I. Introduction

A. What is Equality (Thomson)

(1) Lord Bryce declaring that democracy owes nothing to equality, political or economic.
(2) **Problem of equality** is a current problem.
(3) **Propositions of equality**: 
   (a) Equal not identical (dull/shiny pennies)
   (b) Equality implies similarity, not sameness
   (c) Equality is not uniformity, ⇒ thus uniformity of treatment subject to much disputed moral claims.
   (d) Equality is not absolute economic, even under socialism and communism ⇒ distant future per Marx.
   (e) Equality = common submission to a code of law, type of govt.
(4) Tawney ⇒ “not important if completely attained, but rather it must be **sincerely sought**.”
(5) Haldane ⇒ universal suffrage owed to dogma of man’s equality, but “the progress of biology in the next century will lead to a recognition of the innate inequality of man.”
(6) Equality has roots in Christianity and Greek / Roman rationalism.
(7) Equality product of aristocratic and slaveholding communities ⇒ formed in the crucible of contrast: 
   (a) Inequality in a *heterogenous society* is thorny problem.
   (b) Tolerance product of religious wars
(8) **Liberty / Equality nexus** ⇒ inherent tension, despite ubiquity in governmental preambles.
(9) Tragedy that it now longer has spiritual content.
(10) Centralized Gov’t = development and implementation of egalitarianism.

II. Slavery and the Constitution

A. Three references in Constitution

(1) Art I, § 2, cl 3 ⇒ [3/5] “Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons....”
(2) Art I, § 9, cl 1 ⇒ [Importation tax] “The Migration or Importation of Such Person as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a

Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.”
(3) Art IV, § 2, cl 3 ⇒ [Fugitive Slave clause ⇒ Laws of another state can’t trump slavery] “No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.”
(4) **Slavery and the Constitution**
   (a) **Constitution** is arguably pro-slavery document ⇒ 7 of 15 “influentials” were slaveholding planters.
   (b) Document seems to put slavery beyond “national regulation.”
   (c) “What precisely is the value of the Constitution and of the concomitant nation that would justify even an extra week’s slavery?”

B. Slavery Cases

(1) **State v Post** (1845) ⇒ Does NJ’s constitution abolish slavery?
   (a) HELD: Language pertaining to freedom and independence is modified by understanding of man’s relationship to gov’t. Same language in US Constitution ⇒ didn’t abolish slavery.
(2) **NOTE**: **Prigg v Pennsylvania** (1842) ⇒ Pre-Civil war courts more often than not overturned limitations on slavery.
   (a) SC held that fugitive slave clause prohibits any law which “interrupts, limits, delays, or postpones” rights of owner.
   (b) **Fugitive Slave Act** preempted state law, mandated assistance in reclaiming slaves ⇒ yet also legitimized regulation of slavery, and eventually limiting it growth.
(3) **Johnson v M’Intosh** (1823) ⇒ Action to assert valid title, which was acquired in two transactions with Indian chiefs.
   (a) HELD: Discovery by Europeans = conquer = state has power to grant title; Indians only have right to occupancy, which sovereign may extinguish through either purchase or conquest
   (b) Reason has nothing to do with natural law; everything to do with law of nations.
(c) Rights of native Indians to land have necessarily been impaired.
(d) This has been the law of the continent, which all European nations have accepted as sovereigns have changed.

(4) *State v Mann* (NC 1829) Δ charged with assault and battery on slave, whom he hired from its owner. When she tried to escape, he shot her, impairing her value to her owner.

(a) HELD: Master is not liable for battery committed upon his slave. Δ not criminally liable, but instead subject to laws of bailment.
(b) There is no likeness of master-slave to parent-child, tutor-pupil, etc.
(c) Bond of master over slave = absolute ➔ though conscience find this repugnant.

(5) *Dred Scott v Sandford* (1857) ➔ Scott claims to be a citizen of Missouri. Was a slave who traveled with owner to Illinois and Louisiana Territory, thus claimed to now be free. Jurisdiction based on diversity.

(a) HELD (Taney):
  1) **No jurisdiction:** “[Blacks] were not intended to be included, under the word “citizens” in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for an securies to citizens of the United States.”
  2) **LA Compromise Unconstitutional:** Depriving citizen of his property merely because of his travel into another state is hardly due process of law.
(b) Only second to be declared unconstitutional up until that time.
(c) Expedited fight against slavery, galvanized.

C. Reconstruction

(1) *Federalist No. 28*, Hamilton ➔ Constitution was not designed to protect individual rights from power of state gov’t only federal gov’t.

(2) **13th Amendment** ➔ Slavery is illegal and under § 2 “Congress shall have the power to enforce this article by appropriate legislation.

(3) **Civil Rights Act of 1866** ➔ gives blacks “full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens.”

(4) **14th Amendment** ➔ BO stresses that 14th was designed to give Congress legal authority to pass Civil Rights Act of 1866.

(a) “No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, nor shall any State deprive any person within its jurisdiction the equal protection of the laws.”
(b) Gave Congress ability to enforce through appropriate legislation.
(c) Alters balance between State and Federal power; and between Congress and Judiciary.

(5) **15th Amendment** ➔ The right of citizens of the US to vote shall not be denied or abridged ...on account of race, color, or previous condition of servitude.

(6) **Judicial Reaction** ➔ Federalism, narrow reading: expansive if black, narrow if white SM

(a) *Slaughterhouse Cases* (1873) ➔ narrow reading of 13th and 14th amendments ➔ only dealing with negroes, No LA butchers. First case to interpret 14th amd.
(b) *US v Cruikshank* (1975) ➔ riot following election in LA. 60 freedman killed after they surrendered. Feds charged violation of voting section of Enforcement Act of 1870. No 14th amendment violation because blacks were not exercising right to petition gov’t. 14th Amd “adds nothing to the rights of one citizen as against another.”
(c) *Strauder v W Va* (1879) OUTLIER ➔ But strong if racially oriented, rev’d conviction of black where no black could serve on jury. Can discriminate on lots of other basis under 14th Amendment.
(d) *US v Harris* (1882) ➔ Feds lack power to prosecute lynch mob who seized prisoner from state deputy.
(e) *The Civil Rights Cases* (1882) ➔ Invalidated public accommodation section of 1875 Civil Rights Act. Neither 13th nor 14th amd give Congress power to prohibit private discrimination in public accommodations. Denial of rights by state, not interference by private party.
(f) *Ex Yarbrough* (1884) ➔ Feds can prosecute obstruction of black voters by KKK in Congressional elections.

D. Post-Reconstruction

(1) *Plessy v Ferguson* (1896) – Man claiming to be 7/8 Caucasian sued because he was prohibited from being in the white RR car.

(a) HELD: Segregation of the races is a reasonable exercise of police powers if based
upon the established custom, usage and traditions of the people in the state.
1) 14th mandated “absolute equality of the two races before the law.”
2) Segregation laws “do not necessarily imply the inferiority of either race to the other”
3) State within its Police powers.
4) Inferiority reading is “construction” that blacks read into LA statute.
(b) DISSENT, Harlan: This is another Dred Scott decision.
1) gives states the ability to take away what the Constitution has ensured.
2) “[Black man] ought never to cease objecting to the proposition, that citizens of the white and black races can be adjudged criminals because they sit in the same public coach on a public highway.”

(2) Berea College v KY (1917) → Private school convicted of operating a school where both blacks and whites were taken as students. No state interest; permitted due to lesser rights of a corporation.

(3) Buchanan v Warley (1917) → Invalidated state statute which prohibited black owner from living in his own house in a white neighborhood. Distinguished Berea and Plessy because here state was interfering with Blacks own property.

III. Education, Race, and Constitution

A. Early litigation

(1) Missouri ex rel Gaines v Canada (1938) – π was a black denied admittance to U of Missouri law school. State had arrangement to let him go out of state. π instead cited advantages of going to school in state he would practice in.
(a) HELD: right is a personal one. π entitled to EP of laws within its borders; state must provide “substantially equal” legal educ to π.
(b) ISSUE: who decides if something is equal [courts]; How is this decision made [It is difficult, messy]. Thus, separate but equal was unsustainable.

(2) Sipuel v Bd of Regents (1948) – Court affirmed Gaines; rejected mandamus request of issue of whether state would be forced to build a new bldg for blacks.

(3) Sweatt v Painter (1950) → SC ordered admission of law student to Univ of Texas. “The law school ... cannot be effective in isolation from the individuals and institutions with which the law interacts.

(4) McLaurin v Okla (1950) – Unconstitutional to designate where black graduate student could sit in class, eat, study in library.

B. Brown decisions

(1) Brown I (1954) → Separate but equal in public education is inherently unequal and a violation of the 14th Amendment.
(a) Historical context of 14th amendments passage are inconclusive
(b) Public Education is totally different now; must evaluate EP according to modern educ stds.
(c) Intangible benefits of having one integrated system; thus equal facilities in not controlling.
(d) Soc Science → impact of segregation = inferiority = dulls motivation.

(2) Public Accommodation cases that followed:
(a) Bollings v Sharpe (1954) → DC schools, used DP of 5th amendment to required integration; 14th only applicable to states.
(b) Holmes v Atlanta (1955) → no segregation of municipal golf courses.
(c) Baltimore v Dawson (1955) → no segregation of public beaches, bathhouses

(3) Brown II (1955) → All deliberate speed → ordered that cases were to be remanded to district courts to enter order consistent with the flexible principles of equity. Courts must make a “prompt and reasonable start” toward full racial integration.
(a) If an individual right, why tolerate any delay in implementation → Is right held by black race?
(b) Wilkinson → justified by possible civil → e.g. Little Rock, Birmingham
(c) SC trying to shape norms, letting court implement orders on their own.
(d) Lead to 15 years of remedial failures, though public support grew.

C. Southern School Desegregation

(1) Southern Manifesto – 102 Cong Rec H3948, 4004 (Mar 12 1956) – states were declaring that Brown was illegitimate and would not be followed.

(2) “Freedom of choice” plans, where students had to request transfer to school in order to integrate it.
(3) Briggs v Elliot (E D SC 1955) → NARROW READING: Brown did not require “the states to mix persons of different races in the schools. What it has decided is that a state may not deny any person on account of race the right to attend any school that it maintains. The Constitution, in other words, does not require integration. It merely forbids the use of gov’t power to enforce segregation.”

