

## Tests and Sub Outline For Conlaw 2

### Rule from Slaughterhouse Cases:

The 14<sup>th</sup> Amendment guarantees the rights of the citizens of the United States, thus implicating that the 14<sup>th</sup> covers rights and immunities national in scope. The rights of a national citizen and state citizen are different in scope, and the majority of rights flow from states, such as right to employment.

- Thus, no federal rights, including the BoR, can be made applicable to the states through the 14<sup>th</sup>.
  - o The exception to this is the fundamental right to emigrate interstate which flows from P&I and Citizenship of 14<sup>th</sup>.

### Doctrine of Incorporation:

- Some of the BoR are incorporated through the DP clause of Const.
- *Palko* adopted selective incorporation, then *Duncan* clarified the modern approach, that is, the standard was to analyze if one of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions was
  - o A fundamental principal to *our* scheme of justice,
  - o And it must be essential to *our* civilized social order.

### Modern approach to incorporation

- Still selective incorporation
- considered any guarantees which are fundamental in the context of the judicial process maintained by the American States
- BUT instead of universality, the court considers whether the right in question is fundamental ONLY to an American scheme of justice (like justice Frankfurter's concurrence in *Adamson* when he referenced English speaking peoples)

Jot-For-Jot

- Another standard for Selective Incorporation was adopted which provided that "when the Court holds a right under BoR is held under due process applicable to the states, it is not just that right, but also the majority of the SC decisions that have discussed that right are also incorporated."
  - Court used the jot-for-jot approach because they wanted consistency (which meant they wanted the bill of rights to mean the same thing in state and federal court, and also so the courts of different states would be consistent)

Since jot-for-jot approach

- The rights for the state and federal government are almost completely uniform, with 2 exceptions
  - there must be a 12 person jury in federal court, but states don't need 12 people on a jury to comply with the 6<sup>th</sup> amendment)
  - o The supreme court has held that the requirement of a unanimous verdict is not necessary

## Chapter 9: The Due Process, Contract, and Just Compensation Clauses and the Review of Reasonableness of Legislation:

- With the DP Clause, government must not deprive any person of life, liberty, or property without due process of law. DP gives rise to certain unenumerated substantive constitutional rights, and if legislation of a state intrudes on the right, it may be struck down as unconst.

### *Economic Due Process:*

- The two step process under economic or substantive due process is
  - o Whether the statute serves an acceptable purpose, and
  - o Whether the statute's means of achieving that purpose are also acceptable.
- *Lochner*: sets forth the historical test for EDP when it struck down a state law setting a limit to the weekly hours of a baker.
  - o Is the law within the state's police power?
  - o Is the law for a fair, reasonable, and appropriate exercise of the police power?
    - Thus, the law must serve the *total public good (and health)*, that is, it must not favor one group of people and it must not redistribute the wealth unless the legislature is trying to protect a group of people who are weak and vulnerable.
  - o In Dissent of *Lochner*, Holmes says that there are health issues that the state interest has an interest in regulating, such as air quality. Moreover, he argued that the majority advocated a theory that had not been adopted by the country.
- Modern Approach—Reasonableness Test:
  - o The government must have a legitimate or hypothesized purpose that does not violate the Const.
    - This can even be stated by the Courts
  - o And there must be a rational or reasonable way of carrying out the end.
    - The Existence of Congress having the facts to rule on this is to be presumed.
- The Court proposed that this modern test is used if a statute is challenged via substantive due process for violating an unenumerable Const right. If a claim is made that an express Const right is being violated, then a stricter scrutiny is used.

### Section 2: Protection of Personal Liberties:

#### **Penumbra** – zone of privacy as authorized and guaranteed by the Bill of Rights

- o Includes the unenumerated fundamental constitutional marital privacy right to use contraceptives
- *Griswold* stated that express rights in BoR and unenumerated Right of Association are all accepted Const rights.
  - o Thus, you can look at the explicit words of the BoR and interpret them to include unenumerated rights, such as flowing from the 9<sup>th</sup>.
    - Also can find an unenumerated right flowing from another unenumerated right, such as the right of association.

#### Legacy of Griswold

- All the justices in majority and concurrences agree that there are fundamental non-enumerated non-economic rights.
- *Griswold* recognized that there is a fundamental unenumerated non-economic right constitutional right to marital privacy, which also includes the rights of married couples to use contraception

- Privacy becomes a right to exercise your autonomy, not a right to prevent disclosure
- Marital Privacy right is implicit in other Const rights.
- Thus, Griswold brought back the notion of substantive DP rights.

### Analyzing whether a Substantive Due Process Right is Fundamental:

1. Is plaintiff challenging the Const of a statute or government policy on the theory that it violates a fundamental substantive due process right?
    - o If NO, see # 2.
    - o If YES, see # 3.
  2. If fundamental substantive due process is not being claimed, then use the *rational relationship / reasonableness test* to determine its const.
    - o Does the statute serve a legitimate purpose that does not violate,
    - o Is the challenged statute a reasonable way to achieve the statute? (It does not have to be the most reasonable way, just a way.)
  3. If the plaintiff is asserting a violation of a substantive due process right, does the challenged statute impinge on the right?
    - o If NO, see # 2.
    - o If YES, see # 4.
  4. If the statute impinges on a fundamental substantive due process right, then apply one of the following standards.
    - o **Strict Scrutiny:** The statute must serve 1) a compelling government purpose, and 2) there is no better way to regulate this issue than the statute in question.
      - The statute must be “narrowly tailored” or necessary or “the least restrictive means for carrying out the purpose.”
    - o **Intermediate Scrutiny:** The government statute must serve an important or substantial purpose, and the government must show that the statute was closely tailored.
- When the Court ruled that there is a SPD right to live with others related to you in *Moore v. City of Cleveland*, the court used tradition, stare decisis, and contemporary social values as the basis of their reasoning for the decision. All three were used since by showing they were all present, there'd be less chance to be overturned.
    - o While this case seems to be advocating strict scrutiny in this approach, Bitensky argues that this is in fact intermediate since this is on a zoning regulation—if the Court used strict, anytime they got a similar case, the Court would be forced to use strict scrutiny.
  - The Court also held in *Zablocki* that the right to marry was an unenumerated Const right that required intermediate scrutiny, since the Court not want to use strict and impinge on the state's ability to regulate marriage.
    - o She characterizes this is rational basis with teeth.
    - o The right to marry is a fundamental due process right. When the right is impinged, the court will apply some sort of heightened scrutiny—some see it as strict scrutiny, she sees it as more intermediate.
  - In *Michael H. v. Gerald D.*, the Court split on how to determine from what authority to determine is relevant in deciding this. Scalia advocated that only tradition that is the most specific level at which a relevant tradition protecting the asserted right, or refusing to protect the asserted right, can be identified
    - o Brennan and Blackmun in previous cases advocated a value driven analysis instead.

So, the court will look at:

- Footnote six approach
    - o Justices will only look at tradition, and the sole type of tradition they will look at is the most specific level of tradition that can be identified protecting or denying protection to the asserted right (tradition can be expressed in common law or statutes, but it doesn't have to be in either one)
  - O'Connor/Kennedy approach
    - o Will only look at tradition, but tradition is understood in a much more flexible way (doesn't have to be the most specific level, etc.)
  - Look at tradition, but don't only look at tradition.
    - o Tradition is very liberally understood (the court will look at what interest the court has previously protected, and if the asserted right can be analogized to one of those interests, then it's a substantive fundamental due process right)
      - Justices will also consult modern values (socioeconomic status, etc.)
- ➔ These tests all use the values approach in determining whether or not a right is fundamental

Also there are 3 informal ways of also determining what level of scrutiny the court will apply in a substantive due process case

- Court can reconceptualize the asserted right (determine what is actually being asserted)
- The court can play with impingement (being reluctant to find that the challenged statute is a direct and substantial interference with the asserted right)
- The court can play around with the applicable tradition (make tradition broad or narrow)

In *Troxel*, the Court ruled that the right of a parent to choose how to raise their child is a fundamental due process issue, one that gives the parent the right to choose how it is done, even if at the exclusion of the grandparents. Steven's dissent said that this parental right is not fundamental since you have to weigh the child's right as well, such as the right to a healthy relationship with the grandparents.

#### **MODERN TEST**

1. is the power within the state's police powers (doesn't have to be for the total state, only if its legitimate concern....also is the right fundamental or non-fundamental)
  - a. non-fundamental right – (power usually goes to the state) then the court uses the reasonableness test
    1. Is there a real or hypothetical legitimate state interest?  
AND
    2. Is there a reasonable or rational way to achieve the ends?

