiny.

Frontiero v. Richardson (1973)

- PARTIES
    - Frontiero – Air Force woman with an axe to grind about this bureaucracy
    - Richardson – SecDef who is going to make men not work for it to get those benefits
- FACTS
    - The 60s and 70s were marked by congressional action to end sex based discrimination
    - Two federal statutes indicated that spouses of uniformed service members were entitled to housing and medical benefits. Service MEN could automatically claim wives as dependents and they would receive such benefits regardless of financial dependence. Service WOMEN could only do so if they provided more than half of their husband's financial support
    - Frontiero, AF Officer, applied for benefits for her husband. Denied because it was not shown that the husband relied on her for more than half his support
    - Files suit under the 5th amendment (federal issue) based on due process violations (sex)
- ISSUE
    - Does federal law requiring different qualifying criteria for male and female spousal dependency violate 5th amendment due process? YES!!!
- HOLDING
    - Statutes which distinguish based on sex for administrative convenience, and command different treatment of men and women, is an arbitrary violation of due process (5).
- REASONING
    - PLURALITY – All sex-based classifications are inherently suspect, and therefore require strict scrutiny. This ups *Reed v Reed*. [This is against ERA passage background by congress]
        - Might be a little forward looking on "inevitable" ERA passage
    - GROUPS: Married men v Married Women…
    - Administrative convenince is not a compelling government interest, might be rational
    - Remainder of the judges in the majority, agree that this is invidious discrimination based on *Reed v Reed,* make the argument that it is necessary to claim gender is a suspect class.
        - This wouldn't pass under *Reed* and would fail rational basis.
    - They further point to the ongoing political process, and say "if the state legislatures pass this, it will absolutely be strict scrutiny" but its not our job to get ahead of the political process
    - RHENQUIST Dissent – Statute is not a gender based classification. It classifies based on marital status. And even if it was based on gender, gender is not a suspect classification
        - Thus, rational basis, administrative convenience is a rational reason.
- TAKEAWAY

- 8-1, this statute violates due process. But we are completely unclear about the level of review
- Both *Reed* and *Frontiero* rely on the "invidious discrimination" distinction which is overturned

Craig v. Boren (1976)

- PARTIES
  - Craig – Oklahoma youngster who was going to get that sweet sweet 3.2% ABV beer
  - Boren – Governor of Oklahoma and candidate to star as the preacher from Footloose
- FACTS
  - Oklahoma statute permits the sale of "non intoxicating" 3.2% ABV beer to women 18+. Men can only purchase this when they are 21+.
  - Craig argues that the heterogenous treatment of genders by the statute is a violation of equal protection (14).
- ISSUE
  - Is a statute that permits the sale of alcohol to women of a certain age, but not men of a certain age, unconstitutional under equal protection (14)? YES!!!
- HOLDING
  - To regulate heterogeneously based on sex the **GOVT** must show its use of sex is substantially related to achieving an important government interest
- REASONING
  - BRENNAN writes, the statutes gender based classification violates equal protection.
  - Gender based classifications become intermediate scrutiny.
    - Substantially related to furthering an important govt standard
  - Oklahoma argues that the important objective is to promote traffic safety. Statistics show that men are more likely to drink and drive, and die in car accidents, than women
  - COURT RECOGNIZES THAT PROMOTING TRAFFIC SAFETY IS IMPORTANT
    - Court rejects that the gender based classification is substantially related
    - 2% of men, and 0.8% of women have such arrests. So no reason to set gender rules
    - Studies you are citing are not about 3.2% beer.
      - Bad means and fit.
  - Reverse district court. Statute is unconstitutional
  - POWELL → Should be strict scrutiny rather than intermediate. Not narrowly tailored
  - BURGER → because gender based classifications are not constitutionally prohibited, we end up back a rational basis. This passes under rational basis.
  - RHENQUIST → Rational basis is correct. Nothing supports the new intermediate standard
- TAKEAWAY
  - Intermediate scrutiny covers gender-based discrimination
    - Also covers illegitimate children and children of illegal migrants
  - It is more demanding than rational basis but less than strict. What does that mean?

United States v. Virginia (1996)

- PARTIES
  - United States – Country taking the fun step of trying to be on the right side of history
  - Virginia – Commonwealth whose had enough of this woke culture (note we are pre woke)
- FACTS
  - VMI is a state funded institute of higher learning founded in 1839. It's a branch unaffiliated military academy. No women allowed.
  - Anonymous female lodged a complaint with the DOJ about VMIs refusal to accept women. The DOJ subsequently brings suit against the Commonwealth (equal protection)
  - [Personal Note]: How is this not a standing problem?
- PROCEDURAL HISTORY