(4) Cooper v Aaron (1958) – Ct wanted to abandon deseg due to “extreme public hostility.” SC reversed, “federal judiciary is supreme in the exposition of the Con, and that interpretation of the 14th amendment enunciated by Court in Brown is the supreme law of the land.”

(5) Watson v Memphis (1963) → Public Accommodation no seg of rec facilities → “Brown never contemplated that the concept of ‘deliberate speed’ would countenance indefinite delay in elimination of racial barriers.”

(6) Goss v Bd of Educ (1963) → One-way transfers found unconstitutional.

(7) Griffin v County School Bd (1964) → school closing → Ct found strategy of school closing and gov’t grants and tax credits for private schools unconstitutional. Cf. Palmer v Thompson (1971) → Okay to close pools since Griffin only had to do with public educ.

(8) Norwood v Harrison (1973) → MS practice of lending textbooks to students attending both public and private schools without reference to whether the private schools were racially segregated unconstitutional.

(9) TEXTBOOK argues that it was formation of political coalition, especially around Civil Rights Act of 1964, that the most galvanizing effect. Title VI assisted with guidelines for remedial orders.

D. Collapse of Southern Segregation

(1) Green v County School Bd (1968) → unanimous SC invalidated freedom of choice plan that would have reinforced historical pattern of deseg (a) NOTE: south did not have same residential segregation → neighborhood school would produce integration. (b) Suggests that unitary status is only possible if system in integrated.

(2) Monroe v Bd of Comm (1968) – Rejected acceptance of “free transfer” as a method of mitigating white flight.

(3) Swann v Charlotte-Mecklenburg (1971) – Case that gave federal courts authority to implement busing, redistricting, and involuntary student transfer to effectuate integration. (a) Remedy will end after systems become unitary. (b) Books says this is results-oriented view of Brown, which focuses on outcome in district, making removal of racial criteria unconstitutional. (c) Cf. process oriented, which looks to eliminate racist actions in decision-making process, but doesn’t look at outcome

E. Northern Deseg and Limits on Duty

(1) Keyes v School District No. 1 Denver (1973) – First case to address school segregation in city where separation was not initially enforced by statute. (a) Finding of officials’ intent in part of district is sufficient to implicate entire system (b) Powell’s Dissent / Concurrence:

(2) Milliken v Bradley (1974) (5-4) – Federal cts lack the power to impose interdistrict remedies for school desegregation absent an interdistrict violation or interdistrict effects. (a) “without interdistrict violation and interdistrict effect, there is no constitutional wrong call for an interdistrict remedy” (b) DISSENT, Marshall: There is effectively no remedy for this constitutional violation, though the State had participated in violations in Detroit. (c) Cf. Hills v Gautreaux (1976) – upheld right of district to compel HUD to take action outside of Chicago city limits to remedy discriminatory site selection that occurred only in Chicago.

(3) Milliken II (1977) – Courts have power to order states to expend money and resources to correct past constitutional violations of students.

(4) Missouri v Jenkins (1990) (5-4) – Held that tr ct abused its discretion to raise local taxes and create massive magnet schools that would attract white children to the district.

(5) Jenkins II (1995) (5-4) – restrict tr ct’s authority to order Milliken II-type remedies (e.g. ordering salary 1 for staff) since steps were motivated by attracting more whites into district.
(a) Interdistrict goal is beyond scope of intradistrict violation.
(b) essentially, Interdistrict goal = interdistrict remedy, thus violating *Milliken I*
(c) CONCUR, Thomas: Ridiculous that ct now tries to attract whites who left because of desegregation
1) Bogus social science that blacks learn better sitting next to whites
2) Federalism and sep of powers issues subsumed by untrampled equitable authority.


(7) *OK City Public Schools v Dowell* (1991) – Once unitary status has been achieved, court-ordered desegregation must end.

(8) *Freeman v Pitts* (1992) – “Fed Cts have authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every area of school operations.”
(a) Rejected educational testing as part of unitary status determination

(9) *Bazemore v Friday* (1986) – School operated racially segregated 4-H and Homemakers clubs prior to 1964. Because organizations are voluntary, no affirmative duty to integrate clubs.

(10) *US v Fordice* (1992) – No affirmative duty required by MS to correct racial imbalances among state universities even though historical patterns linger past the end of de jure segregation.

IV. Modern Equal Protection – RACE

A. Race-Specific that Expressly Disadvantage

(1) *Strauder v W. Va* (1879) – Statute precluded blacks form serving on juries. π was black who challenged his conviction because blacks were systematically excluded from serving on grand or petit jury which convicted him.
(a) HELD: EP demands that each citizen receive equal protection. Denial if otherwise qualified black persons are excluded from administration of justice.

(2) *Korematsu v US* (1944) – π was Japanese male who violated military order with force of law (Congress had authorized military control) that required him to say out of Excluded Zone.
(a) HELD: Restrictions on movement of citizens is constitutionally permissible only when “pressing public necessity” like threatened invasion. Here Congress had authority to take prompt and adequate security measures to ensure safety.
(b) DISSENT, Murphy: Exclusion of Japanese persons based on premise of their heighten risk of sabotage and espionage. Reason, logic, experience doesn’t support this idea.
(c) DISSENT, Jackson: *Slippery slope* This rationalization of gov’t action in the context of Constitution “lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.

(3) *US v Caroline Products* (1938) – Most celebrated footnote in Con Law – SC used rational basis to uphold a federal statute prohibiting interstate shipment of filled milk. But fn 4, J Stone suggested that a heightened std of review might apply to statutes “directed at particular religious or national or racial minorities.”

(4) *Palmore v Sidoti* (1984) – white couple had child and divorce. ² remarried a black man, causing court to determine that custody should be awarded to σ because “it is inevitable that the child will ... suffer from the social stigmatization that is sure to come [if allowed to stay w/ mom].
(a) HELD: Private biases and resulting injuries are “impermissible [constitutional] considerations.”

B. Disparate Impact on Race

(1) *Washington v Davis* (1976) – DC Police department gave test where blacks where four times more likely to flunk than whites. Tested verbal skill, reading, vocabulary. π challenged test on grounds of discriminatory impact.
(a) HELD: A race neutral test on relevant criteria for employment does not violation EP where test results in the elimination of a high % of black applicants. Discriminatory effect, standing alone, is insufficient to invoke EP clause.
1) Disproportionate impact not a basis for Con violation.
2) Education cases looked for discriminatory purpose.
(b) CONCUR, Stevens: No clear demarcation between discriminatory intent and discriminatory impact.
Yick Wo v Hopkins (1886) – law forbidding laundries in building not made of stone or brick was non-uniformly administrated against Chinese, found to be EP violation.

Gomillion v Lightfoot (1960) – gerrymandering of municipal border was so flagrant as to be "tantamount to a mathematical demonstration" of discriminatory intent.

Hunter v Underwood (1985) (9-0) – Invalidated 1901 statute disenfranchising all persons convicted of moral turpitude because passage was motivated partially by desire to disenfranchise blacks.
(a) Has disparate impact and racial motivation, thus Arlington Hts and Mt Healthy govern

EP in jury context
(a) Batson v KY (1986) – Can use peremptory strikes to eliminate jurors purely on the basis of race.
(b) Powers v Ohio (1991) – Batson applies even when Δ and juror not same race
(c) Edmondson v Leesville Concrete (1991) – Race-based peremptories by private litigants in civil litigation violation of EP.
(d) Hernandez v NY (1991) – Upheld use of preempatories to remove bilingual juries because juries would be unlikely to understand the testimony via an official interpreter.
1) Disparate impact case ala Wash v Davis, thus removals not per se EP violations
2) CONCUR, O'Connor: strikes were based on language rather than race, thus no EP scrutiny warranted.
(e) Georgia v McCollum (1992) – Batson applied to defense and well as prosecution

Racially motivated classifications that are not strictly scrutinized
(a) Palmer v Thompson (1971) – Racially motivated statutes with neutral effects – permissible to close municipal swimming pool to everyone rather than operate them on an integrated basis.
1) Intent hard to ascertain
2) Implies same law with proper motivation would be okay.
(b) Discretionary decisionsMayor of Philadelphia (1979) Mayor’s power to make appointments need to be preserved in order to “respond to the demands of [their constituency].
(c) Causation requirementsMt Healthy (1977)

Arlington Hts v Metro Housing Dev Corp (1977) – Δ denied rezoning single family to multi-family for purpose of having low income housing development.
(a) HELD: Local decision that results only in a discriminatory effect and there is no proof that a discriminatory purpose is the motivating factor, such decision is entitled to judicial deference.

McClesky v Kemp (1987) – Δ use Baldus study to show that blacks who kill whites were statistically more likely to get death penalty. Claimed denial of EP. State and court did not attack veracity of study.
(a) HELD: Capital cases require an evaluation of the motivations of individual jurors in sentencing; thus raw abstract statistical data are not dispositive of a lack of EP.
(b) DISSENT, Brennan: Numbers clearly a showing of racial basis, making it clearly relevant to EP analysis.
(c) DISSENT: Consideration of such evidence would greatly reduce chance of arbitrary and discriminatory executions.

C. Facially Neutral Classifications

Loving v Virginia (1967) – Loving (white ς) and Jeter (black χ) married in DC. When they returned, they were indicted for violating VA’s ban on interracial marriages.
(a) HELD: State law restricting freedom to marry solely because of racial classification violates the EP Clause.
1) Patently no legitimate reason overriding purpose because invidious discrimination
which justifies classification.

2) Marriage is a basic human civil right.

(b) CONCUR, Stewart: It is simply not possible for a state law to be valid under the Constitution, which makes the criminality of an act depend upon the race of the actor.

(2) Hunter v Erickson (1969) – Invalidated referendum provision that was amended to Akron city charter which required that any ordinance having to do with “race, color, religion, national origin or ethnicity” had to be approved by a majority of voters.

(a) Burden of such legislation falls on minorities, who would benefit from such fair housing laws

(b) Racial housing laws were being subjected to an alternative requirement (majority of counsel and voters), making them especially suspect.

(3) James v Valtierra (1971) – Court upheld provision of Cal Constitution prohibiting state entities from constructing low-rent housing projects unless approved by a majority of those voting in a community election.

(a) Would apply to all poor people, not just blacks

(b) Hard to reconcile with Hunter v Erickson If no low income in Akron, then where?

