I. Chapter 5: The Structure of the Constitution’s Protection of Civil Rights and Civil Liberties

A. Introduction: The original Text of the Constitution have few civil liberties because the founder thought that the Constitution limited the federal government powers so much that negative rights were unnecessary, AND the founder were concerned that if they enumerated civil liberties then ones that were overlooked could be denied later on.

HOWEVER, the original text does have....

- Writ of Habeas Corpus
- No Bill of Attainder or ex post facto law
- No ex post facto contracts
- Jury Trials
- Only the traitor and not the family can be punished.
- No Religious tests

THE BILL OF RIGHTS

2. Keep and Bar Arms Clause
3. Quartering Soldiers Clause
4. Search and Seizure Clause
5. Grand Jury; Double Jeopardy; self-incrimination; due process; Takings Clause
6. Criminal Trial Clauses
7. Civil Jury Trial Clauses
8. Bail/punishment clauses
9. Un-enumerated Rights Clause
10. Reservation of Powers (to the states) clause.

The Reconstruction Amendments

13th Amendment: Abolition of Slavery.
14th Amendment: Civil Rights
15th Amendment: Black Suffrage

***All of these amendments include “The Congress shall have power to enforce, by appropriate legislation” because the south was not trusted to do it.

B. The Application of the Bill of Rights to the States

1. The Rejection of Application Before the Civil War.
   - Barron v. Mayor of Baltimore (1883)—City diverts streams and made the water too shallow for boats. Owner of a wharf sues the city for the uncompensated taking. Court
holds that this is not a 5th Amendment takings because the city is part of the state, and the 5th Amendment only applies to the Federal Government (not states).

2. A False Start in Applying the bill of Rights to the States: The Privileges or Immunities Clause and the Slaughter House Cases: Held, inter alia: that the privileges or immunities clause of the Fourteenth Amendment should not be interpreted as applying the Bill of Rights to the states.

- Butchers’ Benevolent Association of New Orleans v. Crescent City (1872): In response to a huge surplus of cattle in TEX, the LA legislature gave a monopoly in livestock landing company. Butcher’s brought suit that this monopoly is a violation of their rights claiming to be enslaved by the monopoly under the 13th amend., and that the protections of the 14th amend., also go to enforce those rights. However, the court holds that the 14th amend. Only applies to enforcing the 13th amend., which only applies to the recently freed slaves. Dissent argues that it should apply to all persons.

- Saenz v. Roe (1999) CA law places a limit on the maximum welfare benefits available to newly arrived residents. Petitioners argued that they should be afforded same rights. Court holds that they should be because they have a right to travel. ***But for practical purpose, the privileges or immunities clause has been read OUT of the Constitution, protects the right to travel, but cannot be used for anything else, and most likely never will be.

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

- The Debate over Incorporation: Should we just incorporate all 25 rights available under the Bill of Rights? Or just select the ones we need? The latter won out over time. With only 5 rights still not incorporated.
  - Justice Black and Douglass: Wanted all of the first eight amendments to be incorporated through the Fourteenth Amendment.
  - Justice Cardozo: Only included “Principles of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental.
  - Justice Frankfurter: Due Process should only be applied when the state practices would “offend those canons of decency and fairness which express the notations of justice of English-Speaking Peoples.”

- Palko v. Connecticut: (Cardozo, J.) If something is forbidden by the 5th amendment, is it thus forbidden by the 14th amendment? NO! In this case the state allowed a form of double jeopardy that the federal constitution would not allow, but it did not “rise to the fundamental violation of the principles of liberty and justice required to apply a right to the states.” Because States are allowed to alter their jury procedure and other provisions.

- Adamson v. California (1947) CA law allows a jury to take into consideration that a criminal defendant who does not take the witness stand. This would violate the 5th amendment (if this were in federal court). Court held that it was not unfair to the defendant, therefore 5th amendment did not have to apply. Concurrence thought that the outcome was appropriate but states should have the same protections as the federal government. Dissent points out that the 14th amendment was written because
the states could not be trusted to uphold the rights of the people (which is what is happening here).

