CONSTITUTIONAL LAW II OUTLINE

The seven articles of the Constitution are primarily about the structure of government and not individual rights.

THE APPLICATION OF THE BILL OF RIGHTS TO THE STATES

The Rejection of Application Before the Civil War

John Barron v. The Mayor and City Council of Baltimore (1833)

- Does the 5th Amendment Taking Clause apply to the City?
- The SC ruled the amendment contained no expression indicating an intention to apply to State Governments.

A False Start to Applying the Bill of Rights to the States:

The Privileges of Immunities Clause and the Slaughter House Cases

Slaughter House Cases:

The Butcher's Benevolent Association of New Orleans v. The Crescent City Live Stock Landing and Slaughter-House Company (1873)

- The Louisiana legislature gave a monopoly in livestock landing and the slaughter-house business for the city of New Orleans to the Crescent City Livestock Landing and Slaughter-House company.
- Several butchers argued that the state law impermissibly violated their right to practice their trade.
- The Amendments (13th, 14th, and 15th) were meant to end discrimination and deal with the emergency that resulted from the prohibition of slavery.

Saenz v. Roe (1999)

- The right to travel embraces the citizen's right to be treated equally in her new state of residence, the discriminatory classification is itself a penalty.

The Incorporation of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment

Twining v. New Jersey (1908)

- Expressly opened the door to the SC applying provisions of the Bill of rights to the states by finding them to be included – incorporated – into the Due Process Clause of the 14th Amendment.

Palko v. Connecticut (1937)

- Palko argued that a Connecticut statute allowing appeals in criminal cases to be taken by the state is an infringement to the 14th Amendment through the 5th Amendment. Cardozo says NO.

Adamson v. California (1947)

- California Law permits the failure of a defendant to explain or deny evidence against him to be commented upon by the court and counsel and to be considered by the court and jury. This does not offend the 5th or 14th Amendments.

The Current Law as to What's Incorporated

Duncan v. The State of Louisiana (1968)

- Whenever a case involves a state or local violation of a Bill of Rights provision, to be precise, it involves that provision as applied to the states through the Due Process Clause of the 14th Amendment.

The Content of Incorporated Rights

Except for a few provisions the Bill of Rights do apply to state and local governments and, in almost all instances, with the same content regardless of whether it is a challenge to federal, state, or local actions.

THE APPLICATION OF THE BILL OF RIGHTS AND THE CONSTITUTION OF PRIVATE CONDUCT

The Requirement for State Action

- **The State Action Doctrine**- Private conduct generally does not have to comply with the Constitution.
- The constitution limits government action.

The Civil Rights Cases

- The initial articulation of the state action doctrine.

United States v. Stanley (1883)

- Civil Rights Act of 1875
- Denied persons of color the accommodations and privileges of an inn or hotel.
- Until a State law has been passed adverse to the rights of citizens sought to be protected by the 14th amendment, no legislation by the National Government can be called in to activity, for the prohibitions of the amendment are against state laws and acts done under the state authority.

The Exceptions to the State Action Doctrine (1. The public functions exception & 2. The entanglement exception)

- The US court of Appeals for the 2nd Circuit expressly held that the scope of the exceptions to the state actions doctrine turns on whether it is a claim of racial discrimination or another constitutional right. Lebron v. National Railroad Passenger Corp. (1995)

a. **The Public Functions Exception**

- A private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government.

Marsh v. State of Alabama (1946)

- The circumstance that the property rights were held by other than the public, is not sufficient to justify the State's permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement of such restraint by the application of a state statute.

Jackson v. Metropolitan Edison Company (1974)

- The mere fact that a business is subject to state regulation does not by itself convert its action into that of the state for purposes of the 14th amendment.

Elections

Terry v. Adams (1953)

- The Jay bird party brings into being and holds the precisely the kind of election that the Fifteenth Amendment Seeks to Prohibit.
- It is immaterial that the state does not control that part of this elective process, which it leaves for the Jaybirds to manage.

Private Property Used for Public Purposes

Evans v. Newton (1966)

- The public character of the park requires that it be treated as a public institution subject to the command of the 14th amendment, regardless of who now has title under the state law.

First amendment and shopping centers

1. The court initially analogized shopping centers to the company town in Marsh v. Alabama and concluded there is a 1st amendment right of access.

2. The court then qualified the right.
3. The court then held there is no 1st amendment right to use shopping centers for speech purposes.

Judicial and Law Enforcement Actions

b. The Entanglement Exception

Shelly v. Kraemer (1948)

- In granting judicial enforcement of the restrictive agreements in these cases, the states have denied the petitioners the equal protection of the laws and that therefore the action of the state courts can not stand.

