Constitutional Law outline, Spring 2005. Professor Macdonald.

I. Source and structure of individual rights

A. The Fourteenth Amendment

1. Privileges and Immunities Clause

a) *The Slaughter-House Cases* (1873): the Court reads the P&I Clause to be a practical nullity. It says that am14 P&I is the same as artIV P&I, and that, from precedent, artIV P&I are the "fundamental" P&I, such as government protection, property rights, and pursuit of happiness, but all subject to necessary restraints for the public good. Furthermore, the Court said, these P&I are left to the states to determine what they are. This holding has stuck.

b) *Saenz v. Roe* (1999): the Court revives the am14 P&I Clause to strike down a law limiting welfare benefits to brand-new (California) state citizens. The Court says that nobody's ever said that am14 P&I doesn't cover the right to domestic travel. What's more, the Court applies strict scrutiny to the law.

c) Article IV, § 2, Privileges and Immunities Clause (the Comity Clause)

(1) Analytical method

(a) Is there discrimination?: has the state discriminated against out-of-staters with regard to privileges and immunities that it accords its own citizens? The Court has applied artIV P&I when a state discriminates against out-of-staters with regard to (1) constitutional rights and (2) important economic activities.

i) Constitutional rights

ii) Economic activities

a. *Toomer v. Witsell* (1948):

b. *United Building and Construction Trades v. Mayor of Camden* (1984): artIV P&I are just those "fundamental to the promotion of interstate harmony."

iii) Other areas

a. *Baldwin v. Fish and Game Comm'n of Montana* (1978):

(b) If so, is there a justification?: is there a sufficient justification for the discrimination?

i) *Supreme Ct. of New Hampshire v. Piper* (1985):

(2) ArtIV P&I and the dormant Commerce Clause

2. Due Process Clause

3. Equal Protection Clause

4. Enforcement Clause: section 5 of am14 says that "Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

a) Whom can Congress regulate?

(1) *The Civil Rights Cases* (1883): the Court adopts a restrictive view as to the enforcement clause, saying slavery am14 was regulative of the states only, not private conduct.

(2) *United States v. Guest* (1966): in a fractured opinion, the Court suggests that Congress could use the enforcement clause to prohibit private conduct.

(3) *United States v. Morrison* (2000): the Court overrules *Guest*, saying that "the

language and purpose of am14 place certain limitations on the manner in which Congress may attack discriminatory conduct. These limitations are necessary to prevent am14 from obliterating the framers' carefully crafted balance of power between the States and the National Government. The Court uses the state action doctrine to bolster its holding, which struck down as invalid the federal Violence Against Women Act.

b) What is the scope of Congress's power?: some argue for a narrow answer to this question--that Congress only has authority under the enforcement clause to prevent or provide remedies for violations of rights recognized by the Court. Others argue for a broader answer--that Congres can interpret am14 to some extent by expanding the scope of some rights or creating new rights, so long as the spirit of am14 is followed. This is partly a (1) textual dispute, partly a (2) separation of powers question, and partly a (3) federalism issue.

(1) *Lassiter v. Northampton Election Bd.* (1959): the Court adheres to the narrow approach.

(2) *Katzenbach v. Morgan* (1966): the Court rejects the narrow approach to the enforcement clause, holding invalid a federal voting law that prohibited the enforcement of some state voting laws, and saying that the narrow approach "would depreciate both congressional resourcefulness and congressional responsibility for implementing the amendment." Instead, the Court says that the enforcement clause was intended to be and is as broad as the necessary and proper clause. The Court says that "it is enough that we perceive a basis upon which Congress might predicate a judgment that the [state law prohibited by the federal law] constituted an invidious discrimination in violation of the EqP clause." The Court furthermore said that Congress has only got a one-way ratchet--"Congress's power under section 5 is limited to adopting measures to enforce the guarantees of the Amendment; section 5 grants Congress no power to restrict, abrogate, or dilute these guarantees."

(3) *City of Boerne v. Flores* (1997): the Court returns to the narrow approach, striking down the federal Religious Freedom Restoration Act, and saying that "Congress's power under section 5 extends only to enforcing the provisions of am14. The Court has described this power as remedial." Furthermore, the Court sets up a "congruence and proportionality" test (familiar from the state sovereignty/am11 jurisprudence) for when an "enforcement" will be valid. That is: the end of the law must be "congruent" and "proportional" to the means of the law. Nevertheless, the Court does not overrule *Katzenbach*, but rather applies the congruence and proportionality test to show that the result in *Katzenbach* was correct.

(4) [just protect]

(5) [actually interpret, to some extent]

B. Incorporation doctrine

1. State of the law

a) *Duncan v. Louisiana* (1968): the Court summarizes the state of incorporation, saying that the test is still, essentially, whether the right in question is "fundamental to the American scheme of justice." Here, the Court incorporates trial by jury in criminal cases.

b) Content of rights incorporated: generally, Bill of Rights rights come in "jot for jot," with all their "bag and baggage" from the federal constitutional common law.

(1) Exceptions: in the am6 criminal jury context only.

(a) *Williams v. Florida* (1970): states don't have to use a 12-person jury.

(b) *Apodaca v. Oregon* (1972): non-unanimous jury verdicts are okay for states.

c) Reverse incorporation: while there's nothing in the plain language of the Constitution that imposes an Equal Protection requirement on the federal government, the Court has read one in to the Fifth Amendment's Due Process clause. That is, in *Bolling v. Sharpe* (1954), the Court said that "discrimination may be so unjustifiable as to be violative of due process." The analysis is exactly the same.

d) Bill of Rights provisions *not* incorporated

(1) Am2 right to bear arms

(2) Am3 right not to have soldiered quartered in your house (no ruling).

(3) Am5 right to a grand jury indictment.

(4) Am7 right to a jury trial in civil cases.

(5) Am8 prohibition of excessive fines (no ruling).

2. Sources

a) *History*: whether the framers of am14 intended it to apply to the states.

b) *Federalism*

c) *Judicial role*: and judicial activism.

3. Possibilities

a) Fundamental rights incorporation

(1) *Palko v. Connecticut* (1937): Cardozo, for the Court, adheres to a pretty strict form of fundamental rights incorporation--and produces the classic language for this theory. Are the rights "of the very essence of scheme of ordered liberty"? If you abolished them, would you "violate a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental"? If not, then they're not incorporated (or "asbsorbed" as Cardozo says). Here, the Court refuses to apply the criminal protections of the Fifth Amendment to the states.

(2) *Adamson v. California* (1947): another fundamental rights incorporation case, adhering to *Palko*.

b) Total incorporation

c) Selective incorporation

4. History

a) *Barron v. Mayor of Baltimore* (1833): the Court, in the context of an am5 Takings claim, says that the Bill of Rights limits only the federal government, not the states'. "These amendments contain no expression indicating an intention to apply them to the state governments."

b) *The Slaughter-House Cases* (1873): the Court, in the context of a butchers' group's challenge of a state-granted slaughterhouse monopoly, rejects application of the P&I Clause, the DP Clause, and the EqP Clause, each, to the states.

c) *Twining v. New Jersey* (1908): for the first time, the Court indicates that the Bill of Rights might be applicable to the states.

d) *Gitlow v. New York* (1925): the Court applies the First Amendment to a state.

e) *Powell v. Alabama* (1932): the Court implicitly applies the Sixth Amendment right to counsel to a state.