- b. Fundamental rights – then the power goes to the federal government (refer to the Duncan v. Louisiana approach)

**Fundamental rights** – court applies a stricter scrutiny in 2 ways

1. The state’s objective must be compelling, not merely legitimate  
AND
2. The relation between that objective and the means must be very close, so that the means can be said to be “necessary” to achieve the ends

### Test for substantive due process for non-economic rights

1. Does plaintiff assert an unenumerated fundamental substantive due process right?
  - a. No – apply rational relationship test
  - b. Yes- step 2
  
2. Is that right impinged by the challenged statute? (direct AND substantial interference with the right)
  - a. No- apply rational relationship test
  - b. Yes –
    - i. Use strict scrutiny to assess the constitutionality of the challenged statute (typical situation)
    - ii. Use intermediate scrutiny to assess the constitutionality of the challenged statute (used when the right in issue, even though it is fundamental, the court has singled it out for a little less constitutional protection)

### Rational Relationship test

In order for the challenged statute to survive substantive due process, 2 steps

1. The state must be able to show a legitimate purpose (the purpose is within the state’s police powers AND that the purpose does not violate the federal constitution AND that the purpose can be the legislature’s real purpose or hypothetical purpose)  
AND
  2. Court assesses whether the challenged statute is reasonable or rational way to achieve the purpose that is mentioned in step 1
- ➔ If statute or issue is struck down (showing there is no rational relationship) it is called “rational relationship with teeth”

### Intermediate scrutiny test

1. the court looks to determine whether the state has an important or substantial state interest behind the statute  
AND
2. court looks to see whether the statute is closely related to the purpose referred to in step one

### Strict Scrutiny test

1. the court looks to see whether the state has a compelling purpose in enacting the statute  
AND

2. whether the statute is a necessary or narrowly tailored or the least restrictive way to achieve the state's purpose referred to in step one

### **C. Personal Autonomy:**

- When the Court ruled in *Roe v. Wade*, the Court stated that the fundamental right of women to abort is found implicitly in the right to privacy, which is found within the realm of privacy rights.
- The Court said that since the law impinges on the woman's fundamental right to abort, they give the issue strict scrutiny, requiring the state to show a compelling government interest in doing the regulation.
  - o Court says that there is no compelling interest in protecting the fetus in first trimester since it is not viable.
  - o In 2<sup>nd</sup> trimester, the court says that the state has a compelling interest in regulating abortion as it relates to the woman's health; however, in the third trimester, the state has an interest in protecting the health of the fetus.
    - Even in 3<sup>rd</sup> trimester the child does not have 14<sup>th</sup> Amendment rights since it is not a "person" as according to the Const.
    - Herein comes the right to medical self-defense.
- In *Planned Parenthood v. Casey*, the Court rejected Roe's strict scrutiny and the trimester framework for the
  - o **Undue Burden Test:** A regulation will be unconstitutional if the purpose or effect of the regulation is to place a substantial obstacle in the path of the woman before viability.
    - This is only used in cases of abortion and is neither strict or intermediate.
    - The state is interested in the preservation of fetal life, however, if the effect of the regulation makes it more expensive or difficult to obtain, then it is unconst.
    - Application of this in term of specifics:
      - Towards provision of informed consent and 24 hour wait: Const since this allowed for medical knowledge to be given.
      - Spousal Notification: Unconst since many wife's are in abusive situations.
      - Parental Notification: This is not undue burden as long as there is a way to circumvent this step.
    - This test was limited in terms of partial birth abortion when the court said there were other considerations to make, such as potential harm on the doctor's profession.
- IN *Lawrence v. Texas*: the Court said that there was no tradition in America singling out homosexuals, thus a law banning consensual homosexual sex unconstitutionally violates a fundamental due process right.
- In *Washington v. Glucksburg*, the Court looked at patients right to assisted suicide.
  - o The Court stated that substantive due process needed a careful description of the right, and that the Court looks at history and tradition to determine there was precedence set discouraging suicide.
  - o This fits with Roe since there is a right to choose that which will protect your life, but no right to choose to end your own life.
    - Thus, no fundamental SDP, and this uses the rational basis test.

## Equal Protection Clause

- Set forth in the fourteenth Amendment, "Nor deny to any person within its jurisdiction the equal protection of the laws."

Roadmap:

- 1) How does the challenged statute discriminate against a class of people?
    - a. Statute can discriminate on its face.
      - i. That is, it is obvious from its text that it is discriminating.
      - ii. Can be either explicit or implicit, as long as the discrimination is obvious.
    - b. When the law on its face is facially neutral, but when the law, as applied, is discriminatory.
      - i. Ex. All firemen and firewomen must pass a physical strength test to be a fireperson.
        1. If a person can prove that the test cannot be passed by women, then it is discriminatory.
    - c. When the statute is facially neutral, but its purpose or underlying design is to discriminate.
      - i. Ex. Statute says the firemen and firewomen must pass a strength test to keep their job. If plaintiff can prove that the law discriminates against people with PHD's, then it violates this.
  - 2) What is the proper level of scrutiny to apply to the challenged statute?
    - a. This determination depends on the class of people or the activity to which the statute applies.
    - b. If the statute discriminates against a suspect class or impinges a fundamental right, the Court will usually use a strict scrutiny standard.
      - i. A suspect class is:
        1. Race
        2. Alienage (Legal)
        3. National Origin
      - ii. A Fundamental Constitutional Right is:
        1. Fundamental Substantive Due Process Rights
        2. Express Constitutional Rights
        3. Fundamental Un-enumerated Equal Protection Rights
        4. Fundamental Unenumerated privileges and immunities rights.
    - c. If the statute does not impinge on a fundamental right, but does discriminate against a quasi class, then the court will use an intermediate scrutiny.
      - i. Quasi Class:
        1. Gender
        2. Illegitimacy
        3. Children of Illegal Aliens
- Intermediate Scrutiny: The state, in order to show that its statute is constitutional, must show:
- That the statute shows an IMPORTANT governmental purpose
  - AND-
  - That the statute SUBSTANTIALLY RELATES to achieving that purpose
  - ii. These quasi groups are protected by this standard because:
    1. They are immutable characteristics—that is, people are born with them and they cannot be changed.

2. These groups have not been easily able to protect themselves through democratic political processes.
  3. These are groups that have all been subject to historical discrimination.
  - d. If the challenged statute does not impinge on a fundamental Constitutional right, and if the Statute does not discriminate against a suspect or quasi suspect class, then the Court will apply the rationale relationship test to the standard.
    - i. If the statute does not impinge on a fundamental right, the outcome will be determined on if it discriminates against a suspect class, a quasi-suspect class, or neither.
- 3) How do you determine if a statute really discriminates against a suspect, quasi-suspect, or some other class?
- a. The challenged statute must have a discriminatory purpose, *and* discriminatory effects against a suspect or quasi-suspect class in order to determine that that is whom the statute really discriminates against.
    - i. IF the statute discriminates facially, then that is pretty easy to determine because if the statute discriminates facially, then that this will be *presumed* to have a discriminatory purpose and discriminatory effect on a class.
    - ii. When the statute is Facially Neutral, the plaintiff has a burden of proof—she has to show the statute has a discriminatory effect and purpose against a suspect or quasi-suspect class in order to show that that is who is really being discriminated against.
    - iii. If the statute does not discriminate facially or neutrally, then the court will use the rational relationship test.
    - iv. \*\*\*If a statute does not impinge on a fundamental substantive constitutional right, then the outcome of the case is going to pivot on whether the challenged statute discriminates against a suspect or quazi suspect class\*\*\*
- 4) Does the statute meet the requirements of the appropriate level of scrutiny?
- a. Use the test for each scrutiny to determine.
  - b. Using Strict or Intermediate scrutiny, two factors to account for.
    - i. Whether the challenged statute is either over-inclusive, under-inclusive, or both.
      1. It is over-inclusive if it applies to more people than needed to achieve its purpose.
      2. An under-inclusive statute reaches only some of the people who are similarly situated.
    - ii. If the challenged statute is subject to one heightened, what this means is that the court will probably find that the statute is not necessary.
    - iii. Under intermediate, it means that the statute could fail because it is not substantially related to the government's purpose.
    - iv. Over and Under-inclusiveness are not factors for applying the rational relationship test.
- If the statute is facially discriminatory against a suspect or quazi suspect class, then governmental discrimination purpose and effect will be presumed
- Strict scrutiny is then used



- ➔ If the statute is not facially discriminatory, but is discriminatory as applied or in effect, then it is the burden of the plaintiff to prove governmental discriminatory purpose and effect against a suspect or quasi suspect class
  - If plaintiff can prove discrimination, then the court will use intermediate scrutiny
- ➔ If the statute is not facially discriminatory, but plaintiff can only prove purpose or effect but not both, then the court will apply the rational relationship test

### Rules on Prima Facie

\*\*\*If prima facie (on its face) case is not proven against a suspect or quasi suspect class, then the court will apply the rational relationship test\*\*\*

- ➔ A prima facie case is NOT enough on its own to create strict scrutiny, there are still other factors it must meet (they are discussed below)

If prima facie is proven, then the burdens shift to the defendant government.

- If defendant meets the burden on either intent or effects, then the court will use the rational relationship test to the challenged statute

### Over inclusiveness and under inclusiveness

- ➔ A factor which may influence how the second prong (means) of intermediate or strict scrutiny comes out
  - Under inclusive statute – one that applies to not all people who are similarly situation (not everyone in the same situation....not a full class of people)
  - Over inclusive statute – applies to more people than are needed for the statute to achieve its end

Under strict scrutiny, if a statute is either over or under inclusive, it is very likely that government will not be able to show that the statute is narrowly tailored

Under intermediate scrutiny, it could happen that a statute being over or under inclusive will still not be substantially related to carrying out the government's interest

Under the rational relationship test, over or under inclusiveness DO NOT MATTER

### What does "discriminate" mean?

- ➔ The challenged statute must have the PURPOSE and EFFECT of discriminating against a suspect or quasi suspect class
  - For purposes of equal protection, the court considers GOVERNMENTAL DISCRIMINATION

### Intermediate scrutiny for gender (enhanced intermediate scrutiny)

1. State must provide an exceedingly persuasive justification
2. Government must show that the challenged statute serves an important purpose, which is real and not based on gender stereotyping
3. The challenged statute must be shown to be substantially related to carrying out the government purpose
  - If the government can prove elements 2 and 3, then it will be deemed to have provided an extremely persuasive justification to fulfill the purpose

### **Prima Facie part of Equal Protection**

If a challenged law impinges (first part of class) on a fundamental right, then use the tests laid out in the first part of class

If a challenged law discriminates (equal protection...second part of class) against a suspect class or quazi suspect class, then the case will apply the prima facie test:

#### **Prima facie test –**

- ➔ If statute is discriminatory on its face against a suspect or quazi suspect class, then discrimination is PRESUMED
- OR-
- ➔ If not on its face, but plaintiff has shown government intent, and effect will be presumed

### **Sex Discrimination by the government (or any quazi suspect class)**

- ➔ There must be an exceedingly persuasive justification for discrimination based off sex
  - **(intermediate scrutiny with fangs)**
    1. State must provide an exceedingly persuasive justification
    2. Government must show that the challenged statute serves an important purpose, which is real and not based on gender stereotyping
    3. The challenged statute must be shown to be substantially related to carrying out the government purpose
      - If the government can prove elements 2 and 3, then it will be deemed to have provided an extremely persuasive justification to fulfill the purpose

### **Race Discrimination by the Government (or any suspect class)**

- ➔ Then the strict scrutiny test is used
  - Included in this category is restrictions on racial marriage.
  - 3 Types of laws discriminate facially based on race or national origin:
    - Symmetry or EQ Application Statutes: Racial classifications burdening both whites and non-whites.
    - Race Specific Classifications Disadvantaging Only a Specific Racial Minority

- Laws that on its face Require Separation of the Races: Apartheid.
- ➔ Japanese Internment Cases:
  - Normally, this is unconstitutional, but when it is done for military reasons saying one group is more likely to help the enemy, then there is a sufficient justification.
  - Even in these cases, the Court required a rigid scrutiny and a compelling reason
    - Pressing public necessity may sometimes justify the existence of such restrictions.
- ➔ In *Plessy*, the court first used the separate but equal doctrine, saying that as long as the facilities are equal, then the statute is legal.