    - District court rules for VMI → Appeals remands and tasks VA with creating remedy
    - Remedy doesn't admit women to VMI but instead creates the Virginia Women's Instituted for Leadership (separate but equal?). Women's program lacks the humiliating panache of the male program. This was a less rigorous and more cooperative training method. VA argues this is based on differences in how men and women learn
- ISSUE
    - Does VMI's gender based admissions process violate equal protection? YES!!!
        - If so, what is the remedy?
- HOLDING
    - The Commonwealth's exclusion of women from VMI violates Equal Protection (14).
        - Not substantially related to achieving an important government function
- REASONING
    - GINSBURG applies a heightened version of intermediate scrutiny. Exceedingly persuasive
        - Gender based classification must be substantially related to the objective
    - VA argues that providing educational benefits in a single sex environment is an important govt objective that justifies VMI's exclusion of women.
        - Rejected, this is just an after the fact excuse to preserve male only institution. The historical record doesn't support this
    - VA argues that its admission policy is substantially related to the first objective because admission of women to VMI would require drastic changes to accommodations and educational methods.
        - Court rejects, there might be women who cannot meet the physical standards of VMI, but there may be women who can, so categorical bar isn't needed
        - Sure, you might need to build some accommodations, who cares
    - Single sex education itself is a benefit, and this offers diversity, and that is a good
        - Nonsense, VMI wasn't MEANT to be a single sex school. It became one because of the culture of the school. This is an ex post rationale.
            - Might work for Wellesley or Holyoke or Smith
    - What about the Virginia Women's Institute
        - Inferior in prestige and methods to VMI, and build on outmoded assumptions about sex differences. Under the equal protection clause, this is unacceptable
- TAKEAWAY
    - This is a model case for the application of intermediate scrutiny (+ exceedingly persuasive justification)
        - Keep in mind that some of the reasons might work if they were actually applied correctly (separate institution

Crandall v. Nevada (1868)

- PARTIES
    - Crandall – Man who said "damn it, Helen" when he was required to collect a tax
    - Nevada – State taxing all people $1 to leave by hook or by crook
- FACTS
    - Nevada statute required railroad and stagecoach companies to collect a $1.00 tax on all passengers leaving the state.
    - Nevada is doing this because it is admitted to the union in 1864 and is completely broke
    - Crandall says double finger guns and is arrested and fined, argues that Article 1 § 10, which prohibits import and export taxes, disallows this (as does commerce)
- ISSUE
    - Is a state tax on persons leaving a state by standard transport unconstitutional? YES!!
- HOLDING

    - Travel is a fundamental right. A state may not impose a tax on a person for the "privilege" of passing through it.
- REASONING
    - State justifies this not as a capitation text
        - "if the act were much more skillfully drawn" this might be correct
    - There are only two potential constitutional clauses says Nevada: import export and commerce. Neither of them is violated says the state, so It isn't unconstitutional
    - The tax is not in violation of Article I, because people are not goods, and not part of excise.
    - Commerce also doesn't matter because Congress did not pass a law on Nevadan departure
    - States cant hamper the movement of the nation. Citizens have the right to travel, conduct business, and go to the seat of government. This undermines the purpose of a UNITED states.
- NOTES
    - Court argues that this is one nation. The tax frustrates citizens desire to travel and engage with persons across the states. Also, if we allow things like this it prevents citizens from petitioning the government.
    - So we end up back in a *McCulloch,* situation, there is a principle of federalism here. the power to tax is the power to destroy. If we allow these things to become exorbitant then we can upend the union entirely.
    - So on what constitutional grounds do we decide this? Instead, we state that there is a right to travel, and there is a notion of federalism. So there is no specific provision.
        - If the right to pass through a state is guaranteed, then it must be free of taxation
- TAKEAWAY
    - Travel is a fundamental right

Shapiro v. Thompson (1969)

- PARTIES
    - Shapiro – CT commissioner of welfare who keeps a tight fist on Nutmeg dollars
    - Thompson – Mom who wants some help raising her kids
- FACTS
    - Three consolidated cases. Recall, scrutiny for race based classifications and fundamental rights is strict scrutiny (Narrowly tailored to meet a compelling state interest)
    - In 1966, Thompson (19 and pregnant) moves from MA to CT to live with her parents. She then gets her own home and applies for aid under CT statute for families with children
    - CT statute requires applicants to have lived in the state for a year before seeking assistance
- ISSUE
    - Do the residency period requirements violate equal protection (14)? YES!!!
- HOLDING
    - Travel is a fundamental right. Forbidding welfare benefits based on duration of residency is a violation of equal protection
- REASONING
    - What are the two groups?
        - People who have lived there for some time and people that haven't.
    - Free movement between the states is a fundamental right. Strict scrutiny ensues
    - Where does this right come from?
        - No occasion to acribe the right to a particular part of the constitution
        - But, this is fundamental to the notion of a federal union
        - Look on page 4. This is an elementary component of the union.
    - State interests
        - No evidence that it makes planning the state budget easier
        - If this is meant to encourage people to enter the workforce, it should apply to all

        - If this is about deterring fraud there could be less restrictive means
        - Congress has not authorized this, because congress cant authorize violations of equal protection
    - WARREN dissent, Congress has the authority to implement restrictions like these under commerce powers
- NOTES
    - If we took this approach parents couldn't move to chase better school districts
    - When people MOVE, they are travelling, and TRAVELLING is a FUNDAMENTAL right
    - And who cares if they are travelling for better benefits, the goal then is to stop benefits by stymieing travel. And the statute doesn't indicate this is the actual purpose
    - Taken in sum, this is about the right to travel. The state cannot IMPINGE on that right
- TAKEAWAY
    - Source of compelling state interest test
    - Administrative convenience is not a compelling state interest?