(4) Washington v Seattle School District No 1 (1982) – Antimajoritarian strain – Seattle school district adopted a plan to combat racial isolation. An initiative was passed which provided that a school district could not require a student to attend school which was not nearest one to residence. District sued, claiming EP violation.

(a) HELD: state regulation which uses racial nature of issue to define the govt decisionmaking process rather than attempting to allocate govt power on the basis of a general principle violates EP by imposing special burdens on minorities follows Hunter

(b) DISSSENT, Powell actions by people of Washington regarding their schools in no way affects the authority of state or federal govt to order busing.

(5) Cf Crawford v Bd of Educ (1982) Upheld no busing as long as no federal violation of EP If state goes beyond federal minimum, they are “free to return in part to the standard prevailing generally throughout the US.”

D. Affirmative Action

(1) Bakke v U of Cal Davis (1978) Bakke (white σ) unconstitutionally denied admission to medical school, but refused to enjoin all use of race in legislative initiatives in the future.

(2) Fullilove v Klutznick (1980) no need for Congress to make specific findings of discrimination to engage in race conscious relief.

(3) City of Richmond v JA Croson Co. (1989) – State Affirmative Action is Illegal – City of Richmond had a 30 percent set aside for minority contractors. Only 1 percent of bids were minority. 50 percent of Richmond was black.

(a) HELD: A city may not enact “affirmative action” program without demonstrating specific discriminatory practices o be ameliorated by such programs.

(4) Adarand Constructors, Inc v Pena (1995) – Federal Affirmative Action Illegal – Dept of Transportation awarded construction K. Contractor solicited subcontracts, but failed to take low bidder due to federal incentive subsidies for giving subcontract work to minorities. Adarand sued under EP.

(a) HELD: Federal contracting set-asides for minorities are unconstitutional unless they are narrowly tailored to remedy demonstrable past discrimination.

1) Benign discrimination by Congress is not exception
2) Racial classifications of any sort is subject to strict scrutiny.
3) Specific, not general, patterns of discrimination must be shown.

(b) CONCUR, Scalia: Gov’t can never “make-up” for past discrimination by present discrimination.

(c) CONCUR, Thomas: No racial paternalism exception to EP.

(d) DISSSENT, Stevens: Congress has greater leeway in remedying past discrimination than do the states.

(e) DISSSENT, Ginsburg: Large deference should be given to Congress to overcome historic racial subjugation.

(5) Hopwood v State of Texas (5th 1996) – UT law school maintained two groups of candidates for admissions based on racial status, subject to different admissions review.

(a) HELD: EP violated in given substantial racial preferences in its admission.

1) Under strict scrutiny, two questions:
   a) Does it serve a compelling state interest
   b) Is it narrowly tailored to achieve end

2) Bakke = no strict racial quotas

3) “no case since Bakke has accepted
diversity as a compelling state interest under strict scrutiny analysis.”

4) Need **particularized findings** lest court impose remedies that are “ageless in their reach into the past, and timeless in their ability to affect the future.” – *Wygant*.

5) Diversity, reputation among minorities are inadequate compelling state interests

V. Rational Basis Review

A. Overview

(1) **POLICY:** “Pure interest group deals, justified only by political strength of beneficiaries, are prohibited by EP. Yet, not subject to principled judicial enforcement because inquiry into legislative intent in **unmanageable** and strains judicial competence and authority. Though **underenforced**, it is nonetheless binding on legislators and administrators who have obligation to obey Constitution.

(2) **Blackletter Law** – Depending on motive and impact, challenged gov’t action is subject to one of three levels of scrutiny:

   (a) **Strict Scrutiny** if action intentionally discriminates against a suspect class or infringes a fundamental right.

   (b) **Heightened Scrutiny** if action intentionally discriminates on the basis of gender, alienage and illegitimacy; and

   (c) **Rational Basis** for social and economic regulations involving no suspect or quasi-suspect classes or fundamental rights.

B. Rational Basis Cases

(1) *New York Transit Authority v Beazer* (1979) – NY Transit Auth had rule whereby they excluded from employment all persons who were on methadone, though a significant percentage were fully employable and most likely not security risks.

   (a) **HELD:** A public authority may deny employment to methadone users as a class.

   (b) **DISSENT**, White: A rule lumping successful methadone patients with unsuccessful ones is over-inclusive. Such an arbitrary rule is unconstitutional.

(2) *New Orleans v Dukes* (1976) – EP is satisfied so long as the classification is “rationally related to a legitimate state interest.”

(3) *Railway Express Agency v NY* (1949) – Advertisement okay for owner, no okay to lease space. “It is no requirement of EP that all evils of the same genus be eradicated or none at all.”

(4) *Williamson v Lee Optical* (1955) – OK statute permitting only ophthalmologists and optometrists to fit glasses, no opticians. Thus, likely pure **interest group** deal, though rationally related to a public interest.

(5) *Minnesota v Clover Leaf Creamery Co* (1981) – Theory is enough; data showing that legislature was misguided will fail. But MN SC rejected rational basis, which SC in turn found.

(6) *City of Cleburne v Cleburne Living Center* (1985) – City had ordinance permitting hospitals and sanitariums and nursing home, though not for alcoholics, feeble-minded, insane, drug addicts. Justified by negative attitudes and fear.

   (a) **HELD:** For EP analysis, government actions against mentally retarded persons are subject to the rational basis test.

   1) Not quasi-suspect class.

   2) No special hazards seems possible as compared to nursing home or boarding house.

   (b) **CONCUR**, Stevens: “Rational requires that an impartial lawmaker could logically believe the classification serves a legitimate public purpose that transcends the harm to the disadvantaged class.”

   (c) **CONCUR AND DISSENT**, Marshall: this is heightened scrutiny, ordinance would pass the rational basis test.

C. Purpose Review – Actual or Possible?

(1) *US RR Retirement Bd v Fritz* (1980) – Congress enacted new law in which workers with less than ten years were denied double benefits of pension and SS. Challenged on the basis of EP.

   (a) **HELD:** Congress may enact a statute stripping vested benefits from selected portions of eligible RR employees.

   1) Could have eliminated for all, thus why not some.

   2) Classification is not arbitrary and capricious because connection to industry suggest more reliance by workers.

   (b) **DISSENT**, Brennan: Legislation is inimical to intended purpose as stated by Congress, not the purpose articulated post facto. Brennan’s approach is *Lochner*-like.

(2) *US Dept of Agriculture v Moreno* (1973) – Provision denying food stamps to households having **unrelated persons**. Challenged on EP grounds. Purpose in legislation was to increase nutrition levels among kids. Leg Hx suggested it
was to eliminate food stamp assistance to hippies.

(3) *Lyng v Intl Union, UAW, UAAAIW* (1988) – Not EP violation to deny food stamps to workers out on strike. DISSENT = why then do we provide benefits to those who quit work voluntarily; also, why are no business perks attacked by company undergoing a strike. Maintaining neutrality is specious.


(5) *Allegheny Pittsburgh* (1989) and *Nordlinger* (1992) – CA statute permissible because it was meant to preserve continuity an stability of neighbor; PA statute as just administered arbitrarily, with no underlying purpose.

(6) *FCC v Beach Communications* (1993) – “In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against EP challenge if there is any reasonably conceivable state of facts that could provide rational basis for the classification.”
   (a) Irrelevant whether “challenged distinction actually motivated the legislature.”
   (b) CONCUR, Stevens: Formulation sweeps too broadly since it is hard to imagine legislative classification supported by no set of facts ➔ essentially no review at all.

(7) *Kassel v Consolidated Freightways Corp* (1981) (Rehnquist dissenting) – Actual purpose review assume that one purpose motivated legislators, and ignores fact that legislators have often motivated by a multitude of different reasons.

VI. Gender / Heightened Scrutiny

A. Historical Background

(1) *Bradwell v IL* (1873) – upheld IL statute which refused to license ♀ to practice law; practicing law not a privilege or immunity of national citizenship. Same day/judge as *Slaughterhouse Cases*.

(2) *Muller v Oregon* (1908) – upheld Ore statute limiting ♀ workdays to ten hours.
   (a) Cf *NY v Lochner*, striking down workday limit of bakers due to substantive due process; based in this case on “inherent difference between sexes.”

(b) *Adkins v Children’s Hospital* (1923) – striking down ♀ minimum wage law on substantive due process grounds.

(3) *Hoyt v Florida* (1961) – upholding jury selection statute whereby ♀’s had to affirmatively request right to serve. Justified because “♀ is still regard as the center of the home and family life.”

B. Road to Intermediate Scrutiny

(1) *Reed v Reed* (1971) – strikes down ID statute whereby σ chosen over ♀ to administer will. Rejected idea that distinction merely saved state administrative convenience.

(2) *Frontiero v Richardson* (1973) – held that it violated EP component of 5th amendment that spouse of σ enlisted person automatically got more benefits but spouse of ♀ has to be more than 50% dependant to get same.
   (a) Only plurality endorsed heightened EP.

(3) *Cleve Bd of Educ v LeFleur* (1972) – struke down on due process grounds regulation of school bd that presumptively concluded that all pregnant ♀’s quit work well before due date.

(4) *Taylor v LA* (1975) – law prohibiting ♀’s on jury violate 6th amendment right to fair and impartial jury.


(6) *Stanton v Stanton* (1975) – struck down UT statute requiring parental support of σ until 21; ♀ only until 18; rejected state’s claim that σ need longer due to need to prepare for work, while ♀ will be in home.

(7) *Kahn v Shevin* (1974) – sustained FL statute given property tax exemption to only ♀ widowers, since social reality makes it more difficult for ♀ support selves.


(9) *Schlesinger v Ballard* (1975) – uphold federal statute whereby ♀’s are given more time than σ’s to achieve mandatory promotions. Justified based on limitations impose on ♀’s inability to go to see, serve in combat.

(10) *Craig v Boren* (1976) – OK law permitted
sale of 3.2% beer to ♀'s but not to ♂'s. π was a male challenging 18-20 classification, but state defended because of higher proportion of ♂'s involved in drunk driving arrests.

(a) HELD: Under EP, laws which establish classifications by gender must serve:
1) **important governmental objectives**
2) and must be **substantially related** to achievement of those objectives.

(b) .18% to 2% of ♀ and ♂ respectively arrested for DUI; inadequate correlation.