Example: Prejudgment Attachment

Lugar v. Edmondson Oil Co. (1982)

- Two part test:

1. The deprivation must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible.
2. The party charged with the deprivation must be a person who may fairly be said to be a state actor.

Edmonson v. Leesville Concrete Company, Inc (1991)

- Whether a private litigant in a civil case may use peremptory challenges to exclude jurors on account of their race.
- Race based exclusion violates the equal protection rights of the challenged jurors.

Government Regulation

Burton v. Wilmington Parking Authority (1961)

- Eagle Coffee Shoppe refused to serve food to the appellant because of his race.
- Specifically defining the limits of our inquiry, when a state leases public property in the manner and for the purpose as shown to have been the case here, the proscriptions of the 14th amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement itself.

Moose Lodge No. 107 v. Irvis (1972)

- Merely granting a liquor license to a private club which engages in discriminatory practices is not sufficient state action to invoke the 14th amendment.

American Manufactures Mutual Insurance Company v. Sullivan (1999)

- While the decisions of a URO, like that of any judicial official, may properly be considered a state action, a private party's mere use of the State's dispute resolution machinery, without the "overt, significant assistance of the State's officials" cannot.

Government Subsidies

Norwood v. Harrison (1973)

- A textbook lending program is not legally distinguishable from the forms of state assistance foreclosed by the prior cases. Racial discrimination in state operated schools is barred by the constitution and is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.

Rendell-Baker v. Kohn (1982)

- A state normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the state.

Blum v. Yaretsky (1982)

- The complaining party must show that "there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state it self."

Initiatives Encourage Violations of Rights

Reitman v. Mulkey (1967)

- Does the abandonment of a positive nondiscrimination policy by a state in favor of a neutral stance which would allow discrimination to occur in the sale and rental of private housing constitute state action within the meaning of the fourteenth amendment?

If the ultimate effect of a state constitution or statute is to encourage racial discrimination, it violates the equal protection clause of the 14th amendment and is unconstitutional.

In the typical state action case, it's when either (a) the state has somehow provided a *mantle of authority* for the private conduct, or (b) the state was significantly involved in, or encouraged, the private conduct. There are three typical ways this can happen:

1. The state creates a **legal framework** governing the conduct (e.g., a court enforces a racially-restrictive covenant; a statute requires segregated public toilets). Note that the involvement must be non-neutral; e.g., enforcing a neutral trespass law when a minority member is excluded from private property is not state action);
2. The state **delegates authority** to a private actor. (The function must be one traditionally associated with governments and historically operated exclusively by government entities, including running elections and governing towns and cities ["company towns"], but *not* including public utilities or shopping centers); or
3. The state **knowingly accepts benefits derived from unconstitutional behavior**. (E.g., state-run parking garage gets vital rents from privately-owned restaurant that discriminates.)

Due process

1. Procedural Due Process (PDP)

Requires

a. notice

b. hearing

2. Substantive Due Process

1. economic SDP - dead
2. privacy rights SDP - Alive

Procedural due process. This addresses the procedural fairness in depriving someone of a significant interest, typically in property, but also in life or liberty (which includes the right to physical freedom, exercising fundamental constitutional rights, and other forms of freedom of choice or action). You know there's a procedural due process issue in a problem when what's involved are the *mechanical aspects of how someone was deprived of something.* In general, procedural due process problems concern the necessity of *notice* and a *hearing* when a property right is removed.

1. Has a government action impaired a liberty or property interest?
   If not, procedural due process is not an issue. If so, go on to #2.
2. What procedural requirements must be satisfied?

The two principal tools are *notice* and a *hearing*. However, they can range from a full, adversarial prior hearing, to a promise of a prompt post-deprivation evidentiary hearing, to a notification of charges and an opportunity to respond. The requirements are determined by weighing: The **importance** of the **property or liberty interest** in question and the **risk an erroneous deprivation** in a particular procedure would create (considering the probable value of any additional safeguards) *vs*. the **importance to the government** of the function in question, and the **administrative and fiscal expense** of a particular safeguard.

A. Introduction

- Economic Liberties generally refer to constitution rights concerning the ability to enter into and enforce contracts; to pursue a trade or profession; and to acquire, possess, and convey property.
- The Key Issue: The appropriate degree of judicial protection for economic liberties.

Historical Overview

- Lochner Era: Beginning in the late nineteenth century and continuing until 1937, the Court found that the freedom of contract was a basic right under liberty and property provisions of the Due Process Clause.