Saenz v. Roe (1999)

- PARTIES
    - Saenz – Commissioner of Social Services in a normally generous state
    - Roe – newcomers to California who aren't getting those dollars
- FACTS
    - California has generous welfare benefits. In 1992, CA passed statute that limited welfare benefits to new residents to the amount they would have received in their origin state
        - This is usually much lower, although it could be more
        - This is done pursuant to an act of Federal Congress which permitted them to do so
    - The challenge is that this is a violation of equal protection (right to travel)
- ISSUE
    - Does a limitation on first year benefits violate the right to travel under equal protection? YES!!!
- HOLDING
    - California statute limiting new residents' benefits for the first year they live in the state is an unconstitutional discrimination and violation of their right to travel.
- REASONING
    - Equal protection protects travel. Always has, always will
    - There are three fundamental protections under travel
        - Allowing citizens to move freely between states (enter and leave)
            - No source is given
        - Securing the right to be treated equally in all states when visiting (welcome visitor)
            - Privileges and immunities (Article 4). This is not absolute. People can be treated differently (hunting licenses, enrolling in a university)
        - The right of new citizens to be treated as long-term citizens (treated as all other citizens regardless of duration)
            - The right to travel is recognized even by *Slaughterhouse.*
            - Right to use navigable waters
    - So we end up with strict scrutiny
    - The states interest is saving money via some budgeting and administrative forecasting. But saving money this way, even if it is legitimate, isn't narrowly tailored.
- TAKEAWAY
    - Know the three fundamental protections of travel

Substantive Due Process – Protection of Individual Liberties

Meyer v. Nebraska (1923)

- Reproduced under standard due process as well
- PARTIES
  - Meyer – Teacher at a grammar school, who was speaking in TONGUEs. German tongues!
  - Nebraska – State that wasn't going to have children speaking any of that Esperanto stuff!
- FACTS
  - In 1920, Meyer was a teacher at a parochial school operated by Lutherans, taught religion
  - Following the parent's requests, he taught some religious stuff in German, not English
  - One day, a local prosecutor witnessed him speaking German and filed suit under a state law which prohibited the use of foreign languages in schools for any student below the 9th grade
- ISSUE
  - Does the Nebraska statute violate Due Process (14)? YES!!!
- HOLDING
  - A 1919 Nebraska law prohibiting the teaching of modern foreign languages to grade-school children violated Due Process (14)
- REASONING
  - Liberty means freedom from bodily restraint, but it also means parents have the right to raise their children as they see fit. There are common items which this includes: Right to contract, Engage in the common occupations of life, Acquire useful knowledge, To marry, Establish a home and bring up children, Worship god according to the dictates of his own conscious, Generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men
  - The state may have a legitimate interest in encouraging the growth of a student body that can engage in civil and civic discourse, but this is excessive.
  - Under Wartime circumstances we might go another way
- TAKEAWAY
  - This and *Pierce* is the start of substantive due process in the area of personal liberties
  - This incorporates unenumerated personal rights into the constitution

Pierce v. Society of Sisters (1925)

- Reproduced under standard due process as well
- PARTIES
  - Pierce – governor guilty of the crime of governing
  - Society of Sisters – nuns who aren't going to take nun of this… habitually bad to do
- FACTS
  - Parents generally assume they can send their kids to any school, or no school at all
  - Society of Sisters had operated orphanages and schools in Oregon since the 1800s
  - Schools taught all state mandated subjects as well as religious education (this suit is co-filed with Hill Military Academy, private military academy for boys)
  - In 1922, Oregon passes the Compulsory Education Act which mandated children between 8 and 18 attend PUBLIC school
    - Purpose was to compel attendance. Failure to send your kids was a misdemeanor
  - Schools sue the governor, arguing that the law violates (1) and unduly prevents the sisters from engaging in business. They also argue that passage of the law will cause economic harm
- ISSUE
  - Does the statute violate the right of parents to direct the education of their children? YES!!!!
  - To the schools themselves have property interests subject to due process? Sort of..
- HOLDING

    - The Oregon Compulsory Education Act that required attendance at public schools, forbidding private school attendance, is unconstitutional under Due Process (14)
- REASONING
    - Children are not mere creatures of the state, parents and guardians have the right to make decisions. There is a liberty argument to be had here for the parents.
    - The state can regulate and inspect schools, require attendance, that sort of stuff
    - TEST - Constitutional rights can't be abridged by legislation which
        - (i) has no reasonable relation to
        - (ii) some purpose within the competency of the State
    - Theres no emergency that justifies this
    - Appellees are corporations, and therefore, it is said, they cannot claim (14) protections, but they have business and property which they wish to protect, so it could be a taking
    - How do we square this with Berea College?
        - This is a general rule, Berea was targeted as a corporate structure
    - The state clearly has the power to regulate schools and set minimum curriculum
- TAKEAWAY
    - This, with Meyer, is the start of the application of substantive due process to personal liberties