(c) CONCUR, Powell: No fair and substantial relation to the objective of traffic safety.

(d) CONCUR, Stevens: Hard to believe it is traffic safety, since purchase but not consumption are being limited.

(e) DISSENT, Rehnquist: Protests because majority decision:
1) creates 1st std of review for gender.
2) holding dealing with gender and important govt objectives has no foundation in precedent.

C. Archiac-Overbroad Generalities v Real Differences

(1) Gender classification must be based on REAL differences to be upheld.

(2) **Personnel Admin of MA v Feeney** (1979) – MA law required that veterans must be considered for appointment ahead of qualified nonveterans, effectively advantaging ♂.

(a) RULE: Gender neutral statute having a disparate impact on gender evaluated under a two-pronged rule:
1) whether statutory classification is actually non-gender based.
2) whether adverse effects reflect invidious discriminatory intent.

(b) DISSENT, Marshall: Over-inclusive and state has other less discriminatory means to reward veterans.

(3) **Michael M. v Sonoma County Superior Ct** (1981) – Δ was a 17.5 y.o. ♂ who had sex with a 16 yo ♀, charged with statutory rape. Law only made it illegal to have sex with an underaged ♀, challenged under EP clause.

(a) HELD: A state may make it illegal for a male to have sex with an underaged ♀ without similar sanctions applying to females.
1) No strict scrutiny, but must have **fair and substantial** relationship to legitimate state ends.
2) Obvious physical and environmental differences that result from pregnancy

3) Because burden naturally falls to ♀, okay for state to even the scales.

(b) CONCUR, Stewart: It is common experience that males disregard the possibility of pregnancy far more than ♀.

(c) DISSENT, Brennan: State must prove that its gender-based law prevents pregnancies better than gender-neutral would, something it has not done.

(d) DISSENT: Court assumption that ♀’s voluntarily withhold themselves from sex is fanciful at best.

(4) **Rostker v Goldberg** (1981) – Registration for draft only by males is not an EP violation.

(a) RULE: EP demands that similarly situated persons be treated differently.
1) Thus, if Gender classification realistically reflects the fact that the sexes are not similarly situated, the classification is not invidious and does not violate EP.
2) ♀ not in combat, and PURPOSE of registration is to develop pool of combat troops.

(5) **Mississippi Univ for ♀ v Hogan** (1982) – Male denied admission to nursing school (which was closest to his home).

(a) RULE: Gender-based classification is inherently suspect and must be subjected to heightened [strict / exceedingly persuasive std]

(6) **JEB v Alabama** (1994) – Preemptories – *Heightened std of review for Gender* – Gender-based preemptory challenges are unconstitutional → in this case, exclusions are based on stereotypes. CONCUR, O’Connor: “to say that gender makes no difference as a matter of law is not to say that gender makes no difference as a matter of fact. Gender now treated under same special rule of relevance formerly reserved for race.”

(7) **United States v Virginia** (1996) – VMI was elite all male public college that had mission of educating citizen-soldiers. US sued on behalf of Δ, challenging exclusion of ♀'s on EP grounds.

(a) HELD: Three issues:
1) VMI failed to show **exceedingly persuasive justification** for excluding ♀'s, thus violating EP.
3) Use of “substantive comparability evaluation” was plain error.
(b) **Reasoning:**

1) **Diversity as purpose** unpersuasive.
2) Ginsburg stresses “unique educational opportunities, alumni, prestige.
3) At least some can meet the physical challenges.
4) can’t earn an engineering degree at alternative college, only BA.
5) Inherent differences can’t be used to “create or perpetuate the legal, social, and economic inferiority of .”
6) VA has historical dragged its feet on issues of integrating educ by gender.

(c) **CONCUR, Rehnquist:** doesn’t like exceedingly persuasive std.

(d) **DISSENT, Scalia:** Ct is resisting clarifications and limits on std of review, too malleable. Wants to limit strict scrutiny to short list of fundamental rights that have been traditionally been protected.

D. **Classifications Dealing with Family Law**

(1) **Parham v Hughes** (1979) (PLURALITY, Stewart) – Upholding GA statute which prohibited father of child from suing for wrongful death since father had the ability to go through legal legitimation process but failed to do so.

(a) HELD: discriminates only between class of father who have legitimated and those who have not.

(b) DISSENT, White: why aren’t mothers also required to legitimate prior to suing circularity.

(2) **Kirchberg v Feenstra** (1981) – Struck down LA statute that permitted husband, as “head and master” of jointly owned property, to dispose of it without wife’s consent.

(a) HELD: facial gender discrimination. Statute doesn’t substantially further an important govt interest.

(b) = wife could have avoid loss of house through an alternative legal action.

(c) However, absence of insurmountable barrier does not save statute.

(d) Burden on party wanting to uphold the statute to advance an exceedingly persuasive justification.

(3) **Caban v Mohammed** (1979) – Struck down NY statute only requiring consent of mother and not father in adoption of illegitimate child.

(a) HELD: Classification of mother and father is not a fundamental difference.

1) Overbroad generalization.

2) EP clause would permit withholding of veto if father failed to participate in child’s life.

(b) **DISSENT, Stevens:** There is a true difference b/t mother (ID known at birth) and father (ID can be in doubt for a long time). This is just an exceptional case, which is bad from perspective of equality judgment.

(4) **Lehr v Robertson** (1983) – Upholding NY statute whereby mother could veto adoption but father was notified of proceeding only after sending claim of paternity

E. **Benign Gender Classifications and Discrimination against Men.**

(1) **Califano v Goldfarb** (1977) (plurality) – Intermediate scrutiny even if reverse discrimination – SS system would only pay widower’s survivor’s benefits if could establish that relied more than 50% on wife’s income to support household. Sued under 5th amd. Lower ct. held unconstitutional.

(a) HELD: Statutory scheme paying benefits to widows automatically, but to widowers only if they prove support, violates EP.

1) Party denied EP is the deceased who paid premiums but spouse gets no benefits therefrom.

2) Intent of system is based on antiquated stereotypes.

3) Actual purpose is to protect family; not to shelter historically disadvantaged group.

(b) **CONCUR, Had the gov’t been able to justify presumption with facts, scheme would have been valid; doesn’t buy that decease is person whose rights are being violated.

(c) **DISSENT, Rehnquist:** focus on the recipient, who are historically disadvantaged.

(2) **Califano v Webster** (1977) – calculation for social security benefits permitted ’s to exclude low earning years, thus benefits. Trial ct held it a violation of EP of the 5th amendment.

(a) HELD: Benefit calculation justified in terms of longstanding economic disparity between and .

1) done to directly compensate for past econ discrimination.

2) Leg Hx suggest that benefit was not accidental byproduct of stereotyping.

(b) **CONCUR, Burger:** Validity of statutory scheme should not hinge of offensive (invalid) or benign (valid).

VII. **Other EP Classifications**
A. NOTE: Factors affecting suspect class:
   (1) history being a discrete, insular minority
   (2) history of discrimination
   (3) immutable characteristics.

B. Alienage

   (1) Sugarman v Dougall (1973) – NY statute prohibited aliens from taking competitive civil
       service exams, though could still serve in other policy making positions through election or
       appointment.
       (a) HELD: A state may not refuse all service positions on the basis of alienage alone →
           STRICT SCRUTINY.
           1) Aliens have a Hx of being a discrete and insular minority.
           2) Because strict scrutiny, state:
              a) has burden of showing that classification advances a compelling state interest.
              b) class must be narrowly tailored.
       3) Competing loyalties is an important interest, but over and under inclusive
           Janitors covered, policy makers are not.
       (b) DISSENT, Rehnquist: Unlike race, alienage should not trigger strict scrutiny. Just rational
           basis.

C. Classifications based on Wealth

   (1) San Antonio Ind Sch Dist v Rodriguez (1973) – Edgewood = Dist poor in property, poor in median
       income, had low per pupil spending ($356); cf Alamo Hts = $594 per pupil. Challenged on EP
       grounds, which Dist ct upheld.
       (a) HELD: (1) Wealth is not a suspect category under the EP clause; and (2) education is not a
           fundamental interest.
           1) WEALTH
              a) EP doesn’t require absolute equality or precisely equal advantages.
              b) No strict scrutiny because: Poor don’t have hx of unequal treatment, not politically powerless.
           2) EDUCATION
              a) π try to bootstrap education to voting and 1st amendment rights.
              b) Court institutional incompetent to deal with local issue of educ
              c) Slippery slope → “all local fiscal schemes” might fail.
              d) No clear that better educ result from more $.$
              e) Industrial / Comm can prop up tax base in poor districts.
       (b) DISSENT, Marshall: We should rely on a sliding scale whereby the closer the infringed
           interest is to a fundamental right, the more rigorous the scrutiny. Moreover, it is hard to
           say that someone has “enough” education when another group gets more.

D. Other Disadvantaged Groups

   (1) Skinner v OK (1942) – Fundamental Interest →
       Invalidates state law whereby criminal with three convictions related to moral turpitude can be
       sterilized by State.
       (a) “Marriage and procreation are fundamental to the very existence and survival of the race.”
       (b) Larceny / embezzlement → crimes of same amounts have dramatically different outcomes
       (c) Cf. Buck v Bell (1927) (Holmes) → upholding sterilization of insane, low IQ inmates →
           “Three generations of Imbeciles are enough.”

   (2) City of Cleburne v Cleburne Living Center (1985)
       Mentally retarded should not be subjected to scrutiny:
       (a) Institutional incompetence raises largely technical questions better dealt with by leg
           (b) Leg response on this front, both nationally and on state level, belie antipathy.
       (c) Thus not politically powerless
       (d) Slippery slope, lots of other groups with immutable characteristics.
       (e) DISSENT, Marshall, Brennan: What about social darwinism and eugenics?

   (3) Illegitimacy → though rational basis, effectively a more heightened inquiry occurs.
       (a) Levy v LA (1968) → invalidating statute that
excluded non-marital child from wrongful death statute.

(b) *Gomez v Perez* (1973) → failure to provide support rights for illegitimate child violation of EP.

(c) But see *Mathews v Lucas* (1976) → upholding denial of SS survivor’s benefits for certain non-marital children.

(4) *Mass Bd of Retirement v Murgia* (1976) → Elderly subjected to rational basis analysis. Marshall’s dissent says that categories for strict scrutiny needs to be enlarged occasionally.