- **The Current Law as to What’s Incorporated**
- *Duncan v. Louisiana (1968)* LA tried to prevent someone from having trial by jury, but that would have violated the defendant’s fundamental rights when looking at the 5th and 6th amendments and applying the 14th amendment.
- *McDonald v. City of Chicago (2010)* Alto holds that the second amendment right to bear arms is a fundamental right, therefore 2nd amendment applies to the states. Thomas concurrence does not like substantive due process, wants to overrule *Slaughter House Cases* and use privileges or immunities clause.

- **The Content of Incorporated Rights**: Sometimes incorporation is “jot for jot” like with the freedom to practice religion under the First Amendment. However, sometimes this is different, like the right to a jury, the federal government requires 12-person, and unanimity; however, the states are not required to have 12 or unanimity. However, the states are required to have 11-1 or 10-2, but still have unanimity with 6-person.

**C. The Application of the Bill of Rights and the Constitution to Private Conduct**

1. **The Requirement for State Action**: Private conduct generally does not have to comply with the Constitution. This is often refereed to as the “state action” doctrine. HOWEVER, civil rights cases.

   - **The Civil Rights Cases: United States v. Stanley (1883)** Civil Rights act of 1875 stated that persons are entitled to “full and equal enjoyment of the accommodations, advantages, faculties, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement subject only to the conditions and limitations established by law, and applicable alike to citizen of every race and color, regardless of any previous condition of servitude. HOWEVER, the court held that it was ok for an in to refuse blacks, because the law only forbids the states from making laws that would refuse service to blacks, but the inn itself is free to have whatever policy it wants.

2. **The Exceptions to the State Action Doctrine**
   
   a. **The Public Functions Exception**

   - *Marsh v. Alabama (1946)* Chickasaw is a company owned town and is a suburb of Mobile AL, and it is owned by the Gulf Ship building Co. It has all of the characteristics of a town. Marsh is a Jehovah’s witness who is spreading religious literature in business part of town, and was informed that the street corner was privately owned (because of the company) and thus could not distribute her flyer without a permission. Court holds that this is not ok, ownership does not always mean absolute domain. The more an owner, for his own advantage, opens up his land for the use of the general public the more his rights become circumscribed b the statutory and constitutional rights of the people who use it. But not a private shopping center.

   - *Jackson v. Metropolitan Edison Co. (1974)* Electric company (well regulated monopoly), has a policy of giving two weeks notice before cutting power. Does not live up to two-week notice. Jackson sues claiming due process violation. Court holds that the government is not in the business of supplying electricity, therefore the electric
company cannot be treated as being part of the government. Dissent argues that regulated monopolies are state actors.

- **MARSH AND JACKSON ARE VERY DIFFERENT TESTS:** Marsh uses a balancing test and looks to whether the private property is used for a public purpose. Jackson focuses on whether it is an activity that has been traditionally, or exclusively done by the government.

- **SO WHO GETS PROCEDURAL DUE PROCESS??** You can demand it from the government, and or something that serves a public function, which is a close nexus between the company and a traditionally government run action.

- **Terry v. Adams (1953)** The fact that the jaybird election produces the equivalent of the prohibited election, the damage has been done, and thus it does not matter that the election is completely private, the Jaybirds still have to be held to the same standard as a public entity for the 15th Amend.

- **Evans v. Newton (1966)** Park donated by old white guy who thinks the races shouldn’t mix. Years later city wants the park desegregated. Court holds that a golf course CAN restrict membership as a form of expression, a park is a public utility, and thus cannot.

  b. **The Entanglement Exception:** The Constitution applies if the government affirmatively authorizes, encourages, of facilitates private conduct that violates the Constitution. Either the government must cease its involvement with the private actor of the private entity must comply with the constitution.