B. Economic Substantive Due Process

- ***5th Amendment applies to the state***
- ***14th Amendment applies to private rights***

1. Introduction

- The Focus is on the sufficiency of the justification for the governments action, not on the procedures the government has followed.

2. The Early History of Economic Substantive Due Process

- In the slaughterhouse cases the court flatly rejected the idea that the due process clause could be used to safeguard a right to practice a trade or a profession from arbitrary government interference.
- Justices Field and Bradly strongly dissented.
- Justice Bradly interpreted the words liberty and property in the due process clause as protecting a right to practice a trade or profession and believed that arbitrary interference with these rights violated the fourteenth amendment.
- In 1886, the SC held that corporations were persons under the Due Process and equal protection clauses.
- It soon (1870's) became the majority view of the SC.
- Due process was a limit on the governments power.

Loan Association v. Topeka (1874)

- The court invalidated a city law that imposed a tax to fund bonds to attract private business to Topeka as "purely in aid of private or personal objects beyond the legislative power, and an unauthorized invasion of private right."

Munn v. Illinois (1876)

- The court indicated that "under some circumstances" regulation of business would be found to violate due process.
- The test is whether the private property affected the public interest.

Railroad Commission Cases (1886)

- The court said the question of reasonableness of a rate of charge for transportation by a railroad company is eminently a question for judicial investigation, requiring due process of law for its determination.

Mugler v. Kansas (1887)

- If a statute purporting to have been enacted to protect the public health, moral or safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts so to adjudge, and there by give effect to the constitution."

3. Substantive Due Process of the Lochner Era

Police power v. Individual liberty

Allgeyer v. Louisiana (1897)

- Louisiana law prohibited foreign corporations from doing business in the state with out have a place of business and in agent upon whom process could be served in the state.
- The term liberty in the 14th amendment is deemed to embrace the right of the citizen to be free in the right of all his faculties; to live and work where he will; to earn a livelihood by any lawful calling; and to enter into all contracts which may be proper, necessary, and essential to his carrying out a successful conclusion the purposes above mentioned.
- The statute is a violation of the 14th amendment.

Lochner v. People of the State of New York (1905)

- Lochner was convicted for violating a New York statute which prohibited working in a bakery more than 10 hours a day* 60 hours per week.
- The statute necessarily interferes with the right of contract between the employer and the employees.

Law Protecting Unionizing

Coppage v. State of Kansas (1915)

- To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom.

Maximum Hours Laws

Bunting v. Oregon (1917) – upheld maximum hour laws for men and women working in manufacturing.

Muller v. State of Oregon (1908)

- Oregon passed a law that limited a woman's working day to 10 hours.
- (a) The physical organization of women (b) her maternal functions (c) the rearing and education of children (d) the maintenance of the home – are all so important and far reaching that the need for such reduction need hardly be discussed.
- The law is not in conflict with the constitution.

Minimum Wage Laws

Adkins v. Children's Hospital of the District of Columbia (1923)

- The District of Columbia proposed a law for fixed minimum wages for women and children in the District of Columbia.
- The minimum wage does not fall within police powers of the state (health, safety, welfare)

Consumer Protection Legislation

Also invalidated.

Weaver v. Palmer Bros. Co. (1926)

- Whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the Due Process Clause or the Equal Protection Clause.
- Because sterilization eliminates the dangers of shoddy the law is unreasonable and arbitrary.

Price Regulations

- Laws setting the maximum prices for theater tickets, employment agencies, and gasoline, were declared unconstitutional as interfering with freedom of contract.

Nebbia v. People of the State of New York (1934)

- Upon proper occasion and by appropriate measures, a state may regulate a business in any of its aspects, including price fixing.

4. Economic Substantive Due Process Since 1937

Pressures for Change

- The depression created widespread perceptions that government economic regulations were essential.
- Legal realists attacked this premise and persuasively argued that the law reflected political choices; using freedom of contract to invalidate state laws was a political choice that favored employers over employees and corporations over consumers.

The end of Lochnerism

- In 1937 Justice Owens Roberts switched sides in 2 cases (one substantive due process, one the scope of congresses commerce power) and cast the 5th votes to uphold the statutes.

West Coast Hotel Co. v. Perrish (1937)

- The state of Washington authorized the fixing of minimum wages for women and children.
- Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all the court has to decide. **Reasonableness Test**
- The community may direct its law-making power to correct the abuse which unconscionable employers' selfish disregard of the public interest.