(a) No hx of purposeful unequal treatment

(b) No unique disabilities put upon them due to stereotypes

(c) Not discrete and insular → “a stage each of us will reach.”

(5) *Schweiker v Wilson* (1981) → avoiding question of whether mentally ill are a discrete and insular minority.

E. Voting Cases

(1) *Lassiter v Northampton Cty Bd of Elec* (1959) → Education minimum upheld → upheld NC statute that requires that citizen be able to read any part of the state Constitution in English → “A State might conclude that only those who are literate should exercise the franchise.”

(2) *Reynold v Sims* (1964) → Anti-dilution → One person / One vote → Preceded by *Baker v Carr* (1964), which held that apportionment was a justiciable issue.

(a) “The right of suffrage is a *fundamental right* in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote *must be carefully and meticulously scrutinized.”

(b) BO: Ruling ends political logjam → affected drawing of US House congressional lines.

(c) Cf. *Lucas v Forty-Fourth General Assembly* (1964) – Struck down Colo partial reapportionment even though voters rejected scheme whereby both chambers of state legislature would be reapportioned.


(a) Overturns *Breedlove* (1937), distinguishes *Lassiter*, relies on *Reynolds*.

(b) Wealth, like race, creed, color, is irrelevant to one’s ability to participate intelligently in electoral process.

(c) Rejects Rational Basis review in this context.

(4) *Kramer v Union Free School Dist No 15* (1969) – *Strict scrutiny for voting rights* – Strikes down NY law that requires that voters either (1) have kids in school district; or (2) own or lease property in district.

(5) *Gordon v Lance* (1971) Supermajority okay → upholding W Va law that required 60% vote in incur bond indebtedness.

(6) *City of Mobile v Bolden* (1980) – *At large okay* – At large voting system, not created to discriminate against a minority’s voting power is not unconstitutional. EP, not voting = fundamental right.

(a) Submersion of black vote is contested issue.

(b) No inherent right to proportional representation.

(c) DISSENT, Brennan → discriminatory impact is all that is need for *B* to prevail.

(7) *Davis v Bandemer* (1986) – Republican Controlled legislature of IN passed a gerrymandered reapportionment plan designed to protect the Republican majority.

(a) HELD: Redistricting done to preserve as many safe seats as possible for the party in power is not inherently unconstitutional.

(b) BUT... Only when it is shown that a political system continually degrades the ability of a group to have any meaningful political participation will the system constitute an EP violation.

(8) *Shaw v Reno* (1993) – *Strict scrutiny for racial gerrymandering* – Racial gerrymandering is only legal if narrowly tailored to further a compelling state interest, even if facially race neutral.

(a) Racial classifications carry particular danger

(b) May Balkanize into competing factions.

F. Access to Justice System

(1) *Griffin v IL* (1956) – *Trial transcripts* in criminal proceedings, a state that grants appellate review may not discriminate on basis of wealth. Thus indigent must be given a transcript of lower ct case as a matter of right, irregardless of whether error is of constitutional magnitude.

(2) *Douglas v California* (1963) – *Wealth as EP*
basis – right to assistance of counsel for a mandatory permissive appeal.

(a) Denial of counsel based on econ circumstances is a type of invidious discrimination which violates the equality demanded by 14th Amd.

(b) Can’t screen and provide lawyers only on potentially meritorious appeals.

(3) Boddie v Conn (1971) – Divorce → State has monopoly on marriages and divorces. Thus, denial of access through filing fee = denial of opportunity to be heard → DP Clause. Marriage is special.

(a) CONCUR, Douglas → rely on EP instead

(b) CONCUR, Brennan → Marriage is not valid distinction. Lack of wealth can deny lots of people recourse to courts.

G. Travel & Welfare

(1) Shapiro v Thompson (1969) – Travel is a fundamental right – Strikes down law in several states that required a waiting period (usually one year) for a new resident of state to qualify for welfare benefits.

(a) HELD: “When classification touches on fundamental right of interstate movement, its constitutionality must be judged by the stricter std of whether it promotes a compelling state interest.

1) No particular source in Con, just present in Court’s jurisprudence. Guest (1966).

2) Rejects budgetary predictability rationale

3) Rejects bigger benefits rationale since could move for better educ benefits.

(b) DISSENT, Warren: Should be rational basis; Congress restricts right of travel all the time.

(c) DISSENT, Harlan: Court holding that statutory classifications that affect fundamental rights will be struck down under EP unless justified by a compelling state interest.

1) Would balance competing interests under DP clause of 5th Amendment.

(2) Zobel v Williams (1982) – Penalizing the right to travel – struck down law distributing monies for nat’l resources to citizens based on longevity → “not a legitimate state purpose.”

(3) Dandridge v Williams (1970) – Econ and Social Welfare = Rational basis. Upholds $250 limit on family welfare benefits, regardless of family size or computed need.

(a) Don’t want to bring back substantive due process. Williamson v Lee Optical Co.

(b) HELD: In area of economics and social welfare, State’s action survives EP if:

1) Rationally based

2) and free from invidious discrimination.

(c) DISSENT, Marshall and Brennan: Two classes → small, where needs are met, and large, who are inadequately served.

(4) Cases since Dandridge have consistently applied rational basis to all classifications in welfare litigation. But see Moreno, supra, where restrictions on welfare for non-relatives was struck down under rational basis review.

VIII. Substantive Due Process

A. The Incorporation Controversy

(1) Barron v Baltimore (1833) – Rights in first 8 amendments do no apply to the states.

(2) Twining v NJ (1908) – Natural law theory on substantive due process.

(3) Palko v Conn (1937) – Justifying partial absorption based on fundamental principles of liberty and justice.

(a) 5th Amd right to self-incrimination not at that level.

(b) Substantive due process existed, however.


(a) DISSENT, Douglas: Argues for total incorporation.

1) Rejects natural law theory of Twining.

2) Wants to overturn Barron.

(b) CONCUR, Frankfurter: attacked total incorporation theory of Douglas.

1) “Accepted notion of justice” should restrain “the idiosyncracies of a merely personal judgment.”

2) Also defer to states.

(5) KADISH: Limitations on incorporation, flexible due process has taken two forms:

(a) Deference to states

(b) Look for outside indices of moral judgment → policy of govt organs, federalist papers, other common law countries.

(6) Duncan v LA (1968) – 6th Amend right to jury trial now applicable to the states.

(7) Only rights still not incorporated: second, third, fifth (grand jury indictment), and seventh amd.

B. Economic Interests, Problem of Retribution

(1) Road to Lochner
(a) *Dred Scott v Sanford* (1857) → suggesting that law that deprived slaveholder of his property by crossing border *hardly due process of law*
(b) *Munn v IL* (1877) → Maximum charges on grain okay under due process clause because business is affected with a *public interest*
(c) *Railroad Commission Cases* (1886) → Upheld regulations of rates, but *Taking warning* → “power to regulate is not the power to destroy”
(d) *Santa Clara Cty v Southern Pac RR* (1886) → Corporation is a “person” under DP clause
(e) *Allgeyer v LA* (1897) → (Peckham) Invalidated state statute requiring licensing of insurance underwriters. Constitutional protection to *freedom of K*, not just *physical restraint*.

(2) *Lochner v NY* (1905) (Peckham) → NY passed law that limited bakers workweek to 60 hours.
(a) HELD: Struck down law that limited workweek for bakers, citing *Allgeyer* for freedom of K in Constitution. *LIBERTY INTEREST* in 14th Amd.
1) Limits police powers that permit regulations on health, safety, morals, and general welfare of the public.
2) Doesn’t think law had anything to do with healthier bread or healthier working condition → striking down political deal.
3) *Slippery slope* → all professions regulated
4) Distinguishes *Holden v Hardy*, where it was permissible to limit miners’ workday
(b) DISSENT, Harlan: buys social science on health and welfare.
(c) DISSENT, Holmes: Law is product of a political struggle which we should loathe to interfere with it unless a rational person would think law interferes with fundamental principles as understood by the traditions of our people and our law.

(3) *Property rights = Fundamental rights* → support from *Corfield v Corwell* (1823), which was recognized by all justices who adjudicated Slaughterhouse → also, *1866 Civil Rights Act* expressly protected right of blacks “to make and enforce K [and to] purchase, lease, sell, hold and convey real and personal property.”

(4) *Muller v Oregon* (1908) → *Brandeis Brief* → Upheld state law limiting ♀’s workday to 10 hours if in factory, laundry, or mechanical establishment

(5) *Coppage v KS* (1915) → struck down law which made it illegal for employers to forgo any union involvement as a condition of employment.

(6) *Lochner’s Legacy* → *Lochner* was not bad because of judicial activism. Instead:
(a) gov’t inaction
(b) respect for existing distribution of wealth and entitlements
(c) common law baselaw
Thus, *Washington v Davis* and *Bakke* are legacy.

(7) *Bunting v Oregon* (1917) → upheld maximum workday for ♀ and ♀, overruling *Lochner* itself sub silento, but not substantiative DP doctrine.

(8) *Adkins v Children’s Hosp* (1923) → Invalidated statute on *minimum wages* for ♀, distinguishing *Muller*.

(9) *Nebbia v NY* (1934) → *Police power / rational basis limitation* → Upheld state statute which regulated the price of milk → Under DP doctrine, “a state is free to adopt whatever econ policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose.”

(10) *West Coast Hotel Co v Parrish* (1937) → upholding minimum wage law for ♀.
(a) overruling *Adkins*
(b) Unequal bargaining power / overreaching employers.

(11) *Day-Brite Lighting, Inc v Missouri* (1952) → upholding law authorizing employees to take four hours’ leave with full pay on election day, noting that “if our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decision.”

(12) *Public choice and the Allgeyer-Lochner-Adair-Coppage constitutional doctrine*.
(a) *US v Carolene Products* (1938) → upheld Filled Milk Act, despite evidence that it was product of special interest legislation that ↑ prices of milk and foisted unhealthy product of consumers.
(b) *Williamson v Lee Optical of OK* (1955) → Naked interest group legislation that eliminated opticians from eyeglass market
(c) *Ferguson v Skrupa* (1963) → eliminating debt-adjusting except for lawyers. “[Lochner] has long since been discarded.”