C. State action doctrine

1. **Sources:** having a state action doctrine preserves an area of private autonomy, and enhances federalism, proponents argue.
2. **The state action requirement**
   a) *The Civil Rights Cases* (1883): the Court articulates the state action requirement for the first time. "Individual invasion of individual rights is not the subject-matter of the [Fourteenth] amendment."
3. **Exceptions:** this jurisprudence is borderline incoherent. The Court is faced with (1) the inherent difficulties of thinking about state action (everything is state action, in a way), (2) vague language in state action decisions (broad principles, never exactly overruled), (3) social realities (combating racial discrimination at first, but now with statutes to do that work, rather than the constitution itself).
   a) Public functions: a private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government.
      (1) *Marsh v. Alabama* (1946): here, the Court takes a kind-of broad tack on the public functions exception, holding that a company town is subject to the constitution (am1 speech), saying that "the more and owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." And that, "whether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community." Although the Court seems to have limited the public functions exception since this case, most agree that this case would still come out the same.
      (2) *Jackson v. Metropolitan Edison Co.* (1974): the Court here says that a public electric utility is *not* subject to the constitution (procedural due process). "The mere fact that a business is subject to state regulation [isn't enough, nor is] the fact that the regulation is extensie and detailed." Rather, "the inquiry must be whether there is a sufficiently close *nexus* between the State and the challenged action of the regulated entity." Furthermore, the Court said that state-granted monopoly is not determinative.
      (3) *Terry v. Adams* (1953): the Court finds state action (am15) where a private political party excluded blacks from their primaries. "It violates am15 for a state [to circumvent and] permit within its borders the use of any device that produces and equivalent of [what would be a] prohibited election." This indicates, perhaps, the higher probability that the Court will find state action where racial discrimination is involved (see also *Shelley*).
      (4) *Evans v. Newton* (1966): in another case suggesting heightened state action scrutiny when race is involved, the Court holds that a private park (that used to be a public park) open only to whites, is subject to the constitution (and thus can't operate).

(5) *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968): the Court finds that a shopping mall is subject to the constitution (am1 speech), saying that the shopping mall "serves as the community business block and is freely accessible and open to the public."

(6) *Lloyd Corp. v. Tanner* (1972): the Court castrates *Logan Valley* by distinguishing it, saying that there the speech was "directly related" to the shopping center itself, whereas here there was no direct relation and so no state action. The Court noted that there were "adequate alternative avenues" of communication.

(7) *Hudgens v. National Labor Relations Board* (1976): the Court expressly recognizes that *Lloyd* overruled *Logan Valley*, and leaves the public functions exception limited basically to (1) *Marsh*-type cases (which are arguably completely anachronistic, anyhow), and (2) the race cases (which don't come up now that there are statutes to handle them).

b) Entanglement: private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.

(1) Judicial and law enforcement actions

(a) *Shelley v. Kraemer* (1948):

(b) *Lugar v. Edmondson Oil Co.* (1982): the Court attempts to summarize (and coherent-ize) its state action jurisprudence, and articulates a two part test: (1) was the deprivation caused by the exercise of some right or privilege created by the State?; (2) if so, was the party charged with the deprivation a person who may fairly be said to be a state actor? If both answers are yes, then you've got state action.

(c) *Edmonson v. Leesville Concrete Co.* (1991):

i) *Georgia v. McCollum* (1992):

(2) Government regulation and licensing

(a) *Burton v. Wilmington Parking Authority* (1961):

(b) *Moose Lodge v. Irvis* (1972):

(c) *American Manufacturers Mutual Ins. v. Sullivan* (1999):

(3) Government subsidies

(a) *Norwood v. Harrison* (1973):

(b) *Gilmore v. City of Montgomery* (1974):

(c) *Rendell-Baker v. Kohn* (1982):

(d) *Blum v. Yaretsky* (1982):

(4) Voter initiatives

(a) *Reitman v. Mulkey* (1967):

(b) *Hunter v. Erickson* (1969):

(c) *Washington v. Seattle School Dist.* (1982):

(d) *Crawford v. Board of Education* (1982):

(e) *Romer v. Evans* (1996):

c) "Entwinement"?

(1) *Brentwood Academy v. Tennessee Secondary School Athletic Assn.* (2001):

(2) *NCAA v. Tarkanian* (1989):

II. Substance of individual rights

A. Economic rights

1. The Contracts Clause

a) Sources

b) State of the law

(1) Analytical method

(a) Is there a substantial impairment?

i) *General Motors v. Romein* (1992):

(b) If so, does it serve a significant, legitimate public purpose?

(c) If so, is the impairment reasonably related to achieving the goal?

(2) Private contracts

(a) *Home Building & Loan Assn. v. Blaisdell* (1934):

(b) *Energy Reserves Group, Inc. v. Kansas Power & Light Co.* (1983):

(c) *Allied Structural Steel Co. v. Spannaus* (1978): [unconstitutional, but hasn't been followed]

(3) Public contracts: here, the Court employs a slightly heightened scrutiny, compared to with private contracts.

(a) *US Trust Co. v. New Jersey* (1977):

2. The Takings Clause

a) Analytical method

(1) Is there a "taking"?

(a) Possessory takings

i) *Loretto v. Teleprompter Manhattan CATV Corp.* (1982): the Court sets out a super-formalistic per se test: if there's permanent physical occupation, no matter how negligible, then there's a taking. Here, installation of CATV wires and the attendant bolts and screws, was a taking.

(b) Regulatory takings

i) State of the law

a. Analytical methods

1) The *Connolly/Penn Central* factors (originally from *Connolly v. Pension Benefit Guaranty Corp.* (1986)):

1. The economic impact of the regulation on the claimant
2. The extent to which the regulation has interfered with investment-backed expectations
3. The character of the governmental action

b. *Penn Central Transportation Co. v. New York City* (1978): the Court, assessing the *Connolly* factors, says that a historical landmark law that prevented development of the airspace over GCS was not a "taking." You can't establish a "taking" "simply by showing that you've been denied the ability to exploit a property

interest that you heretofore had believed was available for development," the Court says, noting that they law did "not interfere in any way with the *present* uses of the [property]," and thus didn't interfere with "what must be regarded as [plaintiff's] *primary* expectation."

c. *Lucas v. South Carolina Coastal Council* (1992): the Court adopts a second per se rule for "takings," adding to the *Loretto* possessory per se test: this one is the "all economic benefits" test for regulatory takings. If the law "denies all economically beneficial or productive use of land," then you've got a "taking." This case also establishes the sometimes-called "nuisance exception" to this "all economic benefits" rule: if the state can show that the "proscribed use interests were not part of [the owner's] title to begin with," e.g. because they were prohibited by common-law nuisance, then it's not, in fact, a taking.

d. *Palazzolo v. Rhode Island* (2001): the Court addresses standing in the takings context, and says that just because an owner took title to land already regulated by the law he's challenging doesn't mean he doesn't have standing. The Court also addresses a ripeness issue, and it recognizes the denominator problem (for which the current law is that of *Penn Central*: the denominator is the entire parcel).

e. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002): a temporary (32-month) moratorium on development does *not* trigger the *Lucas* per se regulatory taking rule, the Court says.

f. **Conditional development permits:** here, the condition on development must be roughly proportionate to the government's regulatory purpose, or else there's a taking.