United States v. Carolene Products Co. (1938)

- Whether the "Filled Milk Act" which prohibits the shipment in interstate commerce of skimmed milk with any fat or oil other than milk fat, infringes the 5th amendment.
- The existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character to preclude the assumption that it rests upon some rational basis with in the knowledge and experience of the legislature.
- Applies to restrictions on fundamental rights (strict scrutiny)
- Footnote 4

Economic Substantive Due Process Since 1937

- The SC has made it clear that economic regulations will be upheld when challenged under the due process clause so long as they are rationally related to a legitimate government purpose.

Williamson v. Lee Optical of Oklahoma, Inc. (1955)

The day is gone when the court uses the due process clause of the 14th amendment to strike down state laws because they might be unwise. "For protection against abuses by the legislature the people must resort to the polls, not to the courts."

C. The Contracts Clause

1. Introduction

Contracts clause applies only to the states.

2. The Modern use of the Contracts Clause

Home Building & Loan Association v. Blaisdell (1934)

- If the state power exists to give temporary relief from the enforcement of contracts in the presence of disasters due to physical causes such as fire, flood, or earthquake, that power cannot be said to be nonexistent when the urgent public need demanding such relief is produced by other and economic causes.

Government Interference with Private Contracts

Energy Reserves Group, Inc. v. The Kansas Power & Light Co. (1983)

- **TEST** –

1. Is there a substaintial impairment of a contractual relationship
2. If so, does it serve a significant and legitimate public purpose
3. If so, is it reasonably related to achieving the goal

- The test is very similar to traditional rational basis.

Allied Structural Steel Co. v. Spannaus

- The Contracts Clause imposes limits upon the states power to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.

Substantive due process. This addresses legislation that intrudes on personal rights; that is, the court's being asked to look at the *substance* of what the government did. If the right is "fundamental," the statute must pass the "strict scrutiny" test. If it isn't fundamental, the statute is subject to the "rational relation" test.

When legislation impairs a right, ask: **Is the right a "fundamental personal" right?** If "yes," go to (1); if "no," go to (2).

1. Yes, the right is a "fundamental personal" right. These are: the First Amendment rights (speech, press, religion, assembly, petition); interstate travel; voting; privacy (e.g., marriage, contraception, procreation, raising children, family interest); death; fairness in the criminal process (e.g., right to counsel on first appeal).

   Here, the legislation must meet the "compelling state interest" test: it must be necessary to promote a compelling governmental interest.

2. No, the right is not a "fundamental personal" right. (Instead, the statute is merely regulating social or economic interests of lesser importance.)

   Here, the statute is only subject to the "rational relation" test: If there is a set of facts imaginable that would make the law a reasonable means to achieve a legitimate governmental purpose, the law is valid.
   Such laws include: Public health and safety measures and all kinds of business regulations, including trade practices, wage and hour regulations, price controls, and bans on discrimination against union (or non-union) personnel.

Both the federal and state governments are subject to due process requirements. The Fourteenth Amendment's Due Process clause applies to the states; the Fifth Amendment's Due Process Clause applies to the federal government.

A. Introduction

1. Constitutional Provisions Concerning Equal Protection

- The court held that equal protection applies to the federal government through the due process clause of the 5th Amendment.

2. A Framework For Equal Protection Analysis

- All equal protection cases pose the same basic question: Is the government classification justified by a sufficient purpose?
- Strict Scrutiny for racial discrimination…The government must show that it is necessary to achieve a compelling governmental purpose.

Analytical Framework

1. Is there a Classification?
2. What is the Appropriate Level of Scrutiny?
3. Does the Government Action Meet the Level of Scrutiny?

Question 1: What is the classification?

- There are 2 ways of proving the existence of a classification:

1. Showing that it exists on the face of the law; or
2. Demonstrating that a facially neutral law has a discriminatory impact and a discriminatory purpose. Impact + Purpose

Question 2: What are the appropriate levels of scrutiny?

- **Strict Scrutiny**: Used for discrimination against race, natural origin and aliens…The government must show that it is necessary to achieve a compelling governmental purpose. Governmental infringements under Equal protection and Due process.
- **Intermediate Scrutiny**: Used for discrimination against gender and discrimination against non-marital children…A law is upheld if it is substantially related to an important governmental purpose.

- **Rational Basis Test**: All laws not subject to strict or intermediate scrutiny are evaluated under the rational basis test…A law is presumed constitutional. The test - if it is rationally related to a legitimate governmental purpose. The challenger has the burden of proof.

Question 3: Does the government action meet the level of scrutiny?

- Fit…Under and over inclusive

The protection of fundamental rights under equal protection.

- **Skinner v. Oklahoma** (1942) – Oklahoma law required the sterilization of those convicted 3 or more times of crimes involving "moral turpitude". The SC found it discriminated among people in their ability to exercise a fundamental liberty, the right to procreate.