C. *Right to Privacy, Personhood, Family*

(1) RULE:
(a) *Economic* → Rational Basis
(b) *Social*, if *fundamental* right involved, then
strict scrutiny.

(2) *Meyer v NE* (1923) ➔ **DP Liberties** ➔ invalidated state law prohibiting the teaching of any modern language other than English in any public or private grammar school. DP = freedom from physical restraints + acquire useful knowledge, marry, establish home and bring up children, to worship God according to conscience, and other CL freedoms.

(3) *Pierce v Society of Sisters* (1925) ➔ Invalidated state statute requiring public school enrollment ➔ “unreasonably interfered with the liberty of parents and guardians to direct the upbringing and education of children under their control.”

(4) *Griswold v Conn* (1965) (Douglas) ➔ Conn statute prohibited any drug, medicinal article, or instrument for the purpose of preventing contraception. π gave counseling to married people.

(a) HELD: Right to privacy, though not explicitly set forth in Bill of Rights, is part of penumbra of rights formed by other explicit guarantees.
   1) State regulation that sweeps unnecessarily too broad will be struck down. Ostensibly law trying to discourage extramarital sex
   2) Distilled from 1st (association), 3rd (no peacetime quartering of soldiers), 4th (searches and seizures), 5th (self-incrimination), and 9th (un-enumerated rights are reserved to the people)
(b) CONCUR, Harlan: Marital privacy comes directly from DP clause, as it is integral to LIBERTY ➔ not distilling from other rights.
(c) CONCUR, Goldberg: 9th and clarifies that rights enumerated are not exhaustive. Marital privacy is fundamental and can’t be infringed
(d) CONCUR, White: Fails Rational basis test ➔ causal connection of conception and extramarital sex is too tenuous.
(e) DISSENT, Black: 9th Amd and DP have no place as a basis for evaluating wisdom of state laws.
(f) DISSENT, Stewart: No procedural DP issues, not unconstitutionally vague, 9th and limiting feds govt, no mention of privacy in constitution.

(5) *Eisenstadt v Baird* (1972) (Brennan) ➔ **Contraception for unmarried** – Invalidated statute that denied contraception to unmarried couples.

(a) Failed rational-basis, since prevention of disease made deterrence of premarital sex an unrealistic goal.
(b) Unreasonable to presume that Mass gov’t wants to impose unwanted child as punishment for misdemeanor fornication.
(c) Right of privacy (*Griswold*) is an individual right which can’t be limited to married people. Thus, EP violation is limit rights only to married people.
(d) Posner ➔ this decision shows that *Griswold* was based not on privacy but sexual liberty.

(6) *Carey v Population Services* (1977) – Invalidated NY law that made it illegal for anyone but a licensed pharmacist to distribute contraceptives.

(a) “Constitution protects individual decisions in matters of child-bearing from unjustified intrusion by the State.”
(b) Law valid only if:
   1) justified by a compelling state interest
   2) Narrowly drawn to achieve that objective.

(7) *Roe v Wade* (1973) – Challenge to TX statute making abortions illegal except to save the life of the mother.

(a) HELD: Right of privacy under 14th amendment concept of LIBERTY (or 9th amendment reservation of rights to the people) encompasses a 2nd decision whether or not to terminate her pregnancy.
   1) Statute affecting a fundamental right must be justified by a compelling State interest narrowly drawn to achieve that goal.
   2) Fetus not a necessarily a person within meaning of Constitution.
   3) **Right of 2nd is not absolute** ➔ state has legitimate interest in preserving her life and the potentiality of life.
      a) 1st trimester, mortality from abortion lower than childbirth
      b) 2nd trimester, interest in mother’s life permits regulating doctors / facilities.
      c) After viability of fetus, State may proscribe abortion, except where necessary to save mother’s life.
   4) Lack of distinction between early and late term means that TX statute sweeps too broadly.
(b) CONCUR, Stewart: This is just Substantive Due Process in the tradition of *Lochner*.
(c) CONCUR, Douglas: Nothing to do with substantive due process ➔ instead, liberty means lots of freedoms unobstructed by state
(d) DISSENT, White: Improvident and extravagant exercise of judicial review which has not support in Constitution.
(e) DISSENT, Rehnquist: Rational-basis test is
appropriate judgments are better left to legislatures.

(8) Privacy = Meyer-Pierce-Griswold-Eisenstadt

D. Post-Roe Abortion Issues

(1) *Maher v Roe* (1977) – Upheld state statute providing Medicaid benefits only to childbirth and medical necessary abortions.
   (a) Wealth is not a suspect classification.
   (b) Distinguishes *Griffin* and *Douglas* because state has monopoly on criminal justice.
   (c) Right protects only from *unduly burdensome interference* with abortion.
   (d) *Shapiro* and *Maricopa* dealt with right to travel
   (e) Constitution does not provide judicial remedies for every social and economic ill.
   (f) DISSENT, Brennan and Marshall:
      1) “Regulation impinges on right of privacy by bringing financial pressures on indigent that force them to bear children they would not otherwise have.”
      2) Cf. statute invalidated for denying unemployment benefits to Jew who couldn’t work on Sabbath.

(2) *Harris v McRae* (1980) – Upheld Hyde Amendment, which prohibited use of federal Medicaid funds “to perform abortions except where the life of the mother would be endangered if carried to term,” or rape / incest
   (a) Congress has not “invaded a substantive constitutional right, nor enacted leg to the detriment of a suspect class” thus, strict scrutiny is inappropriate.
   (b) DISSENT, Brennan: Poverty and unequal subsidization interferes with choice.


(4) *City of Akron v Akron Center for Reproductive Rights* (1983) – Invalidates city ordinance which requires:
   (a) 2nd trimester abortions be performed in hosp → adds unnecessary costs
   (b) Informed consent by a physician, including information about birthing and adoption → 1) designed to persuade, not inform. 2) adds more $$ to cost.
   (c) 24 hour waiting period → no legitimate state interest in “arbitrary and inflexible waiting period.”

(5) *Planned Parenthood v Danforth* (1976) –

Invalidated MS statute requiring the prior written consent of spouse of ♀ prior to seeking abortion unless certified by doctor as necessary to preserve the life of the mother. Also invalidated provision that required parental consent for ♀ under the age of 18.
   (a) *Bellotti v Baird* (1979) – invalidated statute that required both parents consent if > 18.
   (b) Bee see *Planned Parenthood v Ashcroft* (1983) – Upheld parental consent requirement that had sufficient alternative procedure that passed muster under *Bellotti*. Can go to a court to convince them of her maturity.
   (c) *HL v Matheson* (1981) – Upheld UT statute that required notification if ♀ is dependent and makes not showing / claim of maturity.

(6) *Colautti v Franklin* (1979) – *Fetal viability* – Invalidated PA statute that required doctor to determine viability of fetus and if potentially viable, take measures to preserve life and health of the fetus.
   (a) But see *Planned Parenthood v Ashcroft* (1983) – Upholding MS statute that required 2nd doctor in all post-viability abortions.

(7) *Thornburgh v American Coll of ObGyns* (1986) (5-4) – struck down PA statute that required extensive info be given to mother, required use of abortion technique that would provide most protection to life of fetus in post-viability abortions, and required presence of 2nd doctor.
   (a) Distinguishing *Ashcroft* because of no exception for 2nd doctor when ♀’s endangered

   (a) No quibbling over “life begins at conception” in preamble.
   (b) Ban on public employees and use of public facilities to perform abortions.
   (c) Testing for viability if doctor has reason to believe fetus is > 20 weeks; argues that trimester system should be abandoned since state is regulating now at point of viability.
   (d) “Stare decisis ... has less power in constitutional cases, where ... this Ct is the only body able to make needed changes.”
   (e) DISSENT, Blackmun, Brennan, and Marshall: Roe “… survived but was not secure.”

(9) *Planned Parenthood of SE Penn v Casey* (1992) – (O’Connor) Penn Abortion Control Act required:
   (1) information designed to persuade ♀ against having abortion; (2) 24 Hour waiting period; (3) Consent of one parent of judicial order before a
minor could get an abortion; (4) Married ♀ must sign waiver averring consent of husband, or that she would be physically harmed if she sought consent; (5) a public report on every abortion, detailing info on facility, patient (still confidential), doctor, steps to comply with Act; (6) the first four have waiver provision in medical emergency.

(a) HELD: A law is unconstitutional as an **undue burden** on a ♀’s right to an abortion before viability, if the law places a substantial obstacle in the path of a ♀ seeking to exercise her right.

1) “Liberty finds no refuge in a jurisprudence of doubt” ⇒ thus must maintain Roe.
2) Roe is neither unworkable or based on outdated assumptions.
3) At viability, state’s interest in protecting fetal life outweighs mother’s decision-making interest.
4) Roe = A state may not prevent a ♀ from making the ultimate decision to terminate her pregnancy before viability. DILUTED.
5) Trimester system ignored state interests.
6) Cost and delay of 24 waiting period is not unreasonable and survives facial challenge
7) Only Consent of spouse requirement = undue burden.

(b) CONCUR-DISSENT, Stevens: ♀, unlike fetus, has constitutional right to bodily integrity and personal and private matters. Info and waiting period requirements violate 14th Amendment.

(c) CONCUR-DISSENT, Blackmun: Right to an abortion should remain fundamental and thus subject to strict scrutiny. Reporting requirement does not further maternal health. Fearing harassment, doctor will cease offering abortions. None of above would survive under strict scrutiny. Right grounded in privacy.

(d) DISSENT, Rehnquist: Roe was wrongly decided, leading to confusion, and should now be overturned.

1) New **Undue Burden test** cannot be justified by stare decisis.
2) Judicial integrity is enhanced when it repudiates wrongly decided cases.
3) No all-encompassing right to privacy in 14th amendment.
4) Abortion is liberty right protected by due process, but can be regulated under the rational-basis std.

(e) DISSENT, Scalia: Limits on abortion should be decided democratically.

1) Roe failed to produce settled body of law
2) No stare decisis in chucking trimester system.

3) New **Undue Burden test** is meaningless in application and accord limitless discretion to judges.

(10) **Stenberg v Carhart** (2000) – Partial Birth Abortions – Physician who performed abortions in Nebraska brought suit on behalf of himself and his patients, challenging constitutionality of state’s banning of partial birth abortions.