- **Judicial and Law Enforcement Actions**

- **Shelley v. Kraemer (1948)** Subdivision in St. Louis MO has private encumbrances on the land that prohibit the sale of homes to blacks. A black family purchased one of the homes in the subdivision. Other homeowners are suing to have the private encumbrance enforced. **The Court holds that while the agreement itself is constitutional, it (the court) cannot enforce it because enforcing it would be a violation of the Fourteenth Amendment.** People cannot use the coercive power of the state (Courts) to enforce private agreements that violate the Fourteenth Amendment... ***Shelly is very controversial because ultimately everything can be made state action under it. If any decision by a state court represents state action, then ultimately all private actions must comply with the Constitution. All private violations of rights exist because state law allows them.***

  **Court has only used Shelly for TWO areas.**

  1. Use of Courts for prejudgment attachment.
  2. The use of preemptory challenges at trials.

- **Lugar v. Edmondson Oil Co. (1982)** Lugar owed money to Edmondson Oil, and Edmondson Oil was concerned that before trial, Lugar would get rid of assets to avoid being able to pay, so Edmondson Oil got prejudgment attachment of property through an ex parte motion. Edmondson only had to allege that the property would be destroyed, and 34-days later, failed to even make a case for it. This resulted in loss of use of money and things that Lugar needed in violation of the Fourteenth Amendment. It was a deprivation of property without due process of law, and it was essentially done by the state, thus the fourteenth Amendment applied. ***This is not the case for self-help eviction.***
**LUGAR TEST**: Where discriminatory conduct is “fairly attributable” to the state

(1) Deprivation is caused by exercise of some right/privilege created by the state (or by a person for whom state is responsible); and

(2) Deprivation is performed by a “state actor.”

- **Edmonson v. Leesville Concrete Co. (1991)** Black man injured at work. At civil trial, company was able to remove 3 black jurors, and judge did not require race neutral reason because it was civil and not criminal (thus stating that discrimination was ok). HOWEVER, Supreme Court applies Lugar Test and holds that it was NOT OK to discriminate. (1) deprivation caused by exercise of some right/privilege created by state (because the Court is created by the state, and preemptory challenges only exist within the Court), (2) deprivation is performed by a “state actor” (The lawyers may be private, but the process, i.e. preemptory challenges, voir dire, etc, are all state statute or Court procedure).

- **Government Regulation**

- **Burton v. Wilmington Parking Authority (1961)** Public parking area allows a small coffee shop to lease some space in the middle. Coffee shop wants to deny black man coffee. Court holds that (under the Lugar Test) the coffee shop is part of a state entity for the purpose of the Fourteenth Amendment because (1) there is a mutual and dependent relationship between the coffee shop and the government, and (2) the entanglement with the government makes it responsible for carrying out the responsibilities of the Fourteenth Amendment.

- **Moose Lodge No. 107 v. Irvis (1972)** Moose Lodge has the only liquor license in town. It also is a private club, that owns it own building, and does not allow in anyone not invited (specifically blacks). Majority holds that there is no entanglement with which to apply Lugar. However, dissent points out that the Penn. Liquor license statute entangles it, not to mention the way that the city can only have one liquor license would discriminate if it is only in the hands of the one club.

- **Government Subsidies**

- **Entwinement**—The court already recognized two exceptions to the state action requirement.

  (1) **The Public Function Exception**

  → Which privies that private conduct must comply with the Constitution when it is performing a task what has traditionally been done exclusively by the government.

  (2) **The Entanglement Exception**

  → Which the government affirmatively authorizes, encourages, or facilities unconstitutional conduct.

- **Brentwood Academy v. Tennessee Secondary School Athletic Association (2001)** A private school was fined by the state’s official (but private non profit) High School athletic association for passing out flyers encouraging athletically gifted students to come to their school (in exchange for a scholarship). School wished to sue under First Amendment and Fourteenth Amendment, but it would not have a case unless the association was seen as a state actor. **Court held that there was entwinement (term created in this case), which was “a close nexus between the state and the challenged**
action,” that seemly private behavior “may be fairly treated as that pf the State itself.” Distinguished from *NCAA v. Tarkanian (1989)* where the Court argued that NV law could not be applied to the NCAA (because NCAA = multiple states as opposed to one state).

II. **Chapter 6: Economic Liberties**

A. **Introduction:** Historically, 1800s to 1937 was the Lochner era, where freedom of contract was part of Fourteenth Amendment due process clause. Change after to deference to the government regulation on economic issue (so, now we only apply rational basis test to economic liberties).