Griswold v. Connecticut (1965)

- PARTIES
    - Griswold – Head of CT Planned Parenthood, who is stirring the pot in 1965
    - Connecticut – Unanticipated defendant state, but Greenwich has its day I suppose
- FACTS
    - The head of Planned Parenthood CT and one of its physicians are arrested for the illegal use of contraceptives. CT law forbade the use and provision of contraceptives by the married
    - Griswold and Buxton were found guilty as accessories and fined $100
    - The two fought the conviction arguing this violates the right to due process (substantive due process here)
- ISSUE
    - Does the Constitution protect the right of marital privacy against state restrictions on a couple's ability to be counseled in the use of contraceptives? YES!!!
- HOLDING
    - A right to privacy can be inferred from several amendments in the Bill of Rights, and this right prevents states from making the use of contraception by married couples illegal.
- REASONING
    - DOUGLAS holds that there is a right to privacy implied throughout the bill of rights.
    - There is a penumbra and emanation of constitutional protections that exist
        - Right to assemble (1)
        - Quartering soldiers (3)
        - Secure in persons, houses, papers, and effects against unreasonable search (4)
        - Self incrimination (5)
        - 9th amendment, because why not
    - This zone of privacy extends to intimacies between married people, and that should be protected against intrusion.
    - GOLDBERG concurrence – right to privacy is so fundamental, that allowing it to be infringed just because it is not specifically addressed is to ignore 9 altogether
        - Justices must look to the "traditions and [collective] conscience of our people" to determine whether a principle is "so rooted [there]…as to be ranked as fundamental." Snyder v. Massachusetts (1934). The inquiry is whether a right

involved "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.'…" Powell v. Alabama (1932).…"Liberty" also "gains content from the emanations of…specific [constitutional] guarantees" and "from experience with the requirements of a free society." Poe v. Ullman (1961) (dissenting opinion of Mr. Justice Douglas)

    - HARLAN concurrence – due process clause. No need to look beyond established law
    - WHITE concurrence – excessively broad beyond its intended purpose (prevention of adultery and fornication)
    - BLACK dissent – theres no right that exists here. If you want one, amend
    - STEWART dissent – uncommonly silly, but this is why we have political process
- TAKEAWAY
    - Recognizes the constitutional right to privacy. Creation of penumbra of rights of privacy

Roe v. Wade (1973)

- PARTIES
    - Roe – single pregnant woman who wants a Texas abortion
    - Wade – DA in Texas county where McCorvey (Roe) is seeking her abortion
- FACTS
    - At the time, Texas law prohibited abortions except when the life of the mother was threatened. Suit is filed under the name Roe to protect her privacy.
    - Roe argues that the ban is unconstitutional, requests a court order to prevent enforcement
    - District court strikes down Texas prohibition for being too vague and overly broad. Runs afoul of 14th amendment privacy issues (Griswold) and rights reserved to the people (9)
    - The court does not issue an injunction to prevent enforcement, so little changes
- ISSUE
    - Is there a right to terminate a pregnancy by abortion? YES!!!
- HOLDING
    - Due Process (14) provides a fundamental "right to privacy" that protects a pregnant woman's liberty to choose whether to have an abortion.
        - Right is not absolute, and must be balanced against the government's interests in protecting women's health and protecting prenatal life.
- REASONING
    - BLACKMUN – the implied "zone of privacy" from *Griswold* is broad enough for abortion rights and the ability to terminate a pregnancy
    - Although this is fundamental, the state has a balancing requirement to protect the potential life of the fetus, and to protect the health of the mother
    - Legislative limits must be narrowly tailored to meet a compelling state interest (strict scrutiny
    - To balance these things, we use a term-based approach
        - First Trimester – health risks low – privacy outweighs any competing state interest
        - Second Trimester – states interest in protecting a womans health, and the increased personhood of the fetus, grow and can justify increased regulation
        - Third Trimester - At viability, the state's interest is compelling enough to support a ban
    - Holding, the blanket Texas ban violates the right to choose in the first trimester
    - BERGER concurs that there is an impermissible restriction, but doesn't like the use of medical data by the court
    - DOUGLAS concurs as *Griswold* is controlling. This is a liberty interest from 14 (includes marriage, family decisions, medical decisions, bodily autonomy). May only be outweighed by a compelling state interest. These laws are overbroad because they equal fetal life

    - STEWART agrees that the right to choose is constitutionally protected, but finds this right in the due process clause of 14 rather than under the implied right of privacy
    - WHITE dissents, we have made up a new constitutional right, this is a political issue
    - RHENQUIST dissent, most states have made up some restriction, suggesting this is not a fundamental right. There is no privacy implication. You are also moving a compelling state interest test onto due process, instead of keeping it with equal protection
- TAKEAWAY
    - Why not make a privileges or immunities argument for basic liberties?
    - Novel trimester framework has been modified but remains in tact as of 2022
    - Roe gives birth and gives the child up for adoption
    - No mootness issue for abortion trials
    - All overturned by *Dobbs*

Eisenstadt v. Baird (1972)