(a) HELD: (1) statute was unconstitutional because is lacked any exception for the preservation of health of the mother; and (2) statute was unconstitutional because it applied to D&E procedure as well as D&X procedure, and thus imposed undue burden on ♀’s ability to choose D&E abortion, thereby unduly burdening the right to choose abortion itself. Court sets forth three underlying principles:

1) **Before viability**, the ♀ has a right to choose to terminate the pregnancy;  
2) A law designed to further State’s interest in fetal life which imposes an undue burden on the ♀’s decision before fetal viability” is unconstitutional;  
3) **Subsequent to viability**, the State in promoting its interest in potentiality of life may, if its chooses, **regulate and even proscribe**, abortion EXCEPT where it is necessary, in appropriate medical judgement, for the preservation of the life or health of the mother.

(b) Statutory language covers both D&E and D&X; interpretation offered by AG cannot be given controlling authority.

(c) CONCUR, Steven: both procedures equally gruesome. That some legitimate state purpose is furthered by banning one is irrational.

(d) CONCUR, O’Connor: If limited to D&X and health exception added, then a different case.

(e) CONCUR, Ginsburg: quoting Judge Posner, “If a statute burdens constitutional rights and all that can be said on its behalf is that it is the vehicle that legislators have chosen for expressing their hostility to those rights, the burden is undue.”

(f) DISSENT, Scalia: Undue burden is simply a value judgment, destine for disagreement among justices. Distinction is grounded in neither text nor tradition, but pure policy. **Casey** should be overruled.

(g) DISSENT, Kennedy: No statutory construction issue.

(h) DISSENT, Thomas: Majority decision has not historical or doctrinal pedigree exception
for the justices own philosophical views on abortions. Nebraska ought to be able to ban a procedure that borders on infanticide. Constitution clearly doesn’t compel otherwise.

E. Family Privacy Interests

(1) Moore v City of East Cleve (1977) (Plurality, Powell) – Court invalidated a city ordinance limiting occupancy of any dwelling unit to members of the same family, narrowly defined. Grandmother living with son, and two grandsons of different parents violated ordinance. Violated DP Clause.
   (a) Cf Belle Terre v Boraas, which ban unrelated persons but permitted those related by blood.
   (b) “East Cleveland, by contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself.”
   (c) “This Court has long recognized that freedom of choice in matters of marriage and family life is one of the liberties protected by the DP clause” – Meyer, Pierce, Roe, Griswold, Skinner.
   (d) Ordinance affects a fundamental interest. Although state proffers legitimate interests, ordinance is not narrowly tailored to achieve them.
   (e) “Appropriate limits on substantive due process come from careful ‘respect for the teaching of history and solid recognition of the basic values that underlie our society,’ [Griswold (Harlan concurring)]. Sanctity of family protected because it is deeply rooted in our tradition.
   (f) DISSENT, Rehnquist: Freedom of association only at stake when 1st amendment implicated.
   (g) DISSENT, White: Though DP extends to family, right merely affects one suburb.

(2) Lyng v Castillo (1986) – Effect of Welfare on Family non-fundamental – Upheld provision of Food Stamp Act that treated parents, children and siblings living together as a single household whether or not they buy and prepared food together. In contrast, unrelated people doing the same could each qualify. No a fundamental right (interfering with family) subject to strict scrutiny.

(3) Zablocki v Redhail (1978) – Marriage is fundamental right – Invalidated on EP grounds a WI statute that prohibited marriage by persons having children who they were neither supporting or can ensure will not become public charges.
   (a) HELD: “When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”
      1) Directly and substantially interferes with marriage right.
      2) can effect same outcome through other means.
   (b) CONCUR, Stewart: Should be struck down under Substantive Due Process because it interfere with fundamental liberty of marriage which is deeply-rooted in our traditions.


(5) Michael H v Gerald D (1989) – Upheld Cal statute which provided conclusively presumed that child born to a married couple was product of marriage, thus no visitation rights for claimed genetic father.
   (a) Scalia Footnote: When defining protected interest, “we refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified ... A rule of law that binds together neither text nor any particular, identifiable tradition, is no rule at all.”
   (b) DISSENT, Brennan: In a highly pluralistic society, “liberty” must include the freedom not to conform. If tradition is the touchstone, then DP offers no protection from majority power.

F. Homosexuality

(1) Bowers v Hardwick (1986) – Bowers and other state officials appealed decision finding GA sodomy law unconstitutional in that it violated Hardwick’s (π) fundamental rights, since it applied to consensual, homosexual sodomy.
   (a) HELD: Constitution does not grant a fundamental right to engage in consensual homosexual sodomy.
      1) Rights qualifying for heightened scrutiny include those fundamental liberties that are “implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” Palko
      2) Ct is closest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language of design of the Constitution.
3) Passes rational basis test if merely is a statement that homosexuality is immoral and unacceptable.

(b) CONCUR, Burger: Condemnation of sodomy have ancient roots in our historical tradition.

(c) CONCUR, Powell: Possible 8th amendment violation due to possible 20 year sentence.

(d) DISSENT, Blackmun: Case is not about homosexual sodomy but “right to be left alone” and right to self-identity and control over intimate associations with others.

1) Why is he quoting Holmes dissent in *Lochner* regarding potential that we will confuse what is natural, familiar with what is constitutional?

2) Occur in his own home!

(e) DISSENT, Stevens: “The essential ‘liberty’ that animated the development of the law in cases like *Griswold, Eisenstadt, and Carey* surely embraces the right to engage in nonreproductive, sexual conduct that others may consider offensive or immoral.” But saves his reading by arguing that statute is unconstitutional as applied to married couples and can’t be save by limiting its application to homosexual.

(2) *US Army v Watkins* (9th 1990) – π served 14 years of distinguished service in the Army, never concealing his homosexuality. Following new regulations, Army attempted to discharge π though his sexuality did not affect his job performance.

(a) HELD: Laws discriminating against homosexual orientation are subject to strict scrutiny.

1) Suspect group = purposeful discrimination amounting to gross unfairness. Determined if:
   a) whether trait that defines class bears no relation to ability to contribute to society.
   b) whether prejudices and stereotypes saddle the class
   c) whether the trait is immutable.

(b) DISSENT, Rehnquist: Homosexuality can’t be a suspect class because it involves conduct that can be criminalized.

(3) *Steffan v Perry* (DC 1994) – During senior year at Naval Academy, Steffan admitted his homosexuality. On that basis alone, Navy recommended Steffan’s separation from the Academy pursuant to regulations banning homosexual conduct. Upheld by district ct.

(a) HELD: Military discrimination on the basis of homosexual status is a rational gov’t objective.

1) π argues that homosexual status is different that homosexual conduct.

2) Navy may rely on presumptions to avoid administratively costly addition of proof.

3) Cf. Same as *Murgia*, where > 50 y.o. police officer could be forced out because of presumptions of physical fitness.

(b) DISSENT, Wald: It is inherently unreasonable to equate admission of homosexual identity with conduct. Suggests that gays, unlike heterosexuals, are unable to control selves.

(4) *Romer v Evans* (1986) – SC struck down a Colo anti-gay initiative which prohibited State and its subdivision from enacting any laws that gave gays or lesbians a protected status:

(a) HELD: Unconstitutional under the 14th Amendment.

1) Colo law gives lots of protections to classes that are not subjected to heightened scrutiny.

2) “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate govt interest.” *Moreno*.

3) Up until then, *Bowers* was interpreted as permitting discrimination against gays.

4) Rejects administrative convenience and freedom of association state interests “no identifiable legitimate purpose or discrete objective.”

(b) DISSENT, Scalia: Bootstrap argument If homosexual sodomy can be a crime, why can’t it be basis for a ban on special treatment?

1) Homosexuals are entitled to use legislative process to reinforce their moral sentiments

2) But Amd 2 was designed to counteract geographic concentrations and disproportionate power of homosexuals by (1) resolving controversy at statewide level; and (2) making election single issue contest for both sides.

G. Right to Die

(1) *Cruzan v Director, Ms Dept of Health* (1990) – ξ was injured in a car accident and plugged into vegetative state. Relatives wanted state to cease giving her food, but state ct imposed clear and convincing evidence that Cruzan would request this herself if she were competent.
IX. State Action Doctrine

(1) Civil Rights Cases (1875) – “The 14th amd is prohibitory in its character, and prohibitory upon the states. Individual invasion of individual rights is not the subject matter of the amendment.”

(a) Harlan, Dissent → artificial and too narrow a reading → 14th amd has affirmative character.

(b) Modern Court has read case to establish “essential dichotomy between deprivation by the State, subject to scrutiny under the 14th amd, and private conduct against which the 14th amd offers no shield.” Jackson v Metropolitan Edison Co (1974).

(2) DeShaney v Winnebago County (1989) – Pure Inaction – Divorced father has custody of son. Despite reports of abuse and suspicious injuries, social workers who were alerted to problem, do nothing. Son is beaten to point of permanent brain damage. Mother sued on theory that her son’s 14th amd liberty interest has been deprived by state inaction.

(a) HELD: Due process clause is phrased as to limit State’s power to act, not as a guarantee of certain minimal levels of safety and security

1) It is intended to protect people from the State, not to ensure that the State protected them from each other.

2) No affirmative right to govt aid, even where such aid may be necessary to secure interest which the govt itself may not deprive the individual.

(3) Shelley v Kraemer (1948) – Gov’t Neutrality – Blacks purchased homes that had restrictive covenants. Neighbors sued to enforce agreements.

(a) HELD: Action of state courts and judicial officers in their official capacities is to be regarded as state action within meaning of 14th amd.

1) When state offers it full coercive power to deny citizens equal enjoyment of property rights, 14th amd has been violated.

2) Rights under 14th amd are personal rights

(4) Burton v Wilmington Parking Authority (1961) – State subsidy of private conduct – When a state leases property, proscription of 14th amendment apply to lessee as certainly as if they were binding covenants written into the lease itself. CONCUR, Stewart: State court that enforces DE statute that permits restaurant owner to refuse service to a customer whom would be offensive to a majority
of its customers, when that distinction is based on race, is violative of the 14th amendment.

(5) *Moose Lodge No. 107 v Irvis* (1972) – State Licensing and authorization – Mere licensing for liquor is too attenuated a state action to qualify as a 14th amd violation. DISSENT, Brennan: where an entity was become sufficiently intertwined with state regulations, qualifies a state action.