### Equal Protection Involving Public and Secondary Schools:

- De Facto: Either there is no government discrimination and no government purpose to discriminate, or there is government discrimination, but no government purpose to discriminate.
  - Ex. Situation in pub school where there is racial segregation based on dynamics of private housing market.
- De Jure: There is government discrimination resulting from government conduct taken with the government purpose to discriminate.
  - Ex. State laws saying that students are assigned to a school based on their race to achieve racial segregation.
- In *Brown v. Board of Education*, the Court ruled that de jure discrimination mandating separate but equal was unconstitutional.
  - Separation was an impediment to the children's education and thus inherently unequal.
  - Technically, *Plessy* was never overruled, *Brown* just said that SepbEQ as applied to schools was unconst, then further cases restricted it more.
- *Brown II* gave standards for how to reach this remedy.
  - 1) Courts should use practical flexibility and should eliminate the need for obstacles into a smooth and simple way of desegregation.
  - 2) Defendants must make a prompt and reasonable start to compliance. But lower courts, don't be afraid to give defendants extra time if they can show it is necessary, and that a grant of extra time would be consistent with good-faith compliance.
  - 3) The District Courts should take all proceedings necessary and proper to admit the plaintiff African american children on a non-discriminatory basis with all due speed
    - a. The "all due speed" language was interpreted differently by the states, and so the Court later ruled that it should be done "with no delay."
- If not done fast enough, the Court can mandate a state to desegregate faster.
  - The use of racial quotas can be used, but only as a starting-off point as data and not as the ultimate goal.
  - Sometimes one race schools are unavoidable, but when it is, the Court should subject it to very high scrutiny, and the school district will have the burden under the scrutiny to show that the student assignment to the school is non-discrimin.
  - The Court can assign remedial altering to the districts, even if they are not necessarily contiguous.
  - With bussing, the distance and length of trip is not too imperil the children's health or education.

- If a challenged statute is facially and racially unconst, then it will be presumed that the state had something against race.
- In *Keyes*, the Court created the Keyes presumption, that is if a plaintiff can show government purpose to discriminate in a meaningful part of the district, then the government intent will be presumed.
  - o Moreover, if the effects are segregation, then the government intent will be presumed.
- Courts cannot deseg beyond district lines in multipl districts unless the non-offending suburban districts caused or intended to cause the segrative school district lines.

### Gender Discrimination:

Gender Discrimination is a quasi-suspect class and is thus given intermediate scrutiny.

The test they use is only used in EQP with gender discrimination.

- 1) Government must show it has an exceedingly persuasive justification for the classification,
- 2) To meet that burden, the government must show that it has an important interest that is being served by the classification where the interest is real, and not based on gender-stereotype.
- 3) To meet that burden, the state must show that the gender classification is substantially related to the state's important interest.
  - a. However, there is some dissent in the court that this actually is more strict than intermediate scrutiny, this changing the type of protection for the class.
  - b. Court said that the adversative education interest and diversity of single-sex schools is not an exceedingly persuasive nor an important interest.

- To get heightened scrutiny, plaintiff will have to prove that the government had a discriminatory intent and effects against a suspect or quasi-suspect class in order to show that it is one of the classes the government is discriminating against.
  - o **Once a prima facia case is made, then the burden is shifted to the government to show that the government did not have any discriminatory intent, or that it did not have any discriminatory effects as a result of the government action.**
  - o If the government meets *either* of those burdens, then the Court is to apply the **Rational Relation Test**, since then a PF case will not have been made.
    - This is used even in racially charged cases, such as when the plaintiff sued the city for denying his application to the FD based on race only to have the city rightfully reject based on non-racially motivated reasons.

### Classifications Benefitting Racial Minorities:

- All governmental affirmative action programs for racial minorities are held to strict scrutiny.
  - o This came in the wake of *Adarand* when higher bidder and racial minority was given a construction project, the court said that this should be held to strict scrutiny instead of intermediate.
- Gov't Aff. Action plans like this can have a compeilling interest when the government's discrimination must seek to correct the effects of past discrimination within the defendant government's regulatory jurisdiction.
  - o The discrimination must have been caused by the government itself or by a private entity subject to the government's regulatory jurisdiction.

- The government may adopt remedial race discrimination only if it has a strong basis in evidence to decide that the affirmative action is necessary before it undertakes the affirmative action plaintiff.
- For the program to be narrowly tailored, this must be true:
  - Government must be able to show that in adopting the racial affirmative action program after all race neutral remedies were studied and found insufficient
  - The racial classifications used by the governments program must be no more extensive than necessary to achieve the necessary goals.

### **Affirmative Action in Context of Higher Public Education:**

In the UM law school case, the Court ruled that Institutions of higher learning will always have a compelling purpose in racial affirmative action setting if the purpose is to have a diverse educational body—however, the dissents often came down on the other side.

- IN the dicta of the case, the Court admitted that this can only be a temporary solution.
- IN the undergrad UM case, the Court says that we should be color conscious to ensure there is no discrimination as a result of being blind to it—thus there is a compelling purpose.

- Aliens:

- Legal Aliens are a suspect class and are thus usually subject to strict scrutiny.
- Government Actions Test: used for state discrimination a/g legal aliens from holding office
- Illegal alien children are determined to be a quasi-suspect class, while the adults are given the rational relationship test.

### **Homosexual Protection**

- In *Romer*, the Court ruled on a against a CO law that forbade protecting gays while at same time repealing all other laws based on discriminating gays. The Court ruled that this made gays a suspect class, which they were not.
- Court will usually apply strict scrutiny to this since it only matters on whether there was impingement of a fundamental right.
  - Do the plaintiffs claim that the government violates their EQP? IF yes, go to next.
  - DO plaintiffs assert a fundamental constitutional right, in this case. if no, then the courts are going to use the rational relation test. If yes, go to next.
  - IS the Fundamental Const right impinged by the challenged statutory classification? If no, rational relationship. If yes, then strict scrutiny.
  - Does the challenged statutory classification survive strict scrutiny? It it discriminates against a quasi-suspect or suspect class, then the Court will use strict scrutiny.
- For EQP purposes, fundamental rights are,
  - Express Constitutional Rights,
  - Fundamental Substantive Due Process Rights
  - Fundamental Implied Equal Protection Rights,
  - Fundamental Right Flowing from a Combination of the 14<sup>th</sup>
  - Privileges or Immunities Clause and the Citizenship Clause.

## VOTING

race based discrimination

- In proving impingement on a suspect class, for voting, the plaintiff must make a prima facie case.....but instead of showing a government purpose to discriminate, plaintiff has to show that discriminating on the basis of race was THE predominant factor motivating the government in engaging in race based districting
- Actual voting crisis
- The impingement standard for is if there is a substantial voting dilution.
  - The Courts use strict scrutiny
  - Individual Vote dilution impinges on a Fundamental Right to vote,
  - This means that the ratio between representative to constituents must remain approximately the same.

### Standard for right to travel when citing the equal protection clause

- Standard for impingement under the equal protection clause when it is claimed by plaintiff that he should get strict scrutiny because of violation of a fundamental constitutional right of travel interstate is to look to see if:
  - The durational provision acts as a penalty or deterrent to the right to exercise the constitutional right to travel
    - This is found in Fixed date residency requirement, Fixed point residency requirement , OR Durational residency requirement
      - If any of these requirements is found to create a penalty or deterrent, then the court will apply strict scrutiny
- If residency requirement does not impinge on a fundamental right to immigrate interstate, then the court will use the rational relationship test OR rational relationship with teeth
  - Ex. State law says that one must live in that state for at least 1 month before the person can play lotto....unless you are earning your living by playing the lottery, a fundamental right to immigrate is not being impinged because it is not acting as a penalty or deterrent to the right to exercise the right to travel

### Standard for right to travel when citing the right of citizenship in the United States (citizenship clause)

All that's needed is that a residency requirement acts as a penalty

- (Saenz in 1999 overturned the view in Shapiro about penalty or deterrent...but Shapiro is still good law pertaining to the equal protection clause)
  - The state has imposed a penalty when it treats new comers differently than residents that have lived there long enough
    - Requirements that apply: Durational residency requirement or either a fixed date or fixed point residency requirement that have the same effect as a durational residency requirement( which requires the plaintiffs (recipients

of gov. benefits) to stay in the state for a prescribed amount of time before they can get a benefit)

- The mere inequality that the residency requirement creates two unequal groups of people is ENOUGH to create a penalty (that can be ruled against)
  - The court will then apply strict scrutiny if it finds a penalty (this scrutiny will always work in favor of the plaintiffs)

**Reasons for why a plaintiff would apply the citizenship requirement instead of the equal protection clause:**

- ➔ When there is a fixed date or fixed point has requirement that has the effect of a durational requirement

Ex. A fixed date or fixed point has requirement that has the effect of a durational requirement

- the state of Alaska says that it will make revenues from its oil deposits, and it will reward a family these revenue bonuses, IF they are residents of Alaska between June 15 and September 15 or 2010.
  - So they have to be there for a prescribed amount of time to collect government benefits
    - If it was just one of those dates instead of between the two, then the plaintiff would have to use equal protection clause instead