1) *Nollan v. California Coastal Comm'n* (1987): the Court establishes that "unless the permit condition serves the same governmental purposes as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion."

2) *Dolan v. City of Tigard* (1994): the Court clarifying *Nollan*, sets out an analytical method for development condition cases: (1) is their an "essential nexus" between the legitimate state interest advanced and the permit condition?; (2) if so, is there "rough proportionality" between what the condition takes and what the projected impact of the proposed development would be?

g. **Zoning cases:** basically, these aren't takings unless they take away all economic benefits (see *Lucas*).

1) *Village of Euclid v. Amber Realty Co.* (1926)

2) *Goldblatt v. Town of Hempstead* (1962):

3) *Agins v. City of Tiburon* (1980):

4) *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987):

ii) History

a. *Pennsylvania Coal Co. v. Mahon* (1922): [too far test]

b. *Miller v. Shoene* (1928): [applying too far test]

(2) If so, was it of "property"?: generally, the Court has relied on other sources of law--like state law--to determine this question.

(a) *Phillips . Washington Legal Foundation* (1998):

(3) If so, was it for "public use"?: the Court applies a rational basis review to this question. (Note that if it's *not* for public use, then the taking is invalidated--no takings for private use are allowed.)

(a) *Hawaii Housing Authority v. Midkiff* (1984):

(4) And if all of that stuff, how much is "just compensation"?: the loss to the owner. Not the gain to the taker. And the taker doesn't have to pay for increases in value caused by the taker's interest in the property.

(a) *Brown v. Legal Foundation of Washington* (2003):

(b) *First English Evangelical Lutheran Church v. Los Angeles* (1987): the government must pay just compensation even for temporary takings.

3. Substantive economic due process

a) State of the law: the Court applies a very deferential rational basis review to economic legislation. Basically, you can get any economic law that you can pay for.

(1) *Williamson v. Lee Optical* (1955): the Court applies a very deferential rational basis review to uphold a state law that, practically speaking, puts opticians out of business.

(2) Punitive damages cases: an anomaly? Or a new direction (back to the future)?

(a) *BMW of North America v. Gore* (1996):

(b) *State Farm Mutual Auto. Ins. v. Campbell* (2003): clarifying *BMW* to some extent, by saying that single-digit compensatory-to-punitive ratios will usually be about the limit as far as due process goes.

b) History

(1) *Murray v. Hoboken Land & Improvement Co.* (1855):

(2) *Loan Assn. v. Topeka* (1874):

(3) *Munn v. Illinois* (1876):

(4) *Railroad Commission Cases* (1886):

(5) *Allegeyer v. Louisiana* (1897):

(6) *Lochner v. New York* (1905):

(7) *Coppage v. Kansas* (1915):

(8) *Muller v. Oregon* (1908): [brandeis brief]

(9) *Adkins v. Children's Hospital* (1923):

(10) *Weaver v. Palmer Bros. Co.* (1926):

(11) *Nebbia v. New York* (1934):

(12) *West Coast Hotel Co. v. Parrish* (1937):

(13) *United States v. Carolene Products Co.* (1938):

B. Civil rights

1. Substantive Due Process

a) Substantive economic due process

(1) [See *supra* Part II.A ("Economic rights").]

b) Fundamental "liberty" rights

(1) [See *infra* Part II.B.4 ("Fundamental rights").]

2. Procedural Due Process

a) Analytical method

(1) Is there a deprivation of "life, liberty, or property"?

(2) If so, what process is due?

(a) *Mathews v. Eldridge* (1976): the Court sets out three factors for determining what kind of notice and hearing are due: (1) the importance of the interest involved, (2) the degree to which the procedure will make a difference, and (3) the cost to the government.

3. Equal Protection

a) Basic analytical method

(1) What is the classification?: that is, how is the government drawing a distinction among people?

(a) Classifications on the face of the law: where the law in its very terms draws a distinction among people based on a particular characteristic.

(b) Classifications *not* on the face of the law: here, when you're dealing with race or gender classifications, at least, you must find and prove both a discriminatory purpose behind the law and a discriminatory impact from the law.

(2) What is the appropriate level of scrutiny?: for all appearances, the classification tells you what the level of scrutiny is. To trigger a heightened scrutiny, the challenger must make out a prima facie case that the law makes a suspect classification (see "What is the classification?," just above).

(a) Sources

i) *Immutable characteristics*: the notion is that it's unfair to penalize a person for characteristics that the person didn't choose and cannot change. Things like race, national origin, gender, martial status of one's parents.

ii) *Political powerlessness*: which merits, the notion is, additional help from the judiciary, and so the Court will step in as a sort of "proxy" for the group. Such as women, who have been severely underrepresented in political offices, and aliens, who can't vote. See *United States v. Carolene Products Co.* (1938) at footnote 4: "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities [and so] may call for a correspondingly more searching judicial inquiry."

iii) *History of discrimination*: and the likelihood that the classification

reflects prejudice.

(b) Strict scrutiny: if strict scrutiny is triggered, then the state has the burden to prove that the law is *necessary* to achieve a *compelling state interest*.

i) Race and national origin: these classifications will be allowed only if the government can show that discrimination is *necessary* to achieve a *compelling* state purpose. That is, the state has to show (1) an extremely important reason for the law and (2) that the reason can't be achieved through any less discriminatory alternative (*Wygant v. Jackson Board of Education* (1986) is a good cite for this). The Court has identified three main justification for strict scrutiny of racial/origin classification: (1) that am14's main purpose was to protect blacks, (2) that these groups are relatively politically powerless, and (3) that race and national origin are immutable traits.

ii) Documented aliens

(c) Intermediate scrutiny: if intermediate scrutiny is triggered, the state has the burden to show that the law is *substantially related* to an *important* state purpose. So, it doesn't have to be a "compelling" state interest, here, and the means don't have to be absolutely necessary, as with strict scrutiny.

i) Gender

ii) Illegitimate children

(d) Rational basis scrutiny: if no heightened scrutiny is triggered, then the Court simply looks to see if the law *could* have a legitimate end and whether the means are rationally related to that end. And the challenger has the burden of proof, with this one, with the state having a strong presumption that it acted within its constitutional powers--even if there's some manifest inequality.

i) Analytical method

a. Does the law have a legitimate purpose?

1) What *is* a legitimate purpose?: there's no formula here. However, a police purpose is definitely okay, and, generally, just about any goal not expressly forbidden by the constitution is okay. See *New Orleans v. Dukes* (1976), where the Court let the city ban all pushcart vendors that hadn't been there for eight years, because new ones might "disturb tourists" and "interfere with the charm and beauty of the city." So, yeah--pretty much anything goes here. However, keep in mind the tacitly-heightened rational basis scrutiny, with cases like *Romer v. Evans* (1996) (see below).