B. The Rational Basis Test

1. Introduction

- Is there a single rational basis test or one that varies between complete deference and substantial rigor?

2. Does the law have a legitimate purpose?

What constitutes a legitimate purpose?

Virtually any goal not forbidden by the Constitution will be deemed sufficient to meet the rational basis test.

Romer v. Evans (1996)

- Colorado passed an amendment that stated "No protected status based on homosexual, orientation."
- 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.

Must it be the actual purpose or is conceivable purpose enough?

- The Court has held that under the rational basis review the actual purpose behind a law is irrelevant and the law must be upheld "if any state of facts reasonably may be conceived to justify" its discrimination.
- **A Key Issue:** Whether any conceivable legitimate purpose should be sufficient, or whether the courts should insist on a legitimate actual purpose.

United States Railroad Retirement Board v. Fritz (1980)

- The only eligible former Railroad employees denied the dual benefits are those who had no statutory entitlement at the time they left the railroad industry, but there after became eligible for dual benefits when the subsequently qualified for social security benefits. Congress could properly conclude that persons who had actually acquired statutory entitlement to windfall benefits while still employed in the railroad industry had grater claim to those benefits.
- *Where there are plausible reasons for Congress' action, our inquiry is at an end*.

3. The requirement for a "Reasonable Relationship"

Tolerance for Underinclusiveness Under Rational Basis Review

Cases Where Laws Are Deemed Arbitrary and Unreasonable

The SC has found on occasion laws to be so arbitrary and unreasonable as to fail rational basis review.

U.S. Department of Agriculture v. Moreno (1973)

- A 1971 amendment to the Stamp act of 1964, excludes from participation in the food stamp program any household containing an individual who is unrelated to any other member of the household.
- A purpose to discriminate against hippies cannot, in and of it self with out reference to considerations in the public interest, justify the 1971 amendment.

City of Cleburne, Texas v. Cleburne Living Center, Inc. (1985)

- Because the record does not reveal any rational basis for believing that the Featherston home would pose any special threat to the city's legitimate interests, we affirm the judgment below in so far as it holds the ordinance invalid as applied in this case.

C. Classifications Based on Race and National Origin

1. Race Discrimination and Slavery Before the 13th and 14th Amendments

At no point prior to the civil war did the SC significantly limit slavery or even raise serious questions about its constitutionality.

Dred Scott v. Sanford

Missouri Compromise – Congress admitted Missouri as a slave state, but prohibited slavery in the territories north of the latitude of 36-30. Territories below this line could decide whether to allow slavery and could make that decision when admitted as states.

- Dred Scott was not a citizen of Missouri within the meaning of the Constitution of the U.S. and not entitled to sue in its courts; and consequently, that circuit court had no jurisdiction.
- Any act of congress that would supercede the right to own slaves was unconstitutional. Thus, the Missouri Compromise is unconstitutional.

The Post Civil War Amendments

In 1865, Congress enacted and the states ratified the 13th Amendment, which prohibits slavery and involuntary servitude.

2. Strict Scrutiny for Discrimination Based on Race and National Origin

It is firmly established that race and national origin classifications must meet the most exacting standard of judicial review. Such discrimination will be tolerated only if the government can prove that it is necessary to achieve a compelling governmental purpose.

3. Proving the Existence of a Race or National Origin Classification

a. Race and Nation Origin Classifications on the Face of the Law

Immutable characteristics (They're born that way…there is nothing they can do about it.)

Race-specific Classifications That Disadvantage Racial Minorities

Korematsu v. United States

- During World War II, 110,000 Japanese-Americans were forcibly uprooted from their homes and placed in concentration camps.
- The governments purported justification was national security…concern about espionage and sabotage.
- Pressing public necessity may sometimes justify the existence of racially based restrictions.
- The only post civil war to satisfy strict scrutiny.

Racial Classifications Burdening Both Whites and Minorities

- **Pace v. Alabama (1882)** – the Court upheld an Alabama law that provided for harsher penalties for adultery and fornication if the couple were composed of a white and black than if the couple were both of the same race.
- **McLaughlin v. Florida (1964)** – the SC declared unconstitutional a Florida law that prohibited the habitual occupation of a room at night by unmarried interracial couples.

Loving v. Virginia (1967)

- A state law restricting the freedom to marry based solely on racial classifications violates the equal protection clause. Since Marriage is a basic human civil right, to deny this freedom on so insupportable basis as racial classification deprives all the states citizens of liberty without due process of law.
- There is no legitimate reason, it fails under all tests. Substantive due process – liberty – right to marry → strict scrutiny.