**Benign government discrimination**

- ➔ Means that the government will enact a statute that forces some type of advantage or benefit to a socially and economically disadvantaged individuals
  - Things like affirmative action

**On Gender**

In general, reasonable government measures taken to remedy past discrimination against women or men will be judged an important governmental objective, AS LONG

AS the measure is NOT based on gender stereotyping (things like...women are weak, so here is this handout)

### On Race

All racial classifications, imposed by federal, state or local governments, are constitutional ONLY if they are narrowly tailored measures that further compel governmental interests (strict scrutiny)

**\*\*Remedying the present effects of past racial discrimination IS a compelling purpose under strict scrutiny\*\***

The *Crossan* teaches that governmental remedying of the present effects of past racial discrimination WILL be a compelling purpose if:

1. The remedial law seeks to fix the effects of race discrimination perpetrated by government  
OR by an entity within a government's regularly jurisdiction (like past discrimination caused by a business within a city...then it may be a compelling purpose for the state to fix the discrimination through racial affirmative action)
2. For government to establish that it had a compelling purpose for its affirmative action, prior to adopting the affirmative action, the government must have gathered evidence showing a prima facie case of a constitutional OR statutory violation via racial discrimination

### Chapter 11:

### Procedural Due Process

#### Procedural vs. substantive

- Substantive question – if the state establishes broad, mechanical requirements which must be met before one may be licensed to practice a certain profession, the requirements will be tested solely by use of a substantive due process analysis (**is a fundamental interest at stake?** If not, does the rule have some rational relation to a legitimate state purpose?)
  - o Government must have a good reason for depriving a person of their liberty rights under the due process
- Procedural question- if a state imposes a requirement against which each individual must be carefully, and subjectively evaluated, the need for procedural due process may also be triggered. Thus if the professional licensing procedure requires an evaluation of "good moral character", the elements of procedural due process (**the right to be heard, the right to an explanation, right to a notice, etc.) must be given**
  - o Remedies for procedural issues are most likely a hearing and notice (which were previously not given)
  - o This says that the government has to follow certain procedures before depriving citizens of their due process. Thus it is about the government preventing the unfair application of the procedure.



### What triggers procedural due process?

1. Government must be taking something of yours that fits the due process clause's definition of life, liberty, or property

AND

2. The government's deprivation of those interests MUST be great enough
- For PDP, property is never created by the US Const. It is created by other sources. For a PDP, a government benefit is property only if it can be terminated for cause.

### What are the interests that constitute deprivation of liberty or property?

Property –

Property interest that will trigger procedural due process protections:

- interests are NOT created by the federal constitution, but are created by other sources of law (state laws, other federal laws, etc.)
  - o Includes real property AND personal property
- What if the property is government benefits? (government employment, social security, etc.)
  - o Not all governmental benefits qualify as property
    - In order to qualify as property, government benefits MUST BE subject to termination ONLY for cause
      - So if the government benefits can be terminated for any other reason, then they are NOT property (like a time based benefit)
        - o Court uses the **standard of a legitimate claim of entitlement** to determine if a government benefit is an individual's property...if there is entitlement....then denial of this entitlement provides justification for a hearing and notice
      - A restraining order cannot qualify under PDP since the person has only an interest and is only entitled to the warrant, not the arrest.

### 2 requirements for a government benefits to be proper

- o any law except the U.S. Constitution must create an entitlement to the benefit
- AND
- o the benefit must be subject to termination ONLY for cause

If procedural due process is triggered, how do you know about the nature and timing of the procedures that are due?

Refer to the federal constitutional standards –

1. notice of the oncoming deprivation,  
AND
2. a pre-deprivation hearing
  - at the hearing, there should be AT LEAST an explanation of the evidence against the person,
  - and the person has to have an opportunity to respond to the charges against him

If the hearing is impracticable, OR to determine whether a full blown adversarial hearing is necessary, then the court has come up with a balancing test to determine whether a pre-deprivation hearing must be held, or where a *post deprivation* hearing must suffice if a pre-deprivation hearing is impracticable

Courts will have a balancing test to consider:

1. private interest that will be impacted by the deprivation
2. whether additional procedures will reduce the possibility of error
3. the public interest in an efficient and speedy resolution

#### **Rule for prisoners and due process**

1. The prisoner must show that there exists mandatory language in an applicable source of law creating an entitlement in the prisoner to a reasonable expectation of a continued enjoyment of the prison conditions of which he was sentence  
AND
2. the deprivation must be an atypical and significant hardship imposed on the prisoner
  - a. (So a strip search was found constitutional under this, but denial of a hearing to a severe punishment for actions in prison can be violative of this.)

#### **What is a deprivation under the due process clause?**

- The government has to act INTENTIONAL in order to deprive a person of their due process rights
- ➔ So a prisoner who tripped on a pillow did not have a PDP claim.

#### **Examples of situations where a person claims an irrebuttable presumption**

*Law that says that air force pilots have to retire at age 60, Michael is 58*

- *The air force also says that you can't be fired unless there is good cause*

*Depending on the circumstances, Michael could bring two types of procedural due process claims..*

*Does Michael have a property interest in his employment?*

- Yes because the statute says that he can keep his job unless there is good cause (and therefore a government benefit must have a terminable clause in order to be considered property)

Is there intentional deprivation of property?

- Yes because the letter was signed, meaning it was intentional

→ So Michaels remedy would be a hearing

BUT...change the facts...so now Michael is 60

He can bring a procedural due process claim that he should get a hearing, but this time his procedural due process claim would be to rebut the presumption set forth in the statute that pilots aged 60 or older are unable to perform their piloting duties

- Therefore he is claiming procedural protections to rebut an irrebutable presumption

→ This is considered a non-property, non-liberty, due process claim

- o Because Michael would be proceeding on the suit on the theory that he is entitled to procedural protections (hearing) so as to rebut an unfair presumption that is built into the law that pilots can perform after age 60

Presumptions will be explicit or implicit (stated or not)

Presumptions will also be rebuttable or irrebutable (challengeable or not)

Ex.

A federal statute that says that any military pilot, who reaches age 60, must then retire unless he or she can prove ability to perform his piloting responsibilities

Rebuttable or irrebuttable?

- Rebuttable, because he has the chance to prove that he is still qualified

Explicit or implicit?

- Explicit, because it's essentially saying that a person can no longer perform the job at age 60

Ex.

Federal statute says that any military pilot who reaches age 60, is deemed unable to perform piloting responsibilities and therefore must retire

Rebuttable or irrebuttable?

- Irrebuttable because it says that anyone who is 60 IS DEEMED unable to perform

Explicit or implicit

- Explicit because it says that anyone who is 60 is unable to perform

Ex.

Federal statute says any military pilot who reaches 60 years of age must retire

Rebuttable or irrebuttable

- Irrebuttable because its says anyone over 60 must retire

Explicit or implicit

- The only way to know is to find evidence of the purpose of the statute is to retire older pilots because they are incapable
  - o **So you have to find evidence of a purpose...if you can find evidence, then it is an irrebuttable implied statute**
    - If you cant find purpose, **then you cannot presume** there is an implied presumption

Under what circumstances can people claim that their procedural process protection should be triggered?

- People can only bring this claim IF that statute claims an irrebuttable presumption
  - o Because if its rebuttable, they already have a right to rebut
- It doesn't matter if the irrebuttable presumption is implicit or explicit, as long as its one or the other

Standard for ascertain whether a procedural due process challenge to an irrebuttable statute will be successful

1. Could a legislature reasonably conclude that the legislative classification it created is appropriate to the legislature's legitimate ends
- AND
2. could the legislature reasonably conclude that the difficulty of individual determinations in (lieu of the presumption) justify the over inclusiveness of the classification

## State Action

**State action doctrine** - When the private actor acts like the government or it has close links with the government (state OR federal) it is considered a government action

2 strands to state action doctrine

- Public Function strand
- If a private entity performs a function that is traditionally exclusively performed by government, then the private entity will fulfill the public function requirement and its activities reachable under the constitution
  - o Framed from idea that private groups should not be able to bypass government

- Some powers are so quintessentially governmental in their nature that whoever performs them must be held accountable.

➔ Nexus or entanglement strand

- 3 scenarios where you will know how to handle a state action under the nexus strand

1. Where there is judicial enforcement of a private contract
  - a. Ex. *Shelley v. Kraemer* where the trial court upheld a contract between white landowners forbidding blacks from renting their property. When it got to the SC, they reversed saying that judicial enforcement was key to keeping the black family off the property in this instance.
2. Where there is heavy duty joint activity between the private entity and the government
  - The activity is joint enough that it becomes government activity because effectively the government is facilitating the private actor's actions (which would essentially make it state action)
    - Ex. Restaurant discriminated against black man on account of race. Restaurant was in same building as public parking garage, the Court said based on their symbiotic, mutual financial benefits b/t garage and restaurant show the actions unconst.
3. Where there is government endorsement of the private activity
  - a. Necessary entanglement b/t MHSSA and private school, this fits the category, although the mere selling of a liquor license to a private org does not meet this requirement.

Private actors can be reached by the constitution by ways other than the state action doctrine

-can, through the intermediary of congress, private action can be indirectly reachable through the 13<sup>th</sup> and 14<sup>th</sup> amendments

SEE HANDOUT MARKED III!!!