- PARTIES
    - Eisenstadt – Suffolk county sheriff who isn't going to let any of them abortions happen
    - Baird – Abortion activist who has contraceptive foam and knows how to distribute it
- FACTS
    - Baird is a reproductive rights activist in the 1960s, he has been arrested multiple times
    - In 1967, he moves to Massachusetts where a statute made it illegal to give away contraceptives to unmarried couples to prevent contraception (felony charge)
        - It was legal to distribute to contraceptives to prevent disease
        - There are exceptions for registered physicians
    - There is uncertainty after Griswold, because Griswold guarantees access for the married
    - Baird gives a lecture on birth control at Backup College, afterwards he gave a woman in the audience some contraceptive foam. He was immediately arrested.
- ISSUE
    - Does the appellee have standing to assert the rights of unmarried couples? YES!!!
    - Does a state law banning the use of contraception for unmarried persons violate equal protection (14)? YES!!!
- HOLDING
    - State law outlawing contraception for the unmarried violates equal protection
- REASONING
    - Massachusetts law is struck but not on privacy grounds. The law's distinction between single and married individuals failed to satisfy the rational basis test Equal Protection (14)
    - STATE Rationales for the law
        - Deterrent to fornication → No, there are so many exceptions, so theres no real deterrent. And not all unmarried people will use contraception, so theres no real deterrent. Cannot reasonably be related to the goal
        - Grounds of health → Court doesn't accept, there are already rules for the distribution from the FDA. How can you differentiate health for married people and unmarried people. This invidiously discriminates against single people
        - General prohibition of contraception as immoral → Court doesn't accept. How can it be moral for single people but not married people. Unmarried women dealing with illegitimate children is not a way to deal with this problem
    - Taken in sum, these are not legitimate state purposes, and the approach is not rational
    - "If the right of privacy means anything, wrote Justice William J. Brennan, Jr. for the majority, "it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
- NOTES

    - This is an equal protection case because it treats the MARRIED and UNMARRIED people differently.
        - The wed are not a protected class, so we might be on rational basis. But its unclear
- TAKEAWAY
    - A state law forbidding access to contraception for the unmarried is a violation of equal protection under 14 (married v unmarried persons).

Bowers v. Hardwick (1986)

- PARTIES
    - Bowers – Hard nosed AG who wasn't going to allow any funny business in Georgia
    - Hardwick – gay man who had consensual sex with another man
- FACTS
    - This case is foundationally about challenging sodomy laws for consenting adults. Georgia statute criminalizes such behavior (not specifically for homosexuals but that is the issue here)
    - In 1982, Hardwick is convicted of having consensual sex with a man in his home. He is discovered because he had been cited for public intoxication and missed his court date
    - The DA declines to bring the case but the George AG instead enforces the statute.
    - Note that this is not about governmental discrimination about gay adults, instead this is about the ability of adults to privately engage in sodomy in their own homes
- ISSUE
    - Is there a fundamental right for homosexuals to engage in sodomy? NO!!!
- HOLDING
    - State law classifying homosexual intercourse as illegal sodomy are within state police powers.
- REASONING
    - This is about the right to privacy, *Griswold* holds that a right to privacy is implicit in the Due Process Clause (14). The Court held that this right did not extend to private, consensual sexual conduct, at least insofar as it involved homosexual sex.
    - WHITE framed the legal question as to whether the constitution confers "a fundamental right upon homosexuals to engage in sodomy." No, "to claim that a right to engage in such conduct is 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty is, at best, facetious."
        - NOTE HOW SPECIFIC THIS BECOMES
    - There is also a slippery slope about undesirable potential implications for other sex laws:
    - "If respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road."
- ADDITIONAL NOTES
    - Is the right "deeply rooted in the nations history"? Is it "implicit in the concept of ordered liberty". If not, we apply a rational basis review
- TAKEAWAY
    - Overruled in Lawrence v Texas

Washington v. Glucksberg (1997)

- PARTIES
    - Washington – State that doesn't let its doctors assist in suicide
    - Glucksberg – Physician that wants to help a brother out
- FACTS
    - We are dealing with physician assisted suicide. Washington statute criminalizes (1854) suicide, attempted suicide, and assisting suicide