B. **Economic Substantive Due Process**

1. **Introduction:** Fifthe and Fourteenth amendments = due process clause.

   - **Procedural Due Process**  
     Make sure that the government followed proper procedure before taking life, liberty, and property.

   - **Substantive Due Process:** Make sure that the government has adequate reason for taking away a person’s life liberty, or property. FOCUS on the sufficiency of the justification for the government’s action, NOT the procedures the government has taken....

2. **The Early History of Economic Substantive Due Process**

3. **Substantive Due Process of the *Lochner* Era**

   - **Lochner v. New York (1905)** NY created a law that prohibited persons for working in a bakery more than 60 hours/week or 10 hours/day. Court held that this violated the worker’s right to contract with his employer. Majority recognizes that states do have ability to regulate health safety welfare and morals, BUT unlike a similar case with smelting in a mine, the majority thinks that baking is not harmful to your health, at least not enough to justify this great infringement on right to contract. In dissent, Holmes points out that “the word liberty in the Fourteenth Amendment is perverted when it is held t prevent the natural outcome of a dominant opinion unless it can be said that rational and fair men necessarily would admit that state purpose would infringe fundamental principals as they have been understood by the traditions of our people and laws.” This sounds exactly like rational basis test. Also worth noting that Justice Harlan points out the extreme health issues in bakery

   - **Substantive Due Process:**
     → Economic Substantive Due Process (Protects economic liberties—e.g., right to contract freely, without excessive government interference). BUT, as of today, Economic SDP does NOT give any extra protection—i.e., Courts give RATIONAL BASIS review to laws affecting economic rights.

   → Non-Economic Substantive Due Process (e.g., protects privacy & autonomy rights).

   - **Muller v. Oregon (1905)** Oregon has a statute that prohibits women from working more than 10-hours/24-hour period in mechanical or factory, or laundry. Majority holds that unlike the bakers in *Lochner* the state cold regulate work hours for women because their bodies are different, and for their safety must be regulated differently... THIS CASE IS IMPORTANT BECAUSE OF THE Brandies Brief. Layer for the Women, Louis Brandies (who went on to become a SCOTUS justice) wrote the first influential brief using statistical information.
Minimum Wage Laws—Muller upheld max work hours for women, but declared minimum wage laws unconstitutional.

Adkins v. Children’s Hospital (1923) D.C. passed a minim wage law for women, and the court held that it violated the right to contract. Majority decided that since women now had the right to vote, they did not need to be treated differently than men (looking back to Muller). ***Community not employer is responsible for taking care of these women (employer is not husband, father, brother).

Nebbia v. New York (1934) NY created max and min prices for milk at various places in the state to protect the profits of dairy famers. Court held that this does NOT violate right to contract, because of a public safety exception... Because whenever demand drops, price goes down, and dairy famers cut corners, which could lead to bacterial growth and people getting sick.

4. Economic Substantive Due Process Since 1937

Pressures for Change: Great depression, and Roosevelt’s Court packing plan (set up a replacement for every justice over 70).

The End of Lochnerism: ***Justice Own Roberts switched sides and castes the fifth vote to uphold the statues in a couple of cases in 1937 marking the end of the Lochner era.

West Coast Hotel Co. v. Parrish (1937) State of Washington creates a minimum wage law for women and minors. Woman is suing for missing wages from hotel that she works for. The Constitution does not speak of freedom of contract. OIt speaks of liberty and prohibits the deprivation of liberty without due process of law. “Liberty safeguarded is liberty in a social organization which requires the projection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessary subject to the restraints of due process, and regulation which is reasonable in relation to its subjects and is adopted in the interests of the community is due process.” ****Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

United States v. Carolene Products Co. (1938) Carolene Products is caught in violation of a federal law that prohibits the interstate sale of “Filled Milk.” Court holds that Congress does have the power to prohibit the sale of filled milk because it is rationally related to health safety and welfare. WHEN A PARTY CHALLENGES THEY CAN DO TWO THINGS: (1) Challenge that there is no rational basis for the legislation, or (2) Claim that the circumstances have changed so that the facts that made it rationally related no longer exist. ***Presumption of Constitutionality (absent unexpected or unusual circumstances).