2) Does it have to be the *actual* purpose?: no. A law will be upheld when it's under rational basis review so long as the state's lawyer can come up with some conceivable legitimate purpose. For the debate, see *U.S. Railroad Retirement Board v. Fritz* (1980), where Congress came up with a convoluted retirement system and offered no reason for it. The majority came up with a possible reason for the system (one not found

anywhere in the law or it's legislative history) and said that it was "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision." The dissenters hint at how ridiculous this is, considering the "pristine" federal legislative system we have. Recently, in *FCC v. Beach Communications* (1993), the Court reaffirmed the any-conceivable-purpose doctrine and said that "those attacking the rationality of the legislative classification have the burden to negate every conceivable purpose that might support it." Supporters of the any-purpose doctrine argue that (1) no law really has an actual purpose--there's tons of legislators, and (2) if the Court struck a law down based on its actual purpose, the legislature could just turn around an reenact it with a legitimate purpose.

b. Is there a rational relationship between the law and its purpose?: and, here, this is a really lax test--the Court's said that this test is passed unless that government's action is "clearly wrong, a display of arbitrary power, not an exercise of judgment."

1) **Underinclusivess:** severe underinclusiveness is tolerated, as in *Railway Express Agency, Inc. v. New York* (1949), where a law prohibiting advertisements on autos in Manhattan was upheld against the state purpose of preventing distractions. The Court suggests a one-step-at-a-time doctrine--that the state can "address itself to the phase of the problem which seems most acute to the legislative mind," and doesn't have to develop a comprehensive statutory scheme all at once.
2) **Overinclusiveness:** severe overinclusiveness is tolerated, too, as in *New York City Transit Authority v. Beazer* (1979), where a law prohibiting methadone users from working for the MTA was upheld against the state purpose of safety. The Court said that is probably unwise for such a large employer to rely on such a general rule, but said that "these assumptions concern matters of personnel policy that do not implicate the principle safeguarded by the Equal Protection Clause."
3) **Arbitrariness:** this, though, can kill a law. In *USDA v. Moreno* (1973), the Court struck down a law that excluded households of unrelated people from getting food stamps. An anti-hippy law. The Court said that the was "clearly irrelevant" to the state purposes of the law--to alleviate hunger and malnutrition. Furthermore, in looking for a legitimate purpose for the specific provision in question, all the Court could find was anti-hippy stuff in the legislative history. So, animus. And that may have triggered the tacitly-heightened rational basis scrutiny (see just below). Notably, too, the Court did, briefly, look at the practical impact of the law. In *City of Cleburne v. Cleburne Living Center* (1985), the Court struck down a law that prevented a home for mentally retarded people from existing in a certain part of a town. While the Court

didn't say that a mental retardation classification triggers any heightened scrutiny, the Court nevertheless proceeded to dismiss all of the state's arguments that the law was rationally related to any of a number of legitimate state purposes.

ii) Tacitly-heightened rational basis scrutiny

a. *Reed v. Reed* (1971): [see "Gender classifications," below.]

b. *USDA v. Moreno* (1973): [see "Arbitrariness," above.]

c. *City of Cleburne v. Cleburne Living Center* (1985): [see "Arbitrariness," above.]

d. *Romer v. Evans* (1996): the Court strikes down a Colorado constitutional amendment that prohibited all government action designed to protect homosexuals. And it struck it down without any heightened scrutiny triggered--or at least the Court didn't *say* any heightened scrutiny was triggered. In doing its legitimate purpose inquiry, the Court said that the law imposed a "broad and undifferentiated disability on a single named group," and that the law was so broad that it was "inexplicable by anything but animus." Generally, the Court says that "a law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most *literal* sense." The Court didn't buy the state's offers of a rationale--freedom of association and conserving resources to fight discrimination of other groups.

(e) Other approaches

i) The Marshall/Brennan sliding-scale approach: where the Court would consider a number of factors, such as the constitutional and social importance of the affected interests, and the invidiousness of the basis of the classification, and tailor the analytical scrutiny to the case. This type of thing was kind of done in *Plyler v. Doe* (1982).

ii) The we-already-have-a-spectrum observation: some commentators think the Court is already employing more than three levels of scrutiny--that there's low and higher levels of rational basis review, and that there's some versions of intermediate scrutiny that are indistinguishable from strict scrutiny.

(3) Does the government action meet the level of scrutiny?: in other words, the Court applies the law (i.e., the level of scrutiny).

b) Classifications taxonomy

(1) Racial/origin classifications

(a) History

i) *Prigg v. Pennsylvania* (1842): Court strikes down a law prohibiting violence in catching runaway slaves, citing the Fugitive Slave Clause (ArtIVs2).

ii) *Dred Scott v. Sandford* (1856): the Court holds that to have standing in a federal diversity court, you have to be a "citizen," and that slaves are not "citizens." Additionally, in unnecessary dicta, the Court went on

to say that if Scott *was* a citizen, then his freedom would be a taking (!), and that the Missouri Compromise (prohibiting slavery in the north) was unconstitutional.

(b) Where the face of the law itself contains a racial/origin classification: if the law is discriminatory on its face, that automatically triggers strict scrutiny.

i) Disadvantaging minorities: laws that expressly impose a burden on people because of their race or national origin.

a. *Strauder v. West Virginia* (1879): the Court strikes down a law that limited jury service to white males, saying that it expressly "singled out" blacks, contrary to the eign of am14.

b. *Korematsu v. United States* (1944): the Court articulates the strict scrutiny idea for race/origin classifications for the first time. Ironically, it has been *only* in these Japanese WWII cases that the Court has ever upheld a law after applying strict scrutiny. The Court says that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect . . . [and] the courts must subject them to the most rigid scrutiny." However, the Court upheld the law, saying that "pressing public necessity may sometimes justify the existence of such restrictions."

ii) Burdening both whites and minorities

a. *Pace v. Alabama* (1882): the Court upholds a state law providing harsher penalties for adultery for interracial couples.

b. *McLaughlin v. Florida* (1964): the Court basically overrules *Pace*, and strikes down a state law prohibiting habitual occupation of a room by an interracial couple, saying that the state gave no acceptable justification for why a race-neutral law wouldn't serve the state's announced purpose of punishing premarital sex.

c. *Loving v. Virginia* (1967): the Court strikes down a Virginia law prohibiting interracial marriage, saying, "we reject the notion that the mere 'equal application' of a statute containing racial classifications is enough to remove the classifications from am14's proscription of all invidious racial discrimination." And, although saying that racial classification laws might can be upheld if they're "shown to be necessary to the accomplishment of some permissible state objective, independent of . . . racial discrimination," the Court found now legitimate purpose here (so, this law couldn't have even passed a rational basis review).

d. *Palmore v. Sidoti* (1984): this case is illustrative of how a *court*'s action can be "facial" classification. Here, a state court divested custody from a mother because she had remarried a black man. The Court reversed the order, saying that "public officials sworn to uphold the constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held." We don't, unfortunately, see any real application of strict scrutiny, in the

casebook excerpt, however.

iii) Segregation laws

a. History

1) *Plessy v. Ferguson* (1896): the Court says that am14 allows for "separate, but equal," under the theory that am14 couldn't have been aimed at ending *social* prejudice--only political prejudice. It said, "if one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane."