Plamore v. Sidoti (1984)

- The constitution can not control such prejudices but neither can it tolerate them. The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.

Laws Requiring Separation of the Races

Jim Crow Laws - created a system of apartheid in which the government mandated segregation in public accommodations, transportation, schools, and almost everything else.

Plessy v. Ferguson (1896)

- Segregation of the races is reasonable if based upon the established custom, usage and traditions of the people in the state.

The Initial Attack on "Separate but Equal"

- **Missouri ex rel Gains v. Canada (1938)** – (Pays for blacks to go out of state) The basic consideration is not as to what sort of opportunity other states provide…but as to what opportunities Missouri provides to whites and not to blacks based solely on color.
- **Sweatt v. Painter (1950)** – Th SC cannot find substantial equality in the educational opportunities offered white and black students by the state. (special law school built for blacks)
- **McLaurin v. Oklahoma (1950)** – The court ruled that such segregation hindered the student's "ability to study, to engage in discussions and exchange views with other students, and in general learn his profession."

Brown v. Board of Education (1954)

- The "separate but equal" doctrine has no application in the field of education and segregation of children in public schools based solely on their race violates the equal protection clause.

The invalidation of Segregation in Other Contexts

- Following Brown, in a series of per curiam opinions, the Supreme Court affirmed lower court decisions declaring unconstitutional state laws requiring segregation in all of the remaining areas of southern life.
- It is clearly established that laws requiring separation of the races are racial classifications that will be allowed only if strict scrutiny is met.

b. Facially Neutral Laws with a Discriminatory Impact or with Discriminatory Administration

The Requirement for Proof of Discriminatory Purpose

The SC has held that there must be proof of a discriminatory purpose for such laws to be treated as racial or national origin classifications.

Washington v. Davis (1976)

- A law or official governmental practice must have a "discriminatory purpose," not merely a disproportionate effect on one race, in order to constitute "invidious discrimination" under the 5th amendment due process clause or the 14th amendment equal protection clause.
- The disproportionate effect can only be used as evidence of racial discrimination.

McCleskey v. Kemp (1987)

- The constitution does not require that a state eliminate any demonstrable disparity that correlates with a potentially irrelevant factor, such as race, in order to operate a criminal justice system that includes capital punishment.

City of Mobile v. Bolden (1980)

- Only if there is purposeful discrimination can there be a violation of the equal protection clause of the 14th amendment, so an at-large electoral scheme violates that clause only when it is proven that it was conceived or operated as a purposeful devise to further racial discrimination.

Is Proof of Discriminatory Effect Also Required?

- Whether there must be both discriminatory impact and discriminatory purpose?
- The SC has never expressly addressed the question, it appears that both are required.

Palmer v. Thompson (1971)

- Nothing in the history or the language of the 14th amendment nor in any of our prior cases persuades us that closing of the Jackson swimming pools to all its citizens constitutes a denial of "the equal protection of the laws."

How is a Discriminatory Purpose Proven?

- How can it be proven that a facially neutral law is motivated by a discriminatory purpose?
- It is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences.

Personnel Administrator of Massachusetts v. Feeney (1979)

- It implies that the decision maker, 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.

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

- How can it be proven that a facially neutral law is motivated by a discriminatory purpose?
- The court balances the following factors

1. The impact of the official action.
2. A clear patter unexplainable other than race.
3. The historical background
4. The specific sequence of events leading up to the challenged decision.
5. Departures for the normal procedural sequence.
6. Substantive departures.
7. Legislative or administrative history.

Application: Discriminatory use of Peremptory Challenges

- First, the criminal defendant must set forth a prima facia case of discrimination by the prosecutor.
- Second, the burden shifts to the prosecutor to offer a race-neutral explanation for the peremptory challenges.
- Third, the trial court must decide whether the race neutral explanation is persuasive or whether the "defendant has established purposeful discrimination."

4. Remedies: The Problem of School Segregation

Introduction: The Problem of Remedies

- In some cases, the remedy is simply invalidating the discriminatory law.
- In some cases, the Court must go further and fashion an injunction.

Brown v. Board of Education (1955)

- The cases are remanded to the lower courts to enter orders consistent with equitable principles of flexibility and requiring the defendant to make a prompt and reasonable start toward full racial integration in public schools.

Massive Resistance

- **Cooper v. Aaron** – the governor called out the Arkansas national guard to prevent desegregation…Eisenhower ordered federal troops to protect the desegregation effort.
- Whether there is more the SC could have done in brown or later, to desegregate American public schools.