FAMOUS FOOTNOTE 4: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth Amendment.” (essentially saying that rights have higher scrutiny).

Economic Substantive Due Process Since 1937: ***No law has been overturned on this ground since 1937 because all you have to do is find rational basis (easy).

Williamson v. Lee Optical of Oklahoma (1955) law that in effect prevents an optician from fitting old glasses to new frames or supplying a lenses, where it be new or one to
duplicate a lost or broken lenses, without a prescription. Since the legislature “could” have made a rational argument—that the people needed to get their eyes checked more often or something, it could be argued that there was a rational basis, even if it is minimal. ***IF we can speculate that there is a rational basis for the law to exist, then we have to allow the law to exist, not what the legislature thought, but what we could imagine it could think.

- **The Rebirth of Economic Due Process? ***There is a constitutional limit on punitive damages... When the amount is disproportionate it is violation of the due process of law (Remember, no LAW has been struck down, but this a jury award, result of the judicial process, not the result of the legislature).

- **State Farm Mutual Automobile Insurance Co. v. Campbell (2003) State Farm tricks its client into thinking that they were fully covered for a tort claim against them. After finding themselves liable, settles with other side in order to perform a bad faith claim against state farm. Wins HUGE punitive damages. State Farm appeals, wins, and court outlines a test... What this really comes down to is whether or not State Farm can be punished in Utah Courts for what it is doing around the country (ripping off its customers in these types of cases). Answer—no. Dissenters said that Due process can’t be used to protect against excessive or unreasonable punitive damages, and even if it could, Ginsburg pointed out that State Farm was really bad.

  (1) **The degree of reprehensibility of the ∆’s misconduct.** Things to consider (the harm caused—physical vs emotional, the tortious conduct evidenced an indifference or reckless disregard of health or safety of others, the target conduct has financial vulnerability, the conduct involved repeated actions or was an isolated incident, the harm was the result of intentional malice, trickery, or deceit, or mere accident).

  (2) **The disparity between the actual or potential harm suffered by the ∆ and the punitive damages awarded.** No bright-line ratio, but anything that exceeds ratios already found unconstitutional are unconstitutional.

  (3) **The difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.** Punitive damages are NOT a substantive for the criminal process, and the remote possibility of a crime sanction does NOT automatically substantive punitive damages award.

- **Too Much Deference?**

  C. **The Contracts Clause:** “No State shall . . . pass any . . . law impairing the obligation of Contracts.” → As of today, the Contracts Clause gives little extra protection, the standard of review for the State/local law substantially affecting a contract is RATIONAL BASIS. → → Exception: where the government itself is a party to the contract, the Court will apply heightened scrutiny. REMEMBER, this means that the burden shifts from the challenger to the Government. Which means that normally there is assumed no issue, and challenge must show a problem, but when the government is a party, there is an assumption that there is a problem and the government has the burden to prove that there is no problem. ****Contracts Clause might have even LESS protection than rational basis, because there has to be a substantial impairment in order to trigger the review.
1. **Introduction** Article I, §10 “no state shall . . . pass any . . . laws impairing the obligation of contracts.” → This prevision applies only if a state or local law interferes with existing contracts. In other words, the Contracts Clause does not apply to the federal government; challenges to federal interference with contracts must be brought under the Due process Clause where they will receive the deferential rational basis review.