(6) *Marsh v Alabama* (1946) – Public Function Doctrine – When a private entity replaces all the functions and activities which normally belong to the state or the municipality, constitutional restrictions apply.
I. Introduction ........................................ 1
   A. What is Equality (Thomson) (1)

II. Slavery and the Constitution ............. 1
   A. Three references in Constitution (1)
   B. Slavery Cases (1)
      State v Post (1845) (1)
      Prigg v Pennsylvania (1842) (1)
      Johnson v M’Intosh (1823) (1)
      State v Mann (NC 1829) (2)
      Dred Scott v Sandford (1857) (2)
   C. Reconstruction (2)
      Federalist No. 28, Hamilton (2)
      13th Amendment (2)
      Civil Rights Act of 1866 (2)
      14th Amendment (2)
      15th Amendment (2)
      Judicial Reaction (2)
      Slaughterhouse Cases (1873)
      US v Cruikshank (1975)
      Strauder v W Va (1879)
      US v Harris (1882)
      The Civil Rights Cases (1882)
      Ex Yarbrough (1884)
   D. Post-Reconstruction (2)
      Plessy v Ferguson (1896) (2)
      Berea College v KY (1917) (3)
      Buchanan v Warley (1917) (3)

III. Education, Race, and Constitution ...... 3
   A. Early litigation (3)
      Missouri ex rel Gaines v Canada (1938) (3)
      Sipuel v Bd of Regents (1948) (3)
      Sweatt v Painter (1950) (3)
      McLawrin v Okla (1950) (3)
   B. Brown decisions (3)
      Brown I (1954) (3)
      Public Accommodation cases (3)
      Bollings v Sharpe (1954)
      Holmes v Atlanta (1955)
      Baltimore v Dawson (1955)
      Brown II (1955) (3)
   C. Southern School Desegregation (3)
      Southern Manifesto – 102 Cong Rec H3948, 4004
      (Mar 12 1956) (3)
      “Freedom of choice” plans (3)
      Briggs v Elliot (E D SC 1955) (3)
      Cooper v Aaron (1958) (4)
      Watson v Memphis (1963) (4)
      Goss v Bd of Educ (1963) (4)
      Griffin v County School Bd (1964) (4)
      Norwood v Harrison (1973) (4)
   D. Collapse of Southern Segregation (4)
      Green v County School Bd (1968) (4)
      Monroe v Bd of Comm (1968) (4)
      Swann v Charlotte-Mecklenburg (1971) (4)
   E. Northern Deseg and Limits on Duty (4)
      Keyes v. School District No. 1, Denve (1973) (4)
      Milliken v Bradley (1974) (4)
      Cf. Hills v Gautreaux (1976)
      Milliken II (1977) (4)
      Jenkins II (1995) (5-4) (4)
      Pasadena Bd of Educ v Spangler (1976) (5)
      OK City Public Schools v Dowell (1991) (5)
      Freeman v Pitts (1992) (5)
      Bazemore v Friday (1986) (5)
      US v Fordice (1992) (5)

IV. Modern Equal Protection – RACE .... 5
   A. Race-Specific that Expressly Disadvantage
      Strauder v W. Va (1879) (5)
      Korematsu v US (1944) (5)
      US v Caroline Products (1938) (5)
B. Disparate Impact on Race (5)
   Washington v Davis (1976) (5)
   Yick Wo v Hopkins (1886) (6)
   Gomillion v Lightfoot (1960) (6)
   Hunter v Underwood (1985) (6)
   EP in jury context (6)
      Batson v KY (1986)
      Powers v Ohio (1991)
      Edmondson v Leesville Concrete (1991)
      Hernandez v NY (1991)
      Georgia v McCollum (1992)
   Racially motivated classifications that are not strictly
   scrutinized (6)
      Palmer v Thompson (1971)
      Bush v Orleans Parish School Bd (E D La 1960)
      Mayor of Philadelphia (1979)
      Mt Healthy (1977)
   Arlington Hts v Metro Housing Dev Corp (1977) (6)
   McClesky v Kemp (6)

C. Facially Neutral Classifications (6)
   Loving v Virginia (1967) (6)
   Hunter v Erickson (1969) (7)
   James v Valtierra (1971) (7)
   Crawford v Bd of Educ (1982) (7)

D. Affirmative Action (7)
   Bakke v U of Cal Davis (1978) (7)
   Fullilove v Klutznick (1980) (7)
   City of Richmond v JA Croson Co. (1989) (7)
   Hopwood v State of Texas (5th 1996) (7)

V. Rational Basis Review ................. 8
   A. Overview (8)
   POLICY (8)
   Blackletter Law (8)
   B. Rational Basis Cases (8)
   New York Transit Authority v Beazer (1979) (8)
   New Orleans v Dukes (1976) (8)
   Railway Express Agency v NY (1949) (8)
   Williamson v Lee Optical (1955) (8)
   Minnesota v Clover Leaf Creamery Co (1981) (8)
   City of Cleburne v Cleburne Living Center (1985) (8)

C. Purpose Review – Actual or Possible? (8)
   US Dept of Agriculture v Moreno (1973) (9)
   Lyng v Intl Union, UAW, UAAAIW (1988) (9)
   Zobel v Alaska (1982) (9)
   Allegheny Pittsburgh (1989) (9)
   Nordlinger (1992) (9)
   FCC v Beach Communications (1993) (9)
   Kassel v Consolidated Freightways Corp (1981) (9)

VI. Gender / Heightened Scrutiny .......... 9
   A. Historical Background (9)
      Bradwell v IL (1873) (9)
      Muller v Oregon (1908) (9)
      C/NY v Lochner
      Adkins v Children's Hospital (1923)
      Hoyt v Florida (1961) (9)
   B. Road to Intermediate Scrutiny (9)
      Reed v Reed (1971) (9)
      Frontiero v Richardson (1973) (9)
      Cleve Bd of Educ v LeFleur (1972) (9)
      Taylor v LA (1975) (9)
      Weinberger v Wiesenfeld (1975) (9)
      Stanton v Stanton (1975) (9)
      Kahn v Shevin (1974) (9)
      Geduldig v Aiello (1974) (10)
      Schlesinger v Ballard (1975) (10)
      Craig v Boren (1976) (10)
   C. Archiac & Overbroad Generalities v Real
      Differences (10)
VII. Other EP Classifications ............... 12
A. NOTE: Factors affecting suspect class: (12)
B. Alienage (12)
Sugerman v Dougall (1973) (12)
C. Classifications based on Wealth (12)
San Antonio Ind Sch Dist v Rodriguez (1973) (12)
Edwards v California (1941) (12)
D. Other Disadvantaged Groups (12)
Skinner v OK (1942) (12)
City of Cleburne v Cleburne Living Center (1985) (12)
Illegitimacy (13)
Mass Bd of Retirement v Murgia (1976) (13)
E. Voting Cases (13)
Lassiter v Northhampton Cty Bd of Elec (1959) (13)
Reynold v Sims (1964) (13)
Harper v VA State Bd of Elec (1966) (13)
Gordon v Lance (1971) (13)
City of Mobile v Bolden (1980) (13)
Davis v Bandemer (1986) (13)
F. Access to Justice System (14)
Griffin v IL (1956) (14)
Douglas v California (1963) (14)
Boddie v Conn (1971) (14)
G. Travel & Welfare (14)
Shapiro v Thompson (1969) (14)
Zobel v Williams (1982) (14)
Dandridge v Williams (1970) (14)
VIII. Substantive Due Process ............ 14
A. The Incorporation Controversy (14)
Barron v Baltimore (1833) (14)
Twining v NJ (1908) (14)
Palko v Conn (1937) (14)
Adamson v Cal (1947) (14)
KADISH (15)
Duncan v LA (1968) (15)
B. Economic Interests, Problem of Retribution
Lochner v NY (1905) (15)
Property rights = Fundamental rights ➔ support from
Corfield v Coryell (1823) (15)
Muller v Oregon (1908) (15)
Coppage v KS (1915) (15)
Lochner’s Legacy (15)
Bunting v Oregon (1917) (15)
Adkins v Children’s Hosp (1923) (15)
Nebbia v NY (1934) (15)
West Coast Hotel Co v Parrish (1937) (15)
Day-Brite Lighting, Inc v Missouri (1952) (15)
Public choice and the Allgeyer-Lochner-Adair-
Coppage constitutional doctrine. (16)
US v Carolene Products (1938)
Williamson v Lee Optical of OK (1955)
Ferguson v Skrupa (1963)
C. Right to Privacy, Personhood, Family (16)
RULE: (16)
Meyer v NE (1923) (16)  
Pierce v Society of Sisters (1925) (16)  
Griswold v Conn (1965) (16)  
Eisenstadt v Baird (1972) (16)  
Carey v Population Services (1977) (16)  
Roe v Wade (1973) (16)  
Privacy = Meyer-Pierce-Griswold-Eisenstadt (17)  

D. Post-Roe Abortion Issues (17)  
Maher v Roe (1977) (17)  
Harris v McRae (1980) (17)  
Geduldig v Aiello (1974) (17)  
City of Akron v Akron Center for Reproductive Rights (1983) (17)  
Planned Parenthood v Danforth (1976) (17)  
Bellotti v Baird (1979)  
Planned Parenthood v Ashcroft (1983)  
HL v Matheson (1981)  
Colautti v Franklin (1979) (17)  
Planned Parenthood v Ashcroft (1983)  
Thornburgh v American Coll of ObGyns (1986) (17)  
Planned Parenthood of SE Penn v Casey (1992) (18)  
Stenberg v Carhart (2000) (18)  

E. Family Privacy Interests (19)  
Moore v City of East Cleve (1977) (19)  
Lyng v Castillo (1986) (19)  
Zablocki v Redhail (1978) (19)  
Califano v Jobst (1977) (19)  
Michael H v Gerald D (1989) (19)  

F. Homosexuality (20)  
Bowers v Hardwick (1986) (20)  
US Army v Watkins (9th 1990) (20)  
Steffan v Perry (DC 1994) (20)  
Romer v Evans (1986) (20)  

G. Right to Die (21)  
Cruzan v Director, Ms Dept of Health (1990) (21)  
Washington v Glucksberg (1997) (21)  

IX. State Action Doctrine .................. 21