- 13<sup>th</sup> amendment, § 2, AND 14<sup>th</sup> amendment §5
  - Congress shall have the power to enforce, by appropriate legislation, the provisions of this article (sections 1 of 13<sup>th</sup> and 14<sup>th</sup> amendment)
- Section 1 of the 13<sup>th</sup> amendment bans slavery (and involuntary servitude)
  - "neither slavery nor involuntary servitude, except for punishment, shall exist within the united states or any place subject to their jurisdiction"
    - Only provision of the United States constitution, of its own force, prohibits all governmental sectors and all private individuals of slavery
- Section 2 of 13<sup>th</sup>
  - Authorizes the power of congress to enforce laws against private action if they are related to the badges or incidents of slavery

- Morrison case- says Congress DOES NOT have the power to prohibit private action under §5 of the 14<sup>th</sup> amendment

### Rules that limit Congress' powers under §5 of the 14<sup>th</sup> amendment

1. §5 Only empowers congress to enact preventative OR remedial statutes in the sense of remedying or preventing state violations of judicially recognized constitutional rights under §1 of the 14<sup>th</sup> amendment
  - o Judicially recognized means that the United States supreme court recognizes constitutional right, under §1 of the 14<sup>th</sup> amendment
    - Example: fundamental substantive due process right to marry
2. §5 does NOT empower congress to enact interpretive statutes whereby congress creates new rights, in the sense of creating rights and providing for their enforcement when the rights are not judicially recognized constitutional rights under §1 of the 14<sup>th</sup> amendment

### Congress has come up with 3 types of statutes that may be constitutional under §5 of 14<sup>th</sup> amendment

1. Remedial parallel enforcement statutes – where there is a federal statute which creates a statutory right that is perfectly parallel in all respects to a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment
  - o Ex. Congress enacts a statute creating a private cause of action for damages against states that impose undue burdens on a woman's right to get an abortion before viability
    - The statutory right perfectly mimics the constitutional rights announced by the supreme court

➔ This type of statute is constitutional IF the statute is a rational way of enforcing the judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment
2. Remedial non-parallel enforcement statute – creates a statutory right that is NOT perfectly parallel in all respects to a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment, however the federal statute DOES purport to prevent or remedy state violations of a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment
  - a. Congress enacts a statute creating a statutory right that in substance is perfectly paralleled to a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment, BUT, the federal statute does not require a plaintiff to go through all of the same steps to get relief under the statute that a plaintiff would have to go through to get relief under the 14<sup>th</sup> amendment
    - Ex. Congress enacts a statute that creates a statutory right to marry and creates a private cause of action for damages against states which violate the statutory right. The federal statute also provides that in order for a plaintiff to establish a violation of the statutory right to marry, he MUST show that the state directly interfered with his right and that the interference

does not serve an important purpose or is not substantially related to carrying out that purpose

- The substantive right itself is identical, but procedurally they are not, because under the constitution if a plaintiff is claiming a fundamental due process right has been violated, he has to show impingement (direct and substantial interference)...and the federal statute DOES NOT have an impingement standard

- This statute WILL BE constitutional if 2 things are true:
  - The statute is a rational way to prevent or remediate state violations of the judicially recognized constitutional of substantive due process under §1 of the 14 amendment
  - AND
  - the federal statute is not TOO MUCH of an intrusion on state's sovereignty

b. Where congress enacts a statute that creates a right that, in substance, is NOT perfectly parallel to a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment. The statute purports to be nevertheless enforcing a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment.

- Ex. Congress enacts a statute that creates a positive statutory right in all school age children to receive from the states that quantum of elementary and secondary education which is of excellent quality. (there is no such constitutional right) But congress maintains that it has enacted this statute to enforce the fundamental constitutional right to free speech, which IS judicially recognized right under the 1<sup>st</sup> amendment, which has been incorporated to provide for the state to

- Constitutional if the statute is a RATIONAL way of preventing or remediating state violations of a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment

3. Interpretive statutes - the federal statute creates a statutory right that is NOT parallel to a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment.

- Ex. Congress enacts a statute that creates statutory right for public school children to be free of all corporal punishment in school. This statutory right has absolutely no analog in the form of a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment

➔ These ARE unconstitutional

- Congress exceeds constitutional power when it enacts interpretive statutes

\*\*\*Test to help distinguish between type 2b statutes and 3 statutes – **proportional and congruent test**

- If the federal statutory guarantee is proportional and congruent to preventing or remedying state violation of a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment, then the statute IS a type 2b statute (remedial non-parallel enforcement statute) if it is a rational way of preventing or remedying state violations of a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment

- If the federally statutory guarantee is NOT proportion or NOT congruent to preventing or remedying state violation of judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment, then the statute is interpretive and thus unconstitutional

Proportional – for a federal statute to be proportional to preventing or remedying state violation of a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment, the statutory right MUST NOT OVERSHOOT in reaching its goal of preventing or remediating state violations

-AND-

Congruent- for a federal statute to be congruent in preventing or remedying state violation of a judicially recognized constitutional right under §1 of the 14<sup>th</sup> amendment, there MUST BE evidence of A HISTORY of STATE VIOLATIONS OF THE CONSTITUTIONAL RIGHT, of which the violations could be prevented or remedied by enforcement of the statutory right

This is back to your own notes on this section, minimize as necessary!!!

- IN *US v. Morrison*, the Court struck down a law that provided remedy for victims of gender-related violence, saying that since this was done through the 14<sup>th</sup> and the 14<sup>th</sup> only affects states, Cong does not have the authority under Section 5 of 14<sup>th</sup> to regulate the private conduct of people.
- **Remedial Parallel Enforcement Statute:** this is a federal statute that sets forth a statutory right that is in all respects parallel to a judicially recognized constitutional right under Section 1 of 14<sup>th</sup>.
  - **Ex.** Cong enacts a statute creating a private cause of action for damages against states that impose an undue burden on a woman's right to obtain an abortion prior to viability.
  - **Standard:** Cong's legislation will be Const as within § 5 power, if the statute is a rational way of enforcing a judicially recognized right under § 1 of 14<sup>th</sup>.
- **Remedial Non-Parallel Enforcement Statutes:** 2 types:
  - Where the federal statute sets forth a statutory right that in substance is in all respects parallel to a judicially recognized Const right under § 1 of the 14<sup>th</sup>, but the statute provides that the statutory right can be invoked through less demanding procedural steps than are needed to invoke the Const
    - Ex. Cong enacts a statute See handout for the information on this!!!!!!!!!!!!

The Cases *Boerne v. Flores*, *Kimel* at 1286, *Board of Trustees of Alabama v. Garret*, and *Dickerson* are all examples of this.



## Free Speech

### Free Speech clause of the 1<sup>st</sup> amendment

- Congress shall make no law abridging free speech
  - o Free speech means everything under the umbrella of expression (dance, song, non-verbal actions, etc.)

Expressive conduct- conduct that is intended to convey a message and that is reasonably understood to convey that message

Non-expressive conduct – conduct that is NOT intended to convey a message

➔ Not all expression is protected by the free speech clause

### 3 types of expression

1. Unprotected per se – the free speech clause does not apply at all to:
  - a. Child pornography (i.e. pornographic descriptions of real children)
  - b. Obscenity
  - c. Fighting words
  - d. Commercial speech that's unlawful or misleading
  - e. Threats of unlawful violence
  - f. Offers to provide or requests to obtain child pornography (regardless of whether the actual materials portray a real child or not)
2. Protected per se
  - All speech NOT listed in “protected” AND unprotected per se (e.g. political speech, religious speech, artistic speech, scientific speech, etc.)
3. “Protected” – speech not outside the ambit of free speech clause, but that is sometimes actually unprotected (i.e. incitement, defamation, and commercial speech that is neither unlawful nor misleading)
  - o Any restriction on protected speech is presumed to be unconstitutional and will be held to the strict scrutiny test

### How to analyze free speech issue

1. Analyze the kind of speech identify (what type of speech are you dealing with?)
2. Classify the type of regulation that is being challenged
  - a. **Content based** – regulates the substance of the speakers message (if the government is “aiming at the communicative impact” of the expression)
  - b. **Content neutral** – regulates expression regardless of the substance of the speakers message (e.g. no talking in the library) (government is aiming at something other than the communicative impact, even if it has the effect of burdening expression)
3. Venue of the speech
  - Two types of content based regulations

- a. View point regulation – aimed at the expression of a particular viewpoint (e.g. no speech advocating a pro-choice position on the abortion issue)
- b. Subject regulation – aimed at the expression of a certain subject (e.g. no speech about abortion)

Tests for content based and content neutral regulation:

1. Content based – will generally be strict scrutiny, and the action will usually be struck down
2. Content neutral – the government must satisfy a 3 part test before the regulation will be sustained, if the regulation substantially impairs expression:
  - a. Significant governmental interest – the regulation must serve a significant governmental interest
  - b. Narrowly tailored – the regulation must be narrowly tailored to serve that interest
  - c. Alternative channels – the state must “leave open alternative channels” for communicating the information

Content based regulations of per se protected expression are subject to strict scrutiny in all venues, with one exception

Content based regulations of per se unprotected expression in all venues ARE constitutional, as long as that is what they are regulating

- Even within an un protected per se category of expression (like fighting words), there can be subsets of protected per se messages...and if it is that kind of message that is being regulated, then the regulation is subject to strict scrutiny
  - o This means If you have a content based regulation of all fighting words, as defined by Cohen, then the regulation will be constitutional. BUT if the regulation only bans certain fighting words then the court will apply strict scrutiny
    - it has to be a view point regulation for the strict scrutiny to apply (so this essentially says that you have to ban all fighting words or no fighting words...like in R.A.V. v. St. Paul...the majority held that the regulation was NOT narrowly tailored because it did not include ALL view-point hate speech)
      - this means that there are some un protected per se categories that actually become protected per se expression

**Doctrine of Overbreadth –**

- a statute is overbroad if it bans speech which could constitutionally be forbidden but **also** bans speech which is protected by the 1<sup>st</sup> amendment.
  - o The overbreadth doctrine lets a litigant prevail if he can show that the statute, applied according to its terms, would violate the 1<sup>st</sup> amendment rights of persons not now before the court

**Incitement speech**

**Clear and Present Danger:** If the government wants to punish speech as incitement, then the threat must punish speech that has three factors:

- The speech must have a likelihood
- Of imminent and
- Significant harm.

Some cases had much debate about the meaning of “imminent harm” as required by CaPD, so the Court clarified in this modern case.

### **Court’s modern approach to free speech (POLITICAL SPEECH) is announced in Brandenburg v. Ohio**

**Regulation of speech** (from Brandenburg v. Ohio)(on illegal action) (for **overt** incitement)-

- The government may ban speech that advocates imminent illegal conduct. To be banable, the speech must satisfy 2 requirements:
  1. The advocacy must be intended (directed) to incite or produce imminent unlawful action
  - AND
  2. The speech must in fact be likely to incite or produce that imminent lawless action

Thus, it is often simplified to *directed to incite / likely to incite*.