2. **The Modern Use of the Contracts Clause**
   - **Home building & Loan Association v. Blasdell (1934)** Depression, MN law allows County judges to alter Mortgage agreements when particular criteria is met to keep people in their homes. Court holds that the law fits in the emergency powers in State’s ability to temporarily alter the way a debt is collected. “The integrity of the mortgage indebtedness is not impaired; interest continues to run the validity of the sale and the right of a mortgagee-purchaser to title or to obtain a deficiency judgment, if the mortgagor fails to redeem within the extended period, are maintained; and the conditions of redemption, if redemption there be stated as they were under the prior law.”
   - **Government Interference with Private Contracts**
     - **Energy reserves Group v. Kansas Power (1983)** Federal law authorizes national gas companies to increase their price to the federal minim price regardless of what the contracted price was. BUT KS has a state law prohibiting this practice, and enforces the contract price. Court holds that state can protect citizens against price hike.
   - **Government Interference with Government Contracts—THREE PART TEST**
     1. Is there a substantial impairment of a contractual relationship?
     2. If so, does it serve a significant and legitimate public purpose?
     3. If so, is it reasonably relation to achieving the goal?
        ****The test is very similar to traditional rational basis review!
   - **Allied Structural Steel Co. v. Spannanus (1978)** MN tried to enforce a law that penalized companies who shut down offices or closed out pensions with their employees. Found to be unconstitutional.
   - **United States Trust Co. v. New Jersey (1977)** NY and NJ adopt laws prohibiting the use of toll revenues from the port authority to subsidize passenger services. MEANT to make sure that the toll money would be there to pay the bond holders. BUT, during the energy crisis, the state wants to repeal the law so that it can take the money and reinvest in rail. Court held that the repeal was unconstitutional, because (1) it was not necessary to repeal the law in order to come up with the money (could have just as easily taxed the citizens), and (2) state could have found other ways to reduce car use. Dissent states that states need to be able to decide what is and is not an emergency.

D. **The Takings Clause (Fifth Amendment)** “Nor shall private property be taken for public use without just compensation.” Takings Clause thus acts as a limit on the government sovereign power of “eminent domain” (i.e., the government authority to seize private property for its won uses).

1. **Introduction**: Both states and federal constitutions have takings clause. This allows the government to take property for a public use as long as it gives just compensation.
2. **Is There A “Takings”?**: A “possessory” taking occurs when the government confiscates or physically occupies property. A “regulatory” taking occurs when the government’s regulation leaves no reasonably economically viable use of the property. **NO bright line test for regulatory taking.**

   (1) Has a “taking occurred?
      - Yes, where the government physically takes property.
      - Yes, where government regulation deprives virtually all economically beneficial use.

   (2) Was it “property taken?”
   (3) Is the taking for “public use”?
   (4) Is “just compensation paid”?
      - Typically fair market value.

III. **Chapter 7: Equal Protection** “Nor shall any State deny to any person within it jurisdiction the equal protection of the laws.” -> Applies to State AND federal governments -> Liberty, in the equal protection clause of the Fifth Amendment means that people should be entitled to equal protection.

   A. **Introduction**

      1. **Constitutional Provisions Concerning Equal Protection**: No equal protection in the Constitution until the Fourteenth Amendment, AND even that was not implemented until the *Brown v. Board* case in 1954. The Federal Government is technically not bound by the Fourteenth Amendment, but has carved out an equal protection requirement through the Fifth Amendment Due Process Clause.

      2. **A Framework for Equal Protection Analysis**

         - **QUESTION 0, is there a colorable classification??** If it is not a classification that is suspect (ANY classification you can think of at all, will still get rational basis). HOWEVER, just because something is not discriminatory against a suspects class of people on its face does not mean that you cannot still show discriminatory purpose and move it back up from the rational basis test to the higher scrutiny.

            Classification is “colorable” if it is a classification of people
            - 15-year-old wants to drive, laws says you have to be 16.
            - (1) What is the classification? AGE
            - (2) What level of scrutiny should be applied? Rational Basis Test.
            - (3) Does the particular government action meet the level of scrutiny? YES

         - **QUESTION 1: What is the Classification?** A small an insula minority (not represented by the electoral system, history of discrimination, history of under-representation... (disability has been rejected, LGBTQ could still become one).

            -> If classification exists on FACE of law, go to step 2.
            -> If law is facially NATURAL, level of scrutiny is Rational Basis, go to step 3.
            -> UNLESS discriminatory PURPOSE is shown (if so, go to step 2). This is very difficult to prove, might be easier to show that (from data) the outcomes are rationally discriminatory thus proving that there was a discriminatory purpose.