Judicial Power to Impose Remedies in School Desegregation Cases

Swann v. Charlotte-Mecklenburg Board of Education (1971)

1. **To what extent racial balance or racial quotas may be used as an implement in remedial order to correct a previously segregated system.**
- The use of ratios was no more than a starting point in the process of shaping a remedy, rather than an inflexible requirement.
2. **Whether every all-black and all-white school must be eliminated as an indispensable part of a remedial process of desegregation.**
- The court should scrutinize such schools and the burden upon the school authorities will be to satisfy the court that their racial composition is not the result of present or past discriminatory action on their part.
3. **What the limits are, if any, on the rearrangement of school districts and the attendance zones, as a remedial measure.**
- An assignment plan is not acceptable simply because it appears to be neutral. Conditions in different localities will vary so widely that no rigid rules can be laid down to govern all situations.
4. **What the limits are, if any, on the use of transportation facilities to correct state-enforced racial school segregation.**
- An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.

Milliken v. Bradely (1974)

- May a court include in a school redistricting plan, school districts that have not been shown to have employed racially discriminatory acts that led to interdistrict segregation, only because of their conclusion that total desegregation of Detroit would not produce the racial balance which they perceived as desirable?
- To approve the remedy ordered the court would impose on the outlying districts, not shown to have committed any constitutional violation, a wholly impermissible remedy based on a standard not hinted at in Brown I or II or any holding.

When Should Federal Desegregation Remedies End?

The court said "having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the district court had fully performed its function of providing the appropriate remedy for the previous racially discriminatory attendance patterns.

Board of Education of Oklahoma City Public Schools v. Dowell (1991)

- Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes the "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extended beyond the time required to remedy the effects of past intentional discrimination.

Freeman v. Pitts (1992) – the SC ruled that a federal court desegregation order should end when it is complied with, even if other desegregation orders for the same school system remain in place.

Missouri v. Jenkins (1995) – the SC ordered an end to a school desegregation program for Kansas City school. The court concluded that the Constitution requires equal opportunity and not any result and that therefore disparities between African-American and white students on standardized tests has not a sufficient basis for concluding that desegregation had not been achieved.

5. Racial Classifications Benefiting Minorities

Affirmative Action – 3 key questions

1. What level of scrutiny should be used for racial classifications benefiting minorities?
2. What purpose for affirmative action programs are sufficient to meet the level of scrutiny?
3. What techniques of affirmative action are sufficient to meet the level of scrutiny?

The Initial Rulings on Affirmative Action

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

- Bakke challenged the constitutionality of the University of California's admission policy to its medical school, which is designed to assure the admission of a specified number of students from certain minority groups.
- Does the equal protection clause protect even benign discrimination?
- Yes. The equal protection clause guarantees are equally applicable to both minorities and the white majority and preference of one group over another solely because of race is invalid.
- Dissent (4) intermediate scrunity
- Plurality (4) uc davis affirmative action plan violates 64 civil rights act
- Powell strict scrutiny compelling interest → Diversity; narrowly tailored→no

The Emergence of Strict Scrutiny as the Test

- Educational context

City of Richmond v. J.A. Croson Co. (1989)

- A mere finding of under representation will not in itself prove discrimination, as non-discriminatory explanations may exist.

Adarand Constructors, Inc. v. Pena (1995)

- Racial classifications are subject to strict scrutiny review and are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

The Arguments For and Against Strict Scrutiny

Drawing Election Districts to Increase Minority Representation

The use of race in drawing election districts must meet strict scrutiny.

Purpose is shown by:

1. Bizarre Shape Voting District
2. Race was a predominate factor
3. Maximize minority groups is not a compelling governmental interest. (statutory modification may be necessary)

D. Gender Classifications

1. The level of Scrutiny

Key Question – what is the level of scrutiny that should be used for gender classifications.

Early Cases Approving Gender Discrimination
The Emergence of Intermediate Scrutiny
Frontiero v. Richardson (1973)

- We can only conclude that classifications based on sex, like classifications based upon race, alienage, or national origin are inherently suspect, and must therefore be sustained to strict judicial scrutiny.

Creig v. Boren (1976)

- Craig filed suit challenging an Oklahoma statute that prohibited the sale of "nonintoxicating" 3.2% beer to males under the age of 21.
- In order to withstand a constitutional challenge, classifications by gender must serve important governmental objectives and be substantially related to achieving those objectives.

United States v. Virginia (1996)

- Parties who seek to defend gender-based government action must demonstrate an "exceedingly persuasive justification" for that action.