    - Glucksberg challenged this statute arguing that the liberty interest includes a fundamental right to assisted suicide. This is argued as part of due process (14)
    - The liberty interest is the right to die.
- ISSUE
    - Does due process (14), liberty, protect a fundamental right to assisted suicide? NO!!!
- HOLDING
    - There is no fundamental right to die by assisted suicide under Due Process (14)
- REASONING
    - RHENQUIST writes for a unanimous court. There is heightened scrutiny for many unenumerated rights: Marry, have kids, abortion, education, refused unwanted medical treatment,
    - Two-part analysis for determining a fundamental right
        - Is the a) right deeply rooted in the nation's history and traditions and b) "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if it were all sacrificed"? No
            - Would ordered liberty be violated (not really defined)
            - Washington's ban is not unique
            - The prohibition on suicide has existed since the colonial period
        - Is the right sufficiently particular (careful description)? No
            - Glucksberg describes this as the right to die. This is misleading. It is insufficiently specific. Instead the right is "to assisted suicide"
            - There is a right to be taken off life support if a person is in a persistent vegetative state *Cruzan v Missouri Health*
            - *Cruzan* does not recognize the right to die. It is instead the right to deny life-saving medical treatment. This is because forced medical treatment is common law battery, and you have a right to avoid batter
        - PERSONAL NOTE, IF YOU WANT THIS TEST TO FAIL YOU WANT TO MAKE THINGS SUPER SPECIFIC, IF YOU WANT THE TEST TO SUCCEED MAKE IT BROADER
    - As there is no "fundamental right" we apply rational basis.
- TAKEAWAY
    - No right to assisted suicide. There is a hard line between refusing life saving treatment (protected) and receiving life ending treatment (not protected)
    - NOW THE TEST FOR FUNDAMENTAL RIGHTS
        - NOTE THE IMPORTANCE OF THE SPECIFICITY PRONG, LOOSER TO ACCEPT, TIGHTER TO FAIL
        - THIS IS FOR NEW RIGHTS THAT ARE UNENUMERATED. The application in Troxel suggested that previous rights the court has found doesn't need to be subjected to the entirety of the RHENQUIST test

Troxel v. Granville (2000)

- PARTIES
    - Troxel – grandparents who want to get time with those kids
    - Granville – mom who is not so sure about all that
- FACTS
    - This is a child visitation case. Here, a non-parent is suing a parent for visitation
    - Granville and Troxel never married, but were partners with two children
    - After separation, Troxel moves back in with his parents. Kids often visit the grandparents. Eventually, Troxel the son commits suicide. Granville limits visitation, suit ensues

    - Troxel leverage a WA state visitation statute for judicial petition over child visitation which can be awarded over parental objection if it is in the child's interest. No deference to parents
- ISSUE
    - Does a state statute permitting grandparent petition violate parental due process (14)? YES!
- HOLDING
    - PLURALITY - Parents have a fundamental right to control upbringing. Laws that permit petitioning over parental objection violate due process (14).
        - A freestanding "best interest of the child" provision violates parental rights.
- REASONING
    - SDOC writes that the custody and care of children is a fundamental liberty recognized by the court (*Pierce, Meyer*). The WA statute infringes on that right
    - THOMAS concurrence – would apply strict scrutiny because it is fundamental. The Court should walk through the process of strict scrutiny. [Not a shit argument]
- TAKEAWAY
    - You do not need to do a *Glucksberg* style analysis if the right is already recognized

Planned Parenthood v. Casey (1992)

- PARTIES
    - Planned Parenthood – Doctors always in the thick of it on these things
    - Casey – PA Governor who is all pro on restricting choice
- FACTS
    - We are 19 years after Roe. This is a reaffirmation of the central holding with caveats
    - PA Abortion Control Act of 1982 imposed 5 constraints on women
        - Women must give informed consent and wait 24 hours
        - Women must receive state published content on abortion
        - Parents must give informed consent for a minor's abortion
        - Married women must notify their husband
        - Providers were required to keep records and report information
    - Planned parenthood sues Casey. Argument is that this violates Roe
- ISSUE
    - To what extent may a state restrict abortion access?
- HOLDING
    - The due process clause (14) prevents states from unduly interfering with a woman's right to abort a non-viable fetus
        - Spousal awareness creates an undue burden.
        - Waiting periods, parental consent, and informed consent are valid
- REASONING
    - SDOC (with partial concurrence makes majority) affirms the central Roe holding
        - A woman has the right to abort a non-viable fetus without undue state interference
            - "undue interference" doesn't appear in Roe
        - States can restrict abortions after viability as long as there are exceptions for pregnancies that endanger the mother's life or health
        - States have a legitimate interest in protecting a woman's health and fetal life. The interest exists at the outset of the pregnancy.
            - These were only compelling after viability under Roe
            - Here, they are important the whole time
        - An abortion restriction is an undue burden if she seeks to abort a non-viable fetus if the regulation has the purpose or effect of putting a substantial obstacle in her path
    - Is this right fundamental?
        - This is not a FUNDAMENTAL right. It's a constitutional liberty

                - Generally FUNDAMENTAL is a trigger for strict. Not every time, but if it is missing then that's a sign. Sometimes they say "least restrictive means" instead of "compelling state interest"
        - Stare Dictates also that there is no good reason to overrule Roe.
            - It isn't unworkable
            - Principles of law haven't changed
            - The facts have changed slightly, but that's the timing of viability
        - RULES that we get
            - Trimester framework is out. Undue burden standard is in. Not all government interest is unwarranted because it undervalues the state
            - What is an undue burden?
                - An abortion restriction is an undue burden if she seeks to abort a non-viable fetus if the regulation has the purpose or effect of putting a substantial obstacle in her path
            - What is a substantial obstacle?
                - We are at rational basis + undue burden
                - Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. Unless it has that effect on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal. Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden
                - Undue burden applies to regulations to protect the mother and the viable fetus
            - Viability can shift based on advances in medical science
- TAKEAWAY
    - Definitive reaffirmation of *Roe*.
    - Look on page 481 for a workable set of factors for overruling stare decisis
    - They are getting rid of strict scrutiny for abortion
    - All overturned by *Dobbs*