IN THIS TEST, IF THE REGULATION FAILS THE TEST, THE THEN SPEECH GOES WITH IT (making the speech protected per se)

- o Then if the speech is in question again, the court will apply strict scrutiny
  - (this is important to note because the same is not true for commercial speech under the Central Hudson test)

\*\*\*So incitement speech can still be protected...but it can’t be intended and likely to produce lawless speech\*\*\*

**Covert Incitement Speech:** With speech that is part of an organized clandestine conspiracy, the Court will ask if the gravity of the evil advocator discounted by its improbability, justifies a restriction on the speech to avert the damage.

### **Protected incitement speech (incitement speech that is OK)**

- Expression that incites imminent illegal conduct or action, BUT something that is not directed to incite, and likely to incite imminent illegal conduct
  - o (ex. A high school student who is in a park in Kansas with a bunch of friends, there are tons of people at the park, and then teenager and his friends are talking amongst themselves about how they don’t like the Obama administration, and the teenager says to his friends “I think we need to storm the white house” (without intending to incite anyone), and other people who are within earshot hear him and decide to go storm the white house.
    - He didn’t intend to incite anyone, and they were in Kansas, so there wasn’t imminence
- Expression that incites legal conduct or action (speech to tell someone to go vote, etc.)

### **Test from Dennis v. United States for covert incitement speech**

Test for content based regulation of covert incitement expression is a balancing test:

- Does the gravity of the evil advocated, discounted by its improbability, justify a content based restriction on the speech to over the danger

## Considering Government regulations that are: vague, overbroad, and too early

**Vagueness** (too unclearly) – unclear about what expression it sweeps into its realm, and therefore there is a concern that such a law may sweep in speech that is protected per se—that is, it gives insufficient notice of what type of speech is protected.

- A constitutionally vague law under the free speech clause when people of common intelligence cannot tell what speech is punished and what is not
- 
- This only applies to criminal punishments of expression
- Vagueness and overbreadth may even occur at the same time

**Overbreadth** (too broadly) – sweeps in (punishes) too much speech because it punishes or regulates protected per se speech as well as the illegal speech

- Overbreadth always results in the invalidation of the challenged law on its face, rather than as applied to a particular speaker
- When a statute is invalidated on its face, then it is dead and can't be used
- The overbreadth must be substantial before facial invalidation is appropriate
  - o This means that there are a significant number of instances where the statute could curtail protected per se expression
  - o It also means that the statute could really important speech
- The court will not apply the overbreadth doctrine if the statute can narrowly construed and interpreted so as to avoid the overbreadth of the law
  - o It will also not apply the overbreadth doctrine if the statute can be severed so as to avoid the part that is causing overbreadth without losing the entire meaning of the statute
- Normally in overbreadth litigation, a person claims that the statute is too broad as applied to that person....if the court agrees with that person...then the court will trim away the parts of the statute that are unconstitutional as applied to that person (but the rest of the statute still exists)
- An over breadth case never reaches the question of whether the plaintiff's speech is constitutionally protected (because it doesn't matter for the case)
  - o The plaintiff instead has to show that the claim is overbroad under the free speech clause, so as to curtail the protected per se expression of persons who are not before the court (so he doesn't claim that he is being hurt by the statute, but rather that other people will be hurt by the statute)
    - The concern with an overbreadth statute is the "chilling effect" of regulating free speech

So as in *Coates*, the Court struck down on its face a law prohibiting the expression of sexual matter since it was vague and overbroad in application.

**Prior restraint** (too soon) – This is when there is administrative or judicial ruling preventing a type of speech from occurring. (**Near v. Minnesota**)

- The government intervenes BEFORE there is any expression
- The government intervenes to PREVENT any expression
  - o Ex. Injunctive relief is invalid if they try to stop the speech before it is printed
  
- This is more along the lines of judicial censorship, because the court prevents expression from even happening
  - o This messes with the market for free exchange of ideas
  
- The difference between subsequent and prior restraint turns on the timing of government intervention
- This can happen by way of:
  - o a licensing or permit in order to speak,
  - o a judicial injunction that says “in the future, you will not say \_\_\_”

Prior restraints are highly disfavored by the court because of:

-censorship that it creates

-with licenses, etc. there aren't really that many procedural protections (they can be arbitrary)

-it makes sense to allow speech and then let the ideas work themselves out

-the collateral bar rule (\*\*\*) a person that thinks that a prior restraint is unconstitutionally shutting him up, because if he carries out what he thinks are his free speech rights and violates the order, he cant challenge it in court (\*\*\*)

### **Two exceptions to prior restraint**

1. Troopship exception – for national security prior restraint will be upheld to protect national security
2. Obscenity: this will be upheld if there is a full adversary hearing before the injunction is issued.

With *Watchtower Bible and Tract Society*, the case where the city banned solicitors unless they got a permit. A religious group sued saying that if they got a permit, it would go against their religious beliefs.

If the speech is within the realm of protected speech, then the prior restraint in the form of a licensing or permit system must be:

1. Government must have an important purpose for its licensing arrangement
  - a. This case did not have an important purpose since it will not deter criminals from going to door.
2. The government body in charge of issuing or denying the license must be accorded very clear criteria for doing so, such so that the body has no room for discretion
3. Certain procedural safeguards must be fulfilled
  - a. The administrative decision of the government in granting or denying the license must be prompt
  - b. There must be a full and fair hearing about the propriety of denying or granting the license before any speech is prevented
  - c. There must be a prompt and final judicial determination regarding the validity of any preclusion of expression

What if this type of prior restraint would prevent expression of unprotected speech per se?

- Will be upheld only if the procedural safe guards are upheld
  - o The government does not need to meet the first 2 rules for when the speech is protected

### **Defamation Speech** (New York Times v. Sullivan, Gertz v. Welch)

Defamation – a tort for which tort law usually provides damage actions in response to expression injures a person’s reputation

Content based regulation created damages liability for expression that defames a public official AND public figures, will be constitutional if the expression was:

1. False
- AND
2. if the speaker spoke with actual malice (knowledge that it was false OR reckless disregard for whether or not it was false)
  - ➔ this is to avoid the “chilling effect” of limiting free speech that is true but that could not be proven
  - ➔ This applies whether a person is seeking compensatory OR punitive damages

#### Public officials are:

- elected officials
- candidates for public office
- a government employee with discretion
- a public employee whose job duties make the public interested in his performance

#### Public figures:

- a person who is NOT a public official, but who is in the forefront of trying to resolve important public questions
  - by reason of his or her fame helps shape public events
- Ex. Rush, Michelle O., and Brangelina

#### So some defamation is protected, and other isn’t

##### Unprotected defamatory speech

- speech defaming a public official or public figures, of which is false and made with actual malice (this creates damages)

##### Protected defamatory speech

- speech defaming a public official or public figures, of which is false BUT is made with less than actual malice

### for non-public figures

Content based regulations of defamation of a private individual ARE constitutional, as long as the statute creates liability for compensatory damages AND as long as the defamer was at fault

- almost all private defamation for which you could get compensatory damages will be unprotected
- Private Individual is someone who didn't have any fame or community, he didn't thrust himself into the forefront.

### Punitive damages for defamatory statements

Content based regulation, punishing by punitive damages, of defamation of a private individual are constitutional under the free speech clause, if the defamation:

1. does NOT involve issues of public concern
- AND
2. the defamation results from mere fault

### Obscene Expression

This is unprotected Per Se.

In order for expression to be obscene, the trier of fact must find all three criteria of: **(Miller Test)**

1. whether an average person, applying contemporary community standards, would find that the work as a whole appeals to the prurient (lascivious) interest
2. whether the work depicts, in a patently offensive way, sexual conduct as defined by the applicable state law
3. the trier of fact must determine whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value

- if the content based expression meets the three criteria, then it will be constitutional
- if the content based expression does not meet the three criteria, then it is unprotected by the constitution and can be regulated

➔ When you have a content based regulation of per se protected expression, and that regulation is challenged under the free speech clause, the court will apply strict scrutiny to the regulation

### how do you distinguish obscenity from pornography

- adult pornography is protected per se expression
  - o it is sexually explicit expression about adults, that is NOT constitutionally obscene
- Child Pornography is unprotected per se
  - o It has to be the portrayal of an actual child in a sexually explicit manner
- Animal Cruelty is protected per se, unless the speech is previously recognized to have a long established category of unprotected speech.

## Inflammatory Speech:

### Fighting words

- per se un protected speech (because of the content AND style of the expression)
- **Cohen Rule** -fighting words are expression made by speaker in a face to face encounter and directed at a particular person or persons where the expression taken in context is likely to provoke listener or listeners to a physically violent reaction against speaker
  - o this must be considered in the context of the way the words are said
  - o this is difference from incitement speech because incitement speech addresses a group of people
  - o An Altercation does not have to actually take place.
- **Hostile Audience Crowd:** Similar to last one, in the last instance it is unprotected per se, except in this one the doctrine arises when the expression is not addressed to a particular person or persons.
  - o Thus, in this one, the government should not punish the speaker as much as provide law enforcement to control the crowd.

**R.A.V. rule** - Stat: Whoever places on places on property a flaming cross that arouses anger in others is doing hate speech. The SC said that this as far as it is to

1. Content based regulations of per se regulations are subject to strict scrutiny in all venues except one, we'll get there later.
2. Content based regulations of per se unprotected expression in all venues are constitutional as long as that is what they are regulating., with one exception.
  - a. The viewpoint is one of hatred.
  - b. The viewpoint of hatred can express subsets that are protected viewpoints.
    - i. If dealing with viewpoint reg, then the viewpoint is subject to strict scrutiny.
  - c. The rule from this case:
  - d. All fighting words (unprotected per se as per Cohen gets subject to regulation adhering to Cohen standard.
    - i. Fighting words containing expression of hate against minorities this is viewpoint regulation subject to strict scrutiny operating with category of per se unprotected expression, i.e., fighting words.
    - ii. The rationale is the same as punishing a subset of one
  - e. Because this case's ruling struck down a hate speech law that specifically applied to all laws that expressed one particular viewpoint, the court held the law to be viewpoint based.