2) *Cumming v. Richmond County Board of Education* (1899): the Court upholds separate but equal in the educational setting.

3) *Berea College v. Kentucky* (1908): the Court affirms the conviction of a private college that violated a state law requiring segregation in education.

4) *Gong Lum v. Rice* (1927): the Court says a state can exclude a Chinese-American child from white schools.

5) By 1953, there was a majority on the Court that was willing to go for the "equal" solution--the requirement that, although segregation was okay, the facilities and opportunities must truly be equal. Then, Vinson dies and Warren ascends to the Court and chief justice.

6) *Missouri ex rel. Gaines v. Canada* (1938): the Court says Missouri can't exclude blacks from its law school and instead pay them to go out of state. Missouri responds by creating a separate law school for blacks.

7) *Sweatt v. Painter* (1950): the Court ordered, for the first time, a university to admit a black stuent.

8) *McLaurin v. Oklahoma State Regents* (1950): the Court said that once blacks are admitted to a school, they can't be forced to sit in segregated areas.

b. *Brown v. Board of Education* (1954): the Court, relying heavily on social science and statistical evidence, overrules *Plessy* and says that separate but equal won't satisfy am14. "To separate children from others of a similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone," the Court says, and adds that "this finding is amply supported by modern authority." The reliance on "modern authority" has been real controversial. There isn't really any application of strict scrutiny in the casebook excerpt.

c. *Baltimore City v. Dawson* (1955): segregation of public beaches and bathhouses unconstitutional. No explanation given.

d. *Holmes v. City of Atlanta* (1955): segregation of municipal golf courses unconstitutional. No explanation given.

e. *Gayle v. Browder* (1956): segregation of municipal bus systems

unconstitutional. No explanation given.

f. *Johnson v. Virginia* (1963): segregation of courtroom seating unconstitutional. No explanation given.

g. *Turner v. City of Memphis* (1962): segregation of public restaurants unconstitutional. No explanation given.

h. Remedies

(c) Where the face of the law itself is neutral: here, in order to trigger strict scrutiny, you have to show *both* that the law has a discriminatory impact *and* that the law has a discriminatory purpose.

i) Analytical method

a. Does the law have a discriminatory purpose?: *Davis* tells us that you *have* to prove purpose to trigger strict scrutiny. *Feeney* tells us what *kind* of purpose you have to prove--a desire to discriminate. And *Arlington Heights* tells us just exactly how you might go about proving such a purpose.

1) Sources: supporters of the purpose-is-required doctrine argue that the EqP Clause is about stopping discrimination by government, *not* bringing about equal results. Also, they argue that all kinds of laws would be invalid if impact was all you had to prove to trigger the "fatal in fact" strict scrutiny. Plus, they argue that affirmative action laws can counterbalance the effect of disproportionate impacts from other laws. Critics, on the other hand, argue that requiring purpose belies the fact-of-the-matter: that racism is often unconscious. And, they argue that the EqP Clause *should* be concerned with results, rather than underlying motivations. So, the bottom-line question seems to be, is equal protection about equal *treatment*, or equal *results*?

2) *Washington v. Davis* (1976): although the Court says a discriminatory purpose need not be found on the face of law to trigger strict scrutiny, it does say that a law can't be unconstitutional "solely because it has a racially disproportionate impact." Further, the Court says that "disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution. Standing along, it does not trigger [strict scrutiny]." Here, the Court upholds a police department admissions test that tested communication skills and (thus?) kept most blacks out.

3) *McCleskey v. Kemp* (1987): applying the *Davis* rule that disproportionate impact isn't enough, the Court upholds Georgia's administration of its death penalty.

4) *City of Mobile v. Bolden* (1980): the Court extends the purpose-required doctrine to am15-based challenges. Also, notably, the Court says that "past discrimination cannot, in the manner of original sin, condemn governmental action that is

not itself unlawful." So, no transferring of intent across time. Here, the Court upholds an at-large municipal voting system, finding no discriminatory purpose. Later, in *Rogers v. Lodge* (1982), the Court struck down a similar system--still saying, though, that purpose is required but here finding purpose.

5) *Personnel Administrator of Massachusetts v. Feeney* (1979): in a gender discrimination context, the Court sets out a full smoking gun requirement, saying that "discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part *because of*, not merely in spite of, its adverse effects upon an identifiable group." And so here, the Court finds that the law here--giving a preference to veterans for civil service positions--was not intended to discriminate against women.

6) *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977): in upholding a zoning change that prevented erection of some integrated housing, the Court says that the discriminatory purpose only has to be a "substantial" or "motivating" factor to trigger strict scrutiny (compare *Palmer*), and it sets out three sources of evidence for proving discriminatory purpose to satisfy *Davis*:
(1) You can show a "clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action"; this is *Yick Wo/Gomillion* res ipsa--in *Yick Wo*, the (invalid) law banned wooden laundries and over 200 Chinese laundries were denied but only 1 non-Chinese one was, and in *Gomillion*, gerrymandering transformed a square into a 28-sided figure that put all but 5 of 400 blacks outside of the district but excluded no whites.
(2) You can use historical background--the "specific sequence of events leading up to the challenged decision"--to show a purpose. This is also a kind of res ipsa: the Court gives an example of a zoning change occurring as soon as a town learns of plans to put in integrated housing.
(3) You can use the legislative and administrative history of the law. The Court suggests that in "extraordinary instances," you might could call members of the decisionmaking body to testify.

7) *Hunter v. Underwood* (1985): the Court strikes down a law that denied voting rights to certain misdemeanants, finding a discriminatory purpose using the *Arlington Heights* mere "substantial" or "motivating" requirement.

b. If so, does the law also actually have a disparate impact?

1) *Palmer v. Thompson* (1971): the Court indicates that *purpose* is not enough alone, either: "no case in this Court has held that a

legislative act may violate equal protection solely because of the motivations of the men who voted for it." The Court notes that it's impossible to determine the "sole" or even "dominant" motivation behind an act, and it notes even if it did strike a law down for purpose alone, the legislature could just reenact with a proper purpose. (Strictly speaking, the Court is holding here that because there were some legitimate purposes to the law here, evidence of other, improper purposes, couldn't impeach the legitimacy.) So, here, the Court upholds a decree closing, rather than integrating, public pools in a city--it appeared that the purpose of the decree was discriminatory, but there was no disproportionate impact, since all the pools were closed.

ii) E.g.: peremptory challenges

(d) Where it's an affirmative action law: the Court applies strict scrutiny, just as with any other racial classification.