         - **QUESTION 2: What is the Appropriate Level of Scrutiny?**
            -> **Strict Scrutiny**: Compelling government interest.
“Suspect Class” (race, national origin, alienage—except when related to “self-government and democratic process” then rational basis test)

Fundamental right (e.g., right to vote, bill of rights)

**Intermediate Scrutiny:** Important government interest.

“Suspect Class” (Gender—while women have the history of discrimination, BUT they are more than half of the population), non-marital children).

**Rational Basis:** Rationally related to a government interest.

Default Standard, everything else.

- **QUESTION 3: Does the Government Action Meet the Level of Scrutiny?**
  - I.e., evaluate whether appropriate “means” and “end” are satisfied (see Standards of Review”)
  - Allowed to be more “under-inclusive” and/or “over-inclusive” under rational basis.

- **The Protection of Fundamental Rights Under Equal Protection**
  - **B. The Rational Basis Test**
    1. **Introduction**
       - Often criticized for judicial abdication, other interpretations of the rational basis test have had some bite (like in *Romer*).
    2. **Does the Law Have a Legitimate Purpose?**
       - **What Constitutes a Legitimate Purpose?**
          - traditionally, “police purpose: protecting safety, public health, or public morals. Virtually any goal that is not forbidden by the Constitution will be deemed sufficient for the rational basis test.

- **Romer v. Evans (1996)** Prevents CO from creating any laws that could prevent discrimination against LGBTQ, Majority holds that this **FAILS RATIONAL BASIS**, harming a politically unpopular ground cannot constitute a legitimate government interest. Also, it is too narrow and too broad, it identifies persons by a single trait and then denies them protection across the board. Dissenting opinion suggests that States should have the power to regulate the morals of their citizens.

- **Must it be the Actual Purpose, or is a Conceivable Purpose Enough?**
  - A law will be upheld as long as the government’s lawyer can identify some conceivable legitimate purpose, regardless of whether that was the government’s actual motivation. REMEMBER, Congress is a they, not an it, so we don’t try to figure out why they did something, rather we just look at what they could have meant.

- **3. The Requirement for a “Reasonable Relationship”**
  - **Tolerance for Under Inclusiveness Under Rational Basis Review**
  - **Railway Express Agency v. New York** NY law prohibited advertisements except on vehicles owned by the company. It is under inclusive because the distractions on vehicles should be all cars not just most, but court OK’s the law because it is incrementally closer to safer roads.

- **New York City Transit Authority v. Beazer** Does not allow those rated at methadone clinic to becomes bus drivers. Does not look at repeat users, and basically punishes people for properly seeking help instead of ALL meth users. Overinclusive, but court OK’s the law because it is incrementally closer to safer bus travel.

- **U.S. Department of Agriculture v. Moreno (1973)** Food Stamp act required people living in a home to be related. Government argues that it was to prevent fraud. Majority
held that the government’s interests failed to meet rational basis because it was apparent that the act already had safeguards in place to prevent fraud. Dissent wanted to give deference to Congress.

C. Classifications Based on Race and National Origin

1. Race Discrimination and Slavery Before the Thirteenth and Fourteenth Amendments

The Courts (state and federal) would not question the Constitutionality of slavery until after the Civil War.

- **Dred Scott v. Sandford (1957)** Dred Scott, was a slave owned in Missouri by John Emerson, was taken into Illinois, a free state. His owner dies there, so Dred tries to use the Missouri compromise to argue that he is now free, AND that the case belongs in federal court because of diversity jurisdiction. However, the court holds that the Missouri Compromise is UNCONSTITUTIONAL because he is still a slave, regardless of where he is. Thus, he cannot have jurisdiction in federal court either (so case goes to Missouri, where the estate is, and Missouri definitely sees him as property).

- The Post-Civil War Amendments

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

Ironically, first articulated in *Korematsu*, but reasoning comes from famous footnote 4 in the *Careolene Products* case, “prejudice against discrete and insula minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities” and thus, “may call for a correspondingly more searching judicial inquiry.”

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

- There are laws that are facially discriminatory toward race and national origin.
- Does not require proof of discriminatory purpose.
- Then, there are laws that are facially neutral but a race or national origin classification might be proven by demonstrating discriminatory administration or discriminatory impact.
- BOTH require proof of a discriminatory purpose.

a. Race and National