### 3 exceptions to the R.A.V. rule

1. When the rationale for making an entire category of per se un protected is the same as the rationale for the creation of the subset of expression (the regulation for specific speech) then you do NOT apply strict scrutiny (in order for this exception to apply, the subset has to be MORE of the same of the rationale for the entire category)
  - o If the category of expression is obscene – Miller test
  - o If the category of expression is fighting words- use Cohen test
2. When the viewpoint defined subset is associated with the secondary effects of that speech



- The test becomes the test for regulations of secondary effects speech
- 3. Where the viewpoint regulation is such that there is no realistic possibility that the suppression of ideas is a foot (no real way that the suppression of ideas could happen)
  - Ex. If you had a regulation that said “no blue eyed actresses can have green eyes” ...there is no realistic possibility that the suppression of ideas is afoot if you have such a regulation” ....in this case...apply Miller

### **Threats of unlawful violence Doctrine**

- ➔ The majority says that the cross burning statute is just “more of the same”, which meets the second exception to the R.A.V. case
  - Therefore the regulation in this case is constitutional

**Black Test** - a regulation that punishes threats of illegal violence is going to be constitutional

- Putting the listener or viewer in a state of fear that he or she is going to be subject to illegal violence
- Some acts instill such fear in our hearts that it is not conduct, but pure terror, thus threats of unlawful violence is not protected.

### **Commercial Speech**

Commercial speech- Speech proposing a lawful and not misleading commercial transaction

- When trying to determine whether speech is commercial or not....consider what aspect of the speech seems to dominate, commercial aspect or the non-commercial aspect

Unprotected per se- As long as the commercial speech is not unlawful or misleading, then the status of the speech is protected

- Subject-matter regulation of this speech IS constitutional under the free speech clause

“protected” (lesser protected) – speech not outside the ambit of free speech clause, but that is sometimes actually unprotected anyway

- ➔ This is where you apply the test from Central Hudson

Unprotected- a proposal for a lawful and non-misleading commercial transaction where a content-based regulation of the same would be upheld, using intermediate scrutiny

Protected- a proposal for a lawful and non-misleading commercial transaction where a content-based regulation of the same would be struck down, using intermediate scrutiny

- If the speech survives the test, then it becomes protected speech per se

\*\*\*so lesser protected speech can be seen as speech that hasn't had the chance to go to court to pass or fail the test, but isn't untruthful or unlawful\*\*\*

- Once it passes the test, the speech becomes protected per se (not the regulation)

**Test from Central Hudson-** Assessing constitutionality of content based regulations of commercial speech (lawful and nonmisleading)

1. Does the challenged statute serve a substantial state interest
  - If no, statute struck down
  - If yes, go to step 2
2. Does the statute directly advance that governmental interest?
  - if no, statute is struck down
  - If yes, go to step 3
3. Is the statute more extensive than necessary to serve the government's interest? (is it too broad)
  - if yes, the statute will be struck down
  - if no, statute will be upheld, AND THE SPEECH STAYS IN THE CATEGORY OF PROTECTED

- This test doesn't tell us which speech is within the definition, it just tells us about the regulation itself....therefore test DOES NOT DESIGNATE CERTAIN SPEECH AS "PROTECTED PER SE".....BUT if the regulation is upheld, then the speech is considered unprotected
- This is because the same speech can be brought to this test again later on, whether it is considered protected or not
    - This is different from incitement speech because under the Brandenburg test, if the regulation passes the test, then the speech goes along with it making the speech protected per se (which means strict scrutiny would apply if the speech is questioned again)

### **Content-Neutral Regs:**

### **Time, place and manner regulations**

GOVERNMENT SPEECH IS NOT SUBJECT TO FORUM ANALYSIS

4 types of venues:

1. Traditional public forum
  - Public property, that has by long tradition been used for the free exchange of ideas
    - Only 3 types of public property that are traditional public forums
      - Public parks
      - Public streets
      - Public sidewalks
2. A designated public forum
  - Not a traditional public forum, BUT it is public property that government intentionally, by a standing policy, affirmatively devotes to expression by a wide class of speakers
    - There has to be intentional premises AND have a standing policy that designates the place for expression of speech

- Even if it is a place where the government says “sometimes we will let the place be used as a place for speech, but we will determine this on a case by case basis”, then it is NOT a standing policy, and therefore NOT a designated public forum
  - Therefore this would be a non-public forum

Limited public forum –

A type of designated public forum, where government limits either the topics that can be discussed, or limits the identity of speakers who can speak on the premises

Limitations in limited public forums that are subject matter based need only be reasonable in relation to the designation of the forum

BUT

If the limitation is based on view point, then the regulation will not be upheld unless it passes strict scrutiny

3. Non-public forum
  - Government property (public property), but it is not a traditional public forum AND it is not a designated public forum, but it is government property
    - It is something like the DMV, or a courtroom
4. Private property –
  - Exactly what the name says, private property

Content based - In the traditional public forum, designated forum, AND on private property...content based regulations are constitutionally permissible ONLY if they:

1. Regulate protected per se expression (and meet strict scrutiny)
  - a. With the exception that content based regulations creating a limited public forum for per se protected speech need only be reasonable and view-point neutral
2. Only if the regulation regulates a “protected” category of expression and meets the special assigned constitutional test developed by the United States supreme court (Brandenburg for incitement, Sullivan Gertz and Dunn and Bradstreet for defamation, and central Hudson for commercial)
3. The regulation regulates “unprotected per se” expression, and meets the special tests of constitutionality developed by the United States Supreme Court (cohen for fighting words, miller for obscenity)
  - a. Exception is the R.A.V. rule (view-point regulation operating within a per se unprotected category of expression will be subject to strict scrutiny)

**Content-neutral regulations are permissible only if they meet:**

- 1. The regulations must be narrowly tailored to serve a significant government interest**
- 2. The regulation must leave open ample alternative channels for communicating the information**

- If the regulation fails either one of these prongs, then it fails
- Exception for when the regulation is part of an injunction

IN regulating content-neutral in a traditional public forum, such as the in terms of the regulation of protesters of women going into abortion clinic, the Court stated the standard to use was that it must not burden more speech than necessary to serve a significant government interest.

In non-public forum, the framework above for content-neutral and content-based rules apply, except that subject-matter regulations of per se protected speech and content neutral regulations of any speech need only be reasonable in relation to the pre-arranged use of a property in order to be constitutional

- such as an airport terminal.

\*\*\*what about a regulation that seems to be content-based but also seems to be content-neutral....if you are dealing with a content-neutral regulation, the application of which is triggered by the substance of the speech, then the regulation will be treated as content-based NOT content-neutral\*\*\*

Ex. A federal law that punishes within 500 yards of the perimeter of Arlington national cemetery between 7-10 p.m. every day, speeches or demonstrations against the wars in Iraq and Afghanistan

- So what triggers the application of this regulation is the protest part about Iraq and Afghanistan, even though there are other parts of the reg. that seem neutral, it will be considered content-based
  - o What this is saying is whatever part of the regulation triggers the enforcement of it will be what is considered (in this case it is content based because the type of speech is what triggers it...because people who are protesting other things can still go within the 7-10 limit)

### **Speech on private premises**

Equivalency test – (from city of ladue)

City ord against signs that were not for sale signs in windows or yards.

The Court said this was a content-neutral reg, and used this test, which the case failed.

1. Is the test narrowly tailored to the objectives?
2. Is there ample alternative channels of transmitting speech?

**Secondary effects of speech**- the effects of the speech other than the speech's impact on the listener

- ➔ So anything the listener might do is NOT a secondary speech
  - o It would be something like the crime and other things that a porn store might bring....so the hookers that go to the area around the porn store don't necessarily buy porn or go in the store, but they are a secondary effect of the store

**Secondary effects regulation** – regulation that aims at regulating the secondary effects of the speech

Tests for determining whether the regulation is a secondary effects regulation (from **alameda** books):

1. Did the city rely on evidence that would support a reasonable belief that there is a connect between the speech and the secondary effects

2. If the judge can find that evidence, then they can conclude that the regulation is aimed at a secondary effects regulation
  - ➔ Secondary effects regulations are treated by the court as content-neutral regulations
    - Therefore, the court uses a special intermediate standard to determine (ladue)
      - Narrowly tailored?
      - Ample alternative channels to communicate the information

### Free speech in schools

- Students free speech rights in the public school context are not coextensive with adult free speech rights
- Students free speech rights in the school context are colored by the special characteristics of the school environment

The court in **Tinker** established: (this rule still controls for anything that is not illegal drug use...which is part of the **Morse** holding)

- Student expression may not be suppressed unless school officials reasonably conclude that is likely to “materially and substantially disrupt the work and discipline of the school”
- There can be regulations consistent with the free speech clause, even if the school had concluded that the speech would not substantially disrupt the work and discipline of the school

The court in **Fraser** established two rules:

1. The constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings
2. The mode of analysis set forth in Tinker is not absolute

The court in **Morse** held:

- The special characteristics of a public school environment, combined with the government interest in stopping student drug abuse, justifies a rule consistent with the free speech clause, against promoting illegal drug use
  - So a school event, even if not on school property, is still considered ok (because it has the special characteristics of a public school event)
- A regulation for a public school may restrict/punish speech no further than a reasonable observer would think promoted illegal drug use, and to provide NO regulation of student speech that plausibly could be interpreted as commenting on a political or social issue

## Regulations when the government is the speaker

- When the government speaks, it can express whatever view point it wants, because the free speech clause does not apply to “government speech”
  - o Government has unlimited power to control what is said in its official speech (through its newspapers, speakers, etc.)
  - o Or in organs that it officially endorses
  - o Or any entity that the government contracts to convey its message
    - But this may cause some issues...because may government require that the money which it pays out only be used by the private recipient for the speech that the government wants communicated and no other speech?
      - So does the conditional appropriate of funding to a private entity where the condition controls speech, does this violate the unconstitutional conditions doctrine? (rust v. Sullivan)

**Unconstitutional conditions doctrine** – when congress allocates money under article 1 section 8 (taxing and spending clause), it cannot attach a condition that would require the recipient to give up his constitutional rights

- Recipients could be the lawyers or the clients

**Rust rule** – where government contracts with a private company to convey government’s message, government may demand that the private company limit his speech to the scope of the funded program. This is less of a reg, and more of selective funding.