i) History

a. *Regents of the University of California v. Bakke* (1978): a plurality opinion, where there's one 5-4 majority that says that there can be no racial quotas, and a another 5-4 majority that says that, even so, race *can* be a factor in admissions decisions. The Court says that "the guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." The Court, in looking at the purposes advanced by the state, says that (1) reducing a historic deficit of minority students is a facially invalid purpose, (2) countering effects of societal discrimination is a valid purpose, but that a classification that hurts other groups is not valid, and (3) increasing the number of doctors serving certain communities may be a legitimate purpose, but the means of a racial quota system were not shown to be necessary. But, then the Court says that the purpose of attaining a diverse student body is a legitimate purpose--this is notable. The specific means here--a quota system--was unconstitutional, but using race as a factor was not.

b. *Fullilove v. Klutznick* (1980): the Court upholds a federal law requiring 10% of federal public works funding to go to local set-asides for minority-owned businesses--but, it can't get a majority on the proper level of scrutiny.

c. *United States v. Paradise* (1987): the Court upholds a federal court order requiring a black to be hired or promoted every time a white was hired or promoted, saying that the law would survive even strict scrutiny because of the compelling interest in remedying discrimination. This case is notable as the only instance of a court actually *creating* an affirmative action plan.

d. *Wygant v. Jackson Board of Education* (1986): the Court strikes down a law seeking to achieve faculty diversity by laying off

more-senior white teachers while retaining less-senior black teachers, saying that while the means of busting a seniority system was not narrowly tailored enough (whereas the adoption of hiring goals might be). Also, the Court expressly rejected the state's advanced goals of remedying past discrimination and providing role models for students--it said that remedying societal discrimination is not enough alone, and that you have to show some prior discrimination in order to remedy anything.

ii) **Sources:** supporters of strict scrutiny for affirmative action argue that laws should be color blind, that *all* racial classifications breed hostility and risk "stigmatic harm," and that laws should look at individual merit rather than group merit. Supporters of a lower level of scrutiny, argue that there's a meaningful and significant difference between using racial classifications to benefit minorities and using them to burden minorities. They say that at this point, we simply need to give minorities a leg up in order to remedy the still-existent major disparities. Further, they point out that there's something less suspicious when an empowered majority classifies so as to disadvantage itself at the expense of a traditionally-disadvantaged minority.

iii) *Richmond v. J.A. Croson Co.* (1989): the Court expressly adopts strict scrutiny for review of racial affirmative action laws, striking down a local public contracting set-aside program. The Court says that remedying societal discrimination is not a compelling enough state interest--that you have to show past discrimination that you're remedying; plus, the Court is skeptical about whether the law would be narrowly-tailored enough even if the state could show compelling government interest.

iv) *Metro Broadcasting v. FCC* (1990): the Court holds that congressionally approved affirmative action plans need only meet intermediate scrutiny. Overruled by *Adarand*.

v) *Adarand Constructors v. Pena* (1995): the Court overrules *Metro Broadcasting* and returns the review of affirmative action plans to strict scrutiny no matter who enacted them.

vi) *Grutter v. Bollinger* (2003): the Court upholds affirmative action at a public law school, applying strict scrutiny. As far as the compelling state interest, the Court recognizes the interest in a diverse student body as being enough--and gives "a degree of deference to a university's academic decisions." As far as means, the Court says a quota system won't cut it, but that the use of race as a mere "plus factor," as here, does. The Court distinguished *Gratz,* saying that unlike there, here "the law school awards no mechanical, predetermined diversity bonuses based on race or ethnicity."

vii) *Gratz v. Bollinger* (2003): the Court strikes down the undergraduate admissions affirmative action plan, mainly having a problem with the automatic 20 points that race gave you.

(2) Gender classifications

(a) Sources

i) *Level of scrutiny*: why intermediate scrutiny? Well, there's reasons to have *heightened* scrutiny--a long history of discrimination against women and immutability. And there's reasons not to go all the way to strict scrutiny--the fact that am14 was aimed at blacks, not women, and the fact that women are a political majority and theoretically, at least, could fend for themselves without the "proxy" of the judiciary.

(b) History

i) *Bradwell v. Illinois* (1872): the Court upholds a state law prohibiting women from practicing law, saying that the "paramount destiny and mission of woan are to fufil the noble and benign offices of wife and mother."

ii) *Muller v. Oregon* (1908): despite striking down just about every trade-regulatory law it could find, the *Lochner*-era Court nevertheless uphold a maximum hours law for women (but keep in mind that the Brandeis brief may have had a lot to do with this).

iii) *Adkins v. Children's Hospital* (1921): the Court rejects, however, a minimum wage law for women.

iv) *Radice v. New York* (1924): the Court upholds a state law prohibiting women from being employed in restaurants in the late night/early morning.

v) *West Coast Hotel Co. v. Parrish* (1937): the Court overrules *Adkins* and upholds a minimum wage law for women.

vi) *Goesaert v. Cleary* (1948): the Court upholds a state law preventing women from being bartenders unless they were the wife or daughter or a male owning the bar.

vii) *Hoyt v. Florida* (1961): the Court upholds a law automatically exempting women from jury service.

viii) *Reed v. Reed* (1971): the Court for the first time invalidates a gender classification, here applying rational basis review, ostensibly (but this may be an example of tacitly-heightened rational basis scrutiny).

(c) Level of scrutiny: the Court applies heightened scrutiny to gender classifications--somewhere between tacitly-heightened rational basis scrutiny and strict scrutiny.

i) *Frontiero v. Richardson* (1973): the Court raises the level of scrutiny for gender classifications, citing a long history of discrimination against women, the immutability of gender, and that gender bears no relation to the ability to contribute to society. Here, in fact, a plurality of the Court goes all the way to strict scrutiny,and strikes down a law requiring servicewomen claiming their husbands as dependents to prove it, but requiring servicemen to do the same in the opposite situation.

ii) *Stanton v. Stanton* (1975): the Court strike down law requiring parents

to support female children to 18, but male children to 21, saying that "no longer is the female destined solely for the home . . ." Still, though, there's no majority on the level of scrutiny.

iii) *Craig v. Boren* (1976): the Court finally settles on intermediate scrutiny for gender classifications: "to withstand constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." The Court applies this standard and strikes down a law prohibiting beer to women under 18, but men under 21. Rehnquist, dissenting, says this new intermediate scrutiy is too diaphonous.

iv) *United States v. Virginia* (1996): the Court, in striking down VMI's male-only policy, arguably modifies the gender-classification intermediate scrutiny standard: "parties who seek to defend gender-based government action must demonstrate an *exceedingly persuasive justification* for that action." The Court referred to this as "skeptical scrutiny." Also notable, the Court looks behind the proffered justifications for the law and to the actual purposes: "a tenable justification must describe actual state purposes, not rationalizations or actions in fact differently grounded." As to remedy, the Court says that "a proper remedy for an unconstitutional exclusion [is to] eliminate so far as possible the discriminatory effects of the past and to bar like discrimination in the future."

v) **Laws that benefit women:** here, you get a divide when you look at practical result: if the law benefits women but is based on a gender stereotype, then the Court will strike it down; if the law benefits women and is a sort of affirmative action thing, then the Court will allow it. This makes sense when you realize that the Court is applying intermediate scrutiny, which will let things like affirmative action through.

a. Laws that benefit based on stereotypes

1) *Orr v. Orr* (1979):