2. Proving the Existence of Gender Classification

- There are 2 major ways of proving a gender classification; they are identical to the two methods of demonstrating a racial classification.

1. A gender classification can exist on the face of the law.
2. If a law is facially gender neutral, providing a gender classification requires demonstrating that there is both a discriminatory impact to the law and a discriminatory purpose behind it.

When is it "Discrimination"?
Geduldig v. Aiello (1974)

- A California disability program excludes from coverage certain disabilities resulting from pregnancy.
- Particularly with respect to social welfare programs, so long as the line drawn by the state is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point.

EQUAL PROTECTION

Ask these questions:

1. **Is the action involved a <u>state</u> action?** If so, go on to #3. If not, go on to #2.
2. **Is the action involved a <u>federal</u> action?**

   If so, and it involves an area of unique federal power (e.g., power over immigration or war) — it's subject to the "rational relation" test. Otherwise, federal actions are treated like state actions for equal protection purposes, but you should keep in mind that the Equal Protection Clause doesn't apply to the federal government; the Due Process Clause of the Fifth Amendment, which does bind the federal government, is said to include an equal protection guarantee. For federal actions, go on to #3.

   If not (i.e., the action is by neither the state nor the federal government, but by a private individual), there's <u>no</u> equal protection problem, because **private individuals aren't bound** by the equal protection guarantee.
3. **Does the government action create a <u>classification</u>?** (e.g., men v. women, resident v. non-residents, legitimate vs. illegitimate children). If so — go on to #4. If not — there's no equal protection problem; check for substantive due process.
4. **Is the governmental discrimination <u>intentional</u>?**
   Discriminatory effect *in and of itself* is insufficient to trigger **strict** or **intermediate scrutiny**; the statute must be <u>facially</u> discriminatory OR intentionally unequally <u>administered</u> OR have a discriminatory <u>motive</u>. A government act that only has a discriminatory *effect* is subject to the "**rational relation**" test, regardless of the basis of the classification. Go on to #5.
5. **What's the basis of the classification?**

a. *Is the classification based on <u>race</u>?*

   If so, the classification will be subjected to **strict scrutiny**: it must be necessary to promote a compelling state interest.. This is now true even if the statute is "<u>affirmative action</u>" [see *Richmond v. Croson (1989)*], and even if the affirmative action is being done by <u>Congress</u> rather than by a state [see *Adarand Constructors (1995*)].

   Note that a race-based affirmative action measure might nonetheless be valid if it is <u>very narrowly tailored</u> and is designed to remedy the government entity's <u>own past discrimination</u> (not just discrimination in general).

If the classification is not based on race, go on to (b).

b. *Is the classification based on alienage?*

If so, go on to (c). If not, go on to (e).

c. *Who's creating the (alienage-based) classification?*

If the federal government, it's subject to the "rational relation" test; it need only be rationally related to a legitimate governmental interest. If the state, go on to (d).

d. *Does the (alienage-based) classification involve a "function at the heart of representative government""?*

If so, it's subject to the "**rational relation**" test; it need only be rationally related to a legitimate governmental interest. If not, it's subject to strict scrutiny.

e. *Does the classification unduly burden a fundamental right* (First Amendment rights, interstate travel, privacy, fairness in criminal process, voting)?

If so, it's subject to **strict scrutiny**: it must be necessary to promote a compelling state interest. If not, go on to (f).

f. *Is the classification based on legitimacy or gender?*

If so, it's subject to **intermediate scrutiny**: It must be substantially related to an important state interest. If not, go on to (g).

g. All other classifications are subject to the **"rational relation**" test — including virtually all classifications arising in "economic" and "social-welfare" legislation, and all classifications based on or involving age, mental retardation, poverty, welfare, housing, education, government employment, homosexuality, and access to the judicial process when no fundamental right is involved.

What are the elements of a suspect class?

The class must be:

1. Determined by unalterable characteristics (immutable);
2. Historically subjected to unequal treatment;
3. Politically powerless

Is The Test Met?				
	Who has Burden?	**When**	**Means**	**Ends**
Rational Basis	Presumed constitutional	Default	Law / Amendment rationally related	Legitimate / Permissible intent (conceivable)
Intermediate	Shifting (starts w/ a prima facie showing)	Women & non-marital children	Substantially advancing, more actual	Important Governmental Interest
Strict Scrutiny	Presumed unconstitutional	Race, national origin, aliens Liberties	Narrowly tailored, must be actual	Compelling governmental interest

Other stuff to remember:
*Results oriented decision-making
Is diversity a compelling governmental interest?
5th said Diversity is not Texas
6th said Diversity is Uof M