- the government can, without violating the constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way
  - In doing so the government has not discriminated on the basis of a viewpoint; it has merely chosen to fund one activity to the exclusion of the other

## Penumbral Free Speech Rights:

**Symbolic Speech:** Expressive conduct is conduct that conveys a message and reasonably is understood that a message will come from this.

Is the symbolic action considered expressive conduct?

Expression doctrine:

1. Conduct must be intended by the actor to convey a particular message
- AND
2. That message must be reasonably clear to the recipient

## O’Brien test for symbolic speech

- ➔ If the statute is directed at the content of the expression, then use the appropriate level of scrutiny (based on the type of speech...political..etc)

→ But if the regulation is directed at the conduct, then you use intermediate scrutiny, even though expression may be incidentally adversely impacted (same test that is used to assess content neutral regulations)

1. The regulations must be narrowly tailored to serve a significant government interest
- AND
2. The regulation must leave open ample alternative channels for communicating the information

### **Penumbra of free speech rights**

→ Bitensky does not include symbolic expression under penumbral free speech rights

Compelled affirmation of belief (right to not affirm a belief)

- Protects the right to hold a belief, AND the right to be free of government compulsion to utter any belief

Government cannot compel an individual, consistent with the free speech clause, to use her property to express a belief

- Therefore we use strict scrutiny

**Freedom of Association**: the right to maintain intimate relations. This right is expressed through the substantive due process privacy right.

### **Brotherhood of R.R. Trainmen v. Virginia**

→ This case extended 1<sup>st</sup> amendment association rights to group activities “for the lawful purpose of helping and advising one another in asserting rights”

### **NAACP v. Alabama**

### **NAACP v. Claiborne Hardware Co.**

- Implied in the free speech AND assembly clauses is a right of association
- Right of individuals to gather in groups, in order to engage in pursuits other than intimate relationships
- But, all groups do not receive meaningful protection; there is a dividing line...
  - if individuals gather in a group to pursue economic, or financial goals, and government interferes with the group, the judiciary will assess the constitutionality of the interference under the 1<sup>st</sup> amendment using the rational relationship test
  - if individuals gather in a group to pursue activities that are expressly protected by the first amendment, and there has been impingement, then the court will apply a special form of strict scrutiny to the government interference with the **mission** of the group
    - there will only be impingement in this context if government interferes with the group’s protected expression or assembly

- so its NOT government interference with the group that matters, its government interference with the protected expression or assembly

Activities expressly protected by the 1<sup>st</sup> amendment

- right to engage in protected expression
- right to assemble
- right to engage in religious expression

**So right of association is a fundamental constitutional right**

**--Use this framework of analysis from boy scouts whenever there is government impingement of a group's protected expressive OR assembly rights--**

Test: (From Dale)

1. Does the government interest serve a substantial interest that is unrelated to the suppression of an idea, and
2. Can the government's purpose be achieved through significantly less restrictive means?
  - A court ruling against BSA would force them to send the message that it is for gays and legitimizing it.
    - So the Court looks at the BSA view on gays, then they look to see if it is sincere, or if it was done for purposes of litigation.

In *Rumsfeld*, the Solomon Amendment stated that universities will lose all or part of funding if the school does not give equal access for military recruiters to their students that the school affords other recruiters.

**Rumsfeld Rule** – (to determine if it affects the expression) plaintiff must show that government compulsion adversely alters the group's composition (like in boy scouts v. dale), in order to show that the compulsion significantly affects plaintiff's protected expression

- look at the group to see if there is **articulated** (not necessarily enumerated though) position against whatever right is being asserted, and whether it is a **sincere** position (can't just be a position that the group formed because of the impending trial)

If no, then rational relationship  
If yes, move on

3. Whether the government compelled membership will survive the special strict scrutiny test?

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Strict scrutiny standard

1. Does government have a compelling interest for its interference, unrelated to the suppression of ideas,
- AND
2. is this interference the least restrictive way of accomplishing that government purpose?



## Government and Religion

1<sup>st</sup> amendment says that:

Establishment clause - congress shall make no law respecting the establishment of religion

Free exercise clause- prohibiting the expression of such religion

### What is religion?

- any system of faith based upon the existence of a supernatural being, or some transcendent authority

- Court will not ask:
  - How long a religion has been in existence
  - How bizarre or credible the beliefs of a religion are

→ One's philosophical beliefs DO NOT count as a religion

8 theories to analyze establishment clause problems: (court can rely on one or all, or any combination, and its is usually unpredictable)

1. Separationism – idea that a wall separates church and state
  - The contacts between religion and government should be minimal
2. Non-preferentialism – theory that government can favor religion in general, over non-religion, or vice versa, BUT government cannot favor one religion over another religion
3. Neutrality theory – government must not favor religion in general over non-religion, or vice versa, AND government must not favor one religion over another religion
4. Endorsement test – government must not engage in conduct that could reasonably be perceived as endorsing religion over non religion, or vice versa, AND government must not favor one religion over another religion
5. Lemon test – to be valid from a successful establishment clause attack (court can apply any of these tests, because if the regulation fails one of sub tests, then the regulation fails)
  - a. A statute must have a secular purpose (doesn't mean exclusively a secular purpose, only predominantly)
  - b. The statute must have the primary effect of neither advancing nor inhibiting religion
  - c. The statute must not cause excessive entanglement between government and religion
6. Coercion test- government will only violate the establishment clause if it either: actually establishes a government church OR government coerces an individual into performing a religious practice

7. Combination theory (Accommodation theory)– government may, without violating the establishment clause, take into account the traditional role of religion in our society and even in the functioning of government
8. If government favors or disfavors a particular religion, that government conduct will be subject to strict scrutiny under the establishment clause, AND this is strict scrutiny that is strict in theory and ALWAYS fatal in fact (meaning the statute will always be struck down)

➔ Religious expression under the free speech clause is categorized as per se protected free speech

### **Rules for funding concerning Religion and Schools:**

Where the establishment clause claim is that government is indirectly financially aiding religious elementary and secondary schools, or directly or indirectly financially aiding their students, the court will use lemon with a twist, and perhaps some coercion theory

#### **(Lemon with a Twist) – From Agostini**

1. Challenged legislation must have a secular purpose
  2. Challenged legislation must not have the primary effect of advancing or inhibiting religion
    - Focus here is on the primary effect
      - if the statute says something like "The teachers must teach christian creation theory"
      - then it won't pass 2
      - but if the statute isn't that outright.
      - it'll probably pass 2
  3. There will only be excessive entanglement if the challenged government conduct or statute have the effect of advancing religion
    - So this just means that government must avoid excessive entanglement (entanglement that has the effect of advancing religion)
      - Focus here is on the ENTANGLEMENT
    - 3 is the statute says something that, in effect, forces the school to get entangled in teaching religion
- ➔ Only applies to establishment clause cases involving government financial aid to religious elementary or secondary schools

In applying lemon with a twist, the court will focus on where does the government money directly go?

- This is key, because under Zelman we saw that the money directly went to parents not to students
- In Agostini, it was decisive that the money went directly to students
- In Everson, it was decisive that the money went to parents, rather than the religious school or the children

A government program is more likely to be upheld under the Establishment Clause if the government dollars aid both:

1. Public school students  
AND
2. Religious school students

- And these students are selected by neutral criteria (Everson, Agostini)

A government program is more likely to be upheld under the Establishment clause if the government funds go to parents of both public school students AND religious school students, based on neutral criteria in relation to religion (Everson, Zelman)

A government program is more likely to be upheld if the government funds go to parents who choose to use the money to send their children to either a non-religious private school OR a religious private school, or a public school in another school district (Zelman)

A government financial aid program may be upheld, even if it finances religious instruction in religious schools if the government money went to parents who then made the decision to use the money to send their kids to a religious school

- o **If there isn't the circuit breaker of the money going to parents to decide, the statute would most likely be struck down**

### **Free Exercise Clause of Religion**

The right of a person to speak or to profess, his religious beliefs is not subject to the free exercise clause, but to the free speech clause

The right of a person to believe in any religion is ABSOLUTE under the free exercise clause

The right of a person to engage in religiously motivated conduct is governed by the free exercise clause, and has been the subject of litigation

How do you distinguish between a regulation that is based in religious belief and a statute that is religiously motivated conduct?

- There is no brightline test, but try to figure out what the regulatory object of the statute or ordinance

- ....if the regulatory object seems to be merely a person's thoughts about religion and nothing more, then obviously we are talking about a regulation of religious beliefs (free exercise)
- ...if the object of a regulation appears to be a person's external actions, which are triggered by her religious beliefs, then this is a regulation of religiously motivated conduct

➔ It has to be one or the other

What standard of review should apply to a law of general applicability that inadvertently regulates religiously motivated conduct?

- The standard of review:
  - Laws of general applicability that inadvertently regulate religiously motivated conduct, such laws are PER SE constitutional under the free exercise clause
    - You don't apply any test, except for 2 kinds of cases:
      - Hybrid cases: where the plaintiff claims that a law of general applicability which regulates his religiously motivated conduct, that law constitutes at least 2 constitutional violations, which are: the free exercise clause, AND concurrently, violates a fundamental constitutional right.....if it is claimed that such a law violates both, then the court will apply strict scrutiny to the challenged law, under both free exercise and fundamental right
      - Sherbert v. verner situation: after smith, if an unemployment compensation law of general applicability denies benefits to a person because of his religiously motivated conduct, then the court will assess the constitutionality of the regulation under strict scrutiny (under the free exercise clause)