2) *Weinberger v. Wiesenfeld* (1975):

3) *Califano v. Goldfarb* (1977):

4) *Wengler v. Druggists Mutual Ins. Co.* (1980):

5) *Mississippi University for Women v. Hogan* (1982):

6) *Michael M. v. Superior Court* (1981): [upholding a stereotype law--statutory rape]

7) *Rostker v. Goldberg* (1981): [upholding a stereotype law--selective service act]

b. Affirmative action laws

1) *Califano v.Webster* (1977):

2) *Schlesinger v. Ballard* (1975):

3) *Nguyen v.* (2001):

(d) Prima facie case: this is the same as with racial/origin classifications:

there are facial classifications and facially neutral classifications. If it's facial, you trigger heightened scrutiny automatically. If it's neutral, you have to show purpose and impact.

i) *Personnel Administrator of Massachusetts v. Feeney* (1979): [see "Racial/origin classifications," above.]

ii) *Geduldig v. Aiello* (1974): the Court upholds a state disability insurance system that excludes pregnancy from coverage, recognizing that there are underinclusive aspects to the classification (the insurance program doesn't protect every risk of disability that the state is aiming to), but citing the one-step-at-a-time doctrine (from *Lee Optical* and *Beazer*).

a. *Bray v. Alexandria Women's Health Clinic* (1993): the Court found no EqP violation in the blocking of access to abortion clinics.

(3) Alienage classifications

(a) Sources: the EqP Clause says that no "person" shall be denied equal protection. It doesn't say "citizen." So, from that you get that aliens get the benefit of the clause. The Court articulated this result in *Yick Wo* (1886). Also note that state immigration laws can often be challenged not just on EqP grounds, but on preemption grounds as well, since the Court has said that federal immigration laws wholly occupy the field.

(b) Documented aliens: here, the general rule is that the Court will apply strict scrutiny. However, there are exceptions where the Court will only apply rational basis review.

i) *Graham v. Richardson* (1971):

ii) *Sugarman v. Dougall* (1973):

iii) *In re Griffiths* (1973):

iv) *Examing Board v. Flores de Otero* (1976):

v) *Nyquist v. Mauclet* (1977):

vi) Exceptions

a. Classifications related to the democratic process

1) *Foley v. Connelie* (1978):

2) *Ambach v. Norwick* (1979):

3) *Cabell v. Chavez-Salido* (1982):

4) *Bernal v. Fainter* (1984):

b. Classifications made by Congress

1) *Mathews v. Diaz* (1976):

2) *Hamptom v. Wong* (1976):

(c) Undocumented aliens

i) *Plyler v. Doe* (1982):

(4) Legitimacy classifications: the Court applies intermediate scrutiny here. There is, though, a divide when you look at practical results: laws that benefit all marital children but no non-marital children are always held invalid, whereas laws that benefit some non-marital children but not others are evaluated case-by-case.

(a) Sources: heightened scrutiny is appropriate because its unfair to penalize a child for his parents' marital status, the Court has said. Plus, there's a long history of discrimination here, and illegitimacy is an immutable trait. However, there's no need to go all the way to strict scrutiny because "illegitimacy doesn't carry an obvious badge," like gender or race does, and discrimination against bastards hasn't been as severe as that against women and blacks has been.

(b) Laws that deny benefits to all bastards: the Court has consistently invalidated these kinds of laws.

i) *Levy v. Louisiana* (1968):

ii) *Glona v. American Guarantee & Liability Ins. Co.* (1968):

iii) *New Jersey Welfare Rights Org. v. Cahill* (1973):

iv) *Gomez v. Perez* (1973):

v) *Trimble . Gordon* (1977):

(c) Laws that benefit some bastards but not others: here, the Court does the standard intermediate scrutiny routine--is there an important interest served by means substantially related to the goal.

i) *Lalli v. Lalli* (1978):

ii) *Labine v. Vincent* (1971):

iii) *Mathews v. Lucas* (1976):

iv) *Jiminez v. Weinberger* (1974): [struck down]

(5) Age classifications: even though there's a history of discrimination against the elderly, and even though age is immutable in a sense, the Court has expressly said it's only going to use rational basis review.

(a) *Massachusetts Bd. of Retirement v. Murgia* (1976):

(b) *Vance v. Bradley* (1979):

(6) Disability classifications:

(a) *City of Cleburne v. Cleburne Living Center* (1985): [tacit-heightened rational basis review]

(b) *Heller v. Doe* (1993):

(7) Wealth classifications: only rational basis review, here (although it once appeared as though some heightened scrutiny might be used).

(a) *Griffin v. Illinois* (1956):

(b) *Harper v. Virginia Board of Elections* (1966):

(c) *Dandridge v. Williams* (1970):

(d) *San Antonio ISD v. Rodriguez* (1973)

(e) *Maher v. Roe* (1977):

(8) Sexual orientation classifications: all we've got, really, is *Romer v. Evans* (1996) here, where the court said it was applying rational basis review but actually seemed to be employing the tacitlly-heightened rational basis review. You also have *Lawrence v. Texas* (2003), to whatever extent that might be seen as informing equal protection jurisprudence.

4. Fundamental rights

a) Sources

(1) The Fourteenth Amendment

(2) The Ninth Amendment

(3) The "penumbras and emanations" theory

b) Analytical method

(1) Is there a fundamental right?: [look at history, tradition, crucial-ness]

(2) If so, was it infringed?: the court looks at the "directness and substantiality" of the interference with the right (*Zablocki*).

(3) If so, then strict scrutiny is applied:

(a) Is the government's action justified by a sufficient purpose?

(b) If so, are the means sufficiently related to the goal sought?

c) Fundamental rights taxonomy

(1) Family rights

(a) Right to marry

i) *Loving v. Virginia* (1967): [recognizing right to marry within DPC "liberty"]

ii) *Zablocki v. Redhail* (1978): [reaffirming right to marry as part of the "right to privacy" implicit in am14 (*Griswold*)]

iii) *Boddie v. Connecticut* (1971): [prevention of divorce can be an infringment of right to marry]

iv) *Califano v. Jobst* (1977): [upholding termination of some SS benefits after marriage as not an sufficient infringement of right to marry; also involves some deference to congress notions]

v) *Bowen v. Owens* (1986): [another upholding of benefit termination to divorced spouses, but not widowed one--not a sufficient infringement; also deference to congress]

(b) Right to custody of one's own children

i) *Stanley v. Illinois* (1972): [recognizing right to custody as found in DPC, EqPC, and am9]

ii) *Lehr v. Robertson* (1983): [distinguishing *Stanley* on grounds that father here had not demonstrated any commitment to child--"the mere existence of a biological link does not merit constitutional protection"]

iii) *Michael H. v. Gerald D.* (1989): [the Court, under Scalia's pen, looks at the "most specific level" of tradition to identify the content of fundamental rights, and finds no protection of an adulterous natural father--at least in comparison to the marital father--and leaves the decision of custody to the state (federalism)]