Gonzalez v Carhart (2007)

- Top line takeaways, case relates to 2003 Federal ban on partial birth abortion. This is a type of dilation and extraction abortion. Carhart is a physician who performs such procedures.
- Ban is upheld because it doesn't place an undue burden on the right of the woman pre-viability
- TAKEAWAY with a majority
    - Govt has legitimate and substantial interest in fetal life from conception
    - Govt may not prohibit termination of pregnancy before viability
    - Govt may not put an undue burden on a woman seeking an abortion before the fetus attains viability
    - BUT creating a mechanism for govt to show profound respect for fetal life prior to viability is ok if it doesn't create an undue burden
- "where it has been a "rational basis to act" and "does not impose an undue burden" the state may bar certain procedures and substitute others in furtherance of "legitimate interests" in regulating the medical profession

Whole Women's Health v. Hellerstedt (2016)

- PARTIES

    - Whole Women's Health – Not PP, but they are doing the same work
    - Hellerstedt – Health Commissioner for the state of Texas.
- FACTS
    - House Bill 2 in Texas mandated that abortion providers have admitting privileges in a hospital 30 miles from their clinic and subjected providers to the same standards as ASCs
    - Whole Woman's Health, however, has deemed these requirements unnecessary and expensive as well as an attempt to limit abortion access rather than provide safety to women
    - Texas had waived numerous ASC requirements (78%) for other clinics but none for abortion providers, the practical effect was to close the overwhelming number of clinics
- ISSUE
    - Do these restrictions (admitting-privileges, ASC standards) constitute an undue burden being placed on the mother? YES!!!
- HOLDING
    - Both the admitting-privileges and the surgical-center requirements place a substantial obstacle in the path of women seeking a pre-viability abortion
- REASONING
    - BREYER applies the undue burden standard. This is a burden because the regulations don't provide additional medical benefit than burden to access.
        - Theres no evidence that there is medical benefit to these restrictions
    - GINSBURG concurrence, during oral arguments points out that if these restrictions are put in place, large portions of the state would have no access. Asks Texas about El Paso, which would have to drive 3 hours to secure care. What about this
        - Texas attorney responds: "those persons can go to New Mexico" "doesn't that mean women are going to clinics with different standards, so why do they matter"
        - The conversation about access is really geographic. Modern abortions are incredibly safe. Safer than childbirth. Hypocrisy to say El Pasoans can
- NOTES
    - What test is used?
        - Undue burden standard.
        - Examining costs vs benefits. Comparison to economic legislation
        - Undue burden is some form of heightened scrutiny
        - Three key inquiries from Casey
            - Law must actually further a valid state interest
            - The burden a law imposes on access must be considered tother with the benefits the law confers
            - Evidentiary Requirement: govt as a duty to review factual findings where constitutional (note not fundamental) rights are at stake
        - Admitting privileges requirement is struck down → doesn't advance a state interest. There is no problem to cure here. Abortion is safe. What issue are you correcting? So we are creating burdens without creating burdens
        - Hallway rules for ASCs → you are
- TAKEAWAY
    - Undue burden standard continues. Trimester framework is gone. Look to the above

June Medical v. Russo, (2020)

- PARTIES
    - June Medical – Abortion provider in the state of Louisiana
    - Russo – INTERIM Louisiana Secretary of Health
- FACTS
    - Louisiana passes a bill exceptionally close to whole women's health (30 mile admittance)

    - Louisiana changes things slightly though. In Texas, you had to establish that you would provide a sufficient number of referrals. In LA, there are more ways to establish privileges (referrals, demonstrate competence). This is a problem because if you are an abortion provider, you will never have prior hospital records to demonstrate competence
- ISSUE
    - Does the admitting privileges rule constitute an undue burden? YES!!!
    - Does a third party have standing to raise substantive due process claims on behalf of non-party patients?
- HOLDING
    - Requiring abortion providers to have admitting privileges at a hospital within 30 miles of the clinic imposes an undue burden
- REASONING
    - Again, no medical benefit
- NOTES
    - ROBERTS opinion is controlling in the plurality
    - We are using the whole womens health test. Balancing test is walked through
    - There are not enough benefits to outweigh
    - ROBERTs is the extra vote, Roberts relies on the Casey analysis
        - Law cant impose an undue burden "substantial obstacle", not a balancing test
        - "so long as they are reasonably related" "do we have an undue burden"
        - Theres no real way to execute a balancing test here. The burdens are being considered in a vacuum.
        - What Casey says is you look at the benefits and then look at the burdens individually.
        - If the benefits don't outweigh the burdens, then the burden is substantial
    - WHAT DOES THIS ADD
        - Returns us to the casey standards
    - All overturned by *Dobbs*

Dobbs v. Jackson Women's Health: (Ongoing)

- Issue in Dobbs is whether the "Gestational Age Act" in Mississippi, which bans almost all abortions after 15 weeks, violates dur process.
- Currently, there are injunctions because the state did not provide evidence that a fetus would be viable at 15 weeks
- Roe is overturned.

Lawrence v Texas (2003)

- PARTIES
    - Lawrence – Gay man enjoying his life in Texas until things go horribly wrong
    - Texas – State that wants everyone's hands above the covers (if they have identical genitalia)
- FACTS
    - In 1986, *Bowers* upholds anti-sodomy law, mostly as a moral referendum on LGBT persons
    - Police enter Lawrence's home in response to a weapons disturbance call. They find him having sex with a man and arrest him under Texas anti-sodomy statute
- ISSUE
    - Do homosexual anti-sodomy laws violate equal protection (14)? NO!!
    - Do homosexual anti-sodomy laws violate due process (14)? YES!!!
- HOLDING
    - State laws classifying homosexual sodomy as illegal violates due process under 14.

- REASONING
    - The right to liberty under the Due Process people the right to engage in their conduct without intervention of the government," KENNEDY. TX statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual
        - Bowers will be overturned because subsequent case law recognizes constitutional protections of marriage, procreation, and rejecting class based LGBT discrimination
    - Unlike Bowers, which criminalizes ALL sodomy, Texas is exclusive to the gay community
    - The court declines to analyze this question on the basis of equal protection, because it means that wording the statute to include both gay and straight couples might pass muster
    - The court concludes that the liberty guarantees under the due process clause (14) extends to intimate acts between consenting adults that occur in private
- NOTES
    - KENNEDY makes the argument under due process. He does this very deliberately
    - The court does not call the right to private sexual acts fundamental, but the law fails the emerging heightened rational basis test that we've been seeing.
    - Note recent changes (Casey, Romer, etc) which protect private decisions by adults.
    - The court describes the liberty interest as follows: Liberty and dignity interest, adults may choose to enter into these relationships in the confined of their homes, sex and private lives, unwarranted government intrusions into the home, autonomy of self in intimate content (special and transcendent dimensions). This is about private liberty, autonomy and dignity
    - Kennedy doesn't call this heightened rational basis, but its what's going on here
    - How do we deal with Stare?
        - WE can be more flexible with expanding freedom than contracting it, because there is less of a reliance ← This didn't show up in the abortion arguments…
        - Bowers relied on a history which wasn't as nuanced
- TAKEAWAY
    - Overturns *Bowers* by casting the issue as due process rather than equal protection
    - Homosexual relationships are anchored by the same elements as heterosexual ones

Obergefell v. Hodges (2015)

- PARTIES
    - Obergefell – Gay man who wanted to marry his partner, and had to do so in Maryland
    - Hodges – Director of the Ohio Department of Health
- FACTS
    - Obergefell and his partner live in Ohio, which bans same sex unions. They therefore travel to Maryland which permitted such unions
    - After Obergefell dies, Ohio holds up the ban and refuses John as a surviving spouse. This results in some aggro tax issues.
- ISSUE
    - Are states required under 14 to issue same sex marriage licenses? YES!!!
    - Are state required to recognize lawful out of state same sex marriages? YES!!!
- HOLDING
    - Due process (14) and equal protection (14) requires states to license marriage between two people of the same-sex and recognize lawfully performed out of state marriage.
- REASONING
    - KENNEDY writes, the right to marry is protected by the due process clause
        - *Loving v Virginia*, interracial marriage bans are unconstitutional
        - *Zablocki v Redhail*, marriage bans for fathers delinquent on child support are unconstitutional
    - Judicial precedent has also progressed in recognizing the right of same sex couples

        - *Lawrence v Texas*, laws criminalizing homosexual acts are invalid
    - There are four principals behind the right to marry that are the same across all couples
        - The right to choose whom to marry is inherent in individual autonomy
        - The right protects the intimate relationship between two people
        - The right protects children and families by giving legal protection to homebuilding and the raising of children
        - Marriage is a keystone of the social order, and the foundation of families in the US. There are tax benefits, inheritance rules, evidentiary privilege, and medical decision making authority
    - We also rely on equal protection. Due process and equal protection are interrelated in marriage. The marriage bans deny same sex couples the same protection as opposite sex couples. This is significant given the historical animus towards same sex couples
    - MARRIAGE IS A FUNDAMENTAL RIGHT
- NOTES
    - How does Kennedy determine that this is a a fundamental right? Not *Washington v Glucksberg*
        - Kennedy uses an exercise of reasoned judgement
- TAKEAWAY
    - This concludes that the right to marriage exists for same sex couples
    - MARRIAGE IS A FUNDAMENTAL RIGHT NOW
    - For purposes of the exam, consider Washington v Glucksberg to be good law, but consider it with a question mark

US v Windsor (2013)

- Not required readings, minor takeaway
- Defense of Marriage Act (DOMA) federally defined marriage as between one man and one woman
- Another huge tax implication case (Windsor is left with pile of tax bills when her wife dies).
- ISSUE: Does DOMA's definition of marriage deprive same sex couples of Due Process (5)? YES!!!
- Denial of due process comes from denial of legal protections that other legally married persons receive in their states. Purpose of the legislation is to "disadvantage, a separate status, and so a stigma" upon same-sex partners. Animus is not a legitimate government interest.