(c) Right to keep the family together

i) *Moore v. City of East Cleveland* (1977): [striking down law preventing extended family from living together; not limiting right to live together to nuclear family because "appropriate limits on substantive due process come not from drawing arbitrary lines but rather from careful respect for the teachings of history and solid recognition of the basic values that underlie our society"]

a. *Belle Terre v. Boraas* (1974): [upholding law limiting number of unrelated people that can live together]

ii) *Smith v. Org. of Foster Families* (1977): [upholding law providing hearings prior to removal only to foster families of 18 mos. or more (and not deciding nature of foster family fundamental right, but assuming it)]

(d) Right of parents to control the upbringing of their children

i) *Meyer v. Nebraska* (1923): [*Lochner*-era case expressly using substantive due process to say there's a right to control the raising of your children--here in the context of law prohibiting teaching German]

ii) *Pierce v. Sisters* (1925): [another *Lochner*-era express-substantive-due-process case holding a right to raise you children how you want]

iii) *Prince v. Massachusetts* (1944): [setting out limits to this right--state had a compelling enough interest in protecting children to apply child labor laws to soliciting Jehovah's Witness child]

iv) *Wisconsin v. Yoder* (1972): [free exercise and parent's right to raise wins out against state's interest in requiring school attendance]

v) *Troxel v. Granville* (2000): [holding that law permitting anyone to petition for custody at any time (here, grandparents), was unconstitutional as applied because overbroad--not deciding precisely what DPC would require, as far as showings, with such a custody law]

(2) Reproductive rights

(a) Right to procreate

i) *Buck v. Bell* (1927): [upholding sterilization of the "feeble-minded," saying that state's interest in the public welfare was enough to justify this]

ii) *Skinner v. Oklahoma* (1942): [finding a fundamental right to procreate, based here in EqPC (this is soon after *Lochner*-era, when the Court was still scared of substantive due process).

(b) Right to purchase and use contraceptives

i) *Griswold v. Connecticut* (1965): [majority opinion uses the "penumbras formed by emanations" theory to put the Court back in the smack middle of the fundamental rights bandwagon--citing am1, am3, am4, am5, am9, and am14 as together evidencing a right to privacy. The analysis that's stuck, though, is in Goldberg's and Harlan's concurrences, which focus on "liberty" from the DPC.]

a. Note Goldberg on finding fundamental rights: "In determining which rights are fundamental rights, judges are not left to decide cases in light of their personal and private notions. Rather, they 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. 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."

ii) *Eisenstadt v. Baird* (1972): [extending the right to purchase contraceptives to everyone--not just married couples as established in *Griswold*, noting that there'd be an EqPC violation otherwise.]

iii) *Carey v. Population Services Int'l* (1977): [expressly setting out strict scrutiny as test for any law restricting access to contraceptives]

(c) Right to abortion

i) A right is recognized: *Roe v. Wade* (1973): [finding limited right to abortion inside the implicit fundamental right to privacy. Then, identifies first trimester as when state begins having a compelling interest in the mother's health, and the second trimester as when the state begins having a compelling interest in the unborn child.]

ii) The right is clarified: *Planned Parenthood v. Casey* (1992): [abandoning the trimester scheme of *Roe*, but retaining, expressly, the "core" of *Roe*--that there's a qualified right to abortion found within the implicit constitutional fundamental right to personal autonomy/privacy. The new test is the "undue burden" test, which means that prior to viability the state can't place a "substantial obstacle" in the path of a woman seeking an abortion.

iii) Specific burdens

a. Partial-birth abortion bans

1) *Stenberg v. Carhart* (2000): [striking down state law banning D&X but not D&E abortions because it did not have a health of the mother exception, as required by *Casey*.]

b. Waiting periods

1) *City of Akron v. Akron Center for Reproductive Health* (1983): [striking down waiting period--during *Roe* era. *Casey* expressly overrules this result and says that waiting periods are generally okay.]

c. Informed consent

1) *Thornburgh v. American College of Obstetricians and Gynecologists* (1986): [striking down informed consent law--during *Roe* era. *Casey* expressly overrules this result and says that informed consent laws are generally okay.]

d. Funding restrictions

1) *Maher v. Roe* (1977): [holding that state has no right to make sure indigent mothers can get nontherapeutic abortions.]

2) *Beal v. Doe* (1977): [holding that federal Medicaid act doesn't require states to fund nontherapeutic abortions.]

3) *Poelker v. Doe* (1977): [upholding city's refusal to pay for nontherapeutic abortions conducted in public hospital.]

4) *Harris v. McRae* (1980): [upholding law that denied public funding for medically necessary abortion except where mother's life was a stake.]

e. Notification

1) *Planned Parenthood v. Danforth* (1976): [striking down

spousal consent requirement.]

2) *Planned Parenthood v. Casey* (1992): [striking down spousal notification requirement as being an undue burden because of what the spouses might do.]
3) *Bellotti v. Baird* (1979): [upholding validity of parental notification or consent as long as the state offers an alternative procedure where minor can go before a judge who can determine an abortion is in the minor's best interests.]
4) *H.L. . Matheson* (1981): [upholding mere parental notification law, noting parental right to raise their children.]
5) *Ohio v. Akron Center* (1990): [upholding parental notification law that required notification of at least one parent, but had judicial bypass.]
6) *Hodgson v. Minnesota* (1990): [upholding law requiring notification of both parents, but had judicial bypass.]

(3) Medical care rights

(a) Right to refuse treatment

i) *Cruzan v. Director* (1990): [recognizing a "liberty interest" in refusing medical treatment (citing, among other things, common law bodily integrity rights). Then, the Court balances this liberty interest against state interests and finds that state can, at the very least, require clear and convincing evidence of end-of-life decisions.]

(b) Right to assisted suicide

i) *Washington v. Glucksberg* (1997): [after examining nation's history, legal traditions, and practices, finds fundamental right assistance in committing suicide. Then, applying rational basis review, finds no constitutional violation.]
ii) *Vacco v. Quill* (1997): [this time entertaining an EqPC challenge to assisted-suicide bans, and finds no violation because pulling the plug is not the same thing as affirmatively assisting in suicide.]

(4) Sexual activity and orientation rights

(a) *Bowers v. Hardwick* (1986): [finding that prohibitions against sodomy have ancient roots in our law, the Court finds no fundamental right to homosexual conduct, and so applies rational basis and upholds a sodomy law (even though it applied to heterosexual couples, too).]

(b) *Lawrence v. Texas* (2003): [without expressly recognizing any new fundamental rights, and while ostensible applying rational basis review, the Court finds no legitimate state interest to support homosexual sodomy law and strikes it down. O'Connor would strike it down under EqPC only. Dissenters say morality is a sufficient state interest.]

(5) Right to control personal information

(a) *Whalen v. Roe* (1977): [upholding state law requiring all prescriptions be sent to a central office to entered in a database, noting federalism (right of states to experiment in solving problems), a penalty in this law for disclosure of information, and the risk of disclosure even without this

law.]

(b) *California Bankers Assn. v. Schultz* (1974): [upholding law requiring recording of financial records, rejecting am4 and am5 challenges and noting state's need to monitor financial transactions and to prevent fraudulent conduct.]

(6) Right to travel

(7) Right to vote

(8) Right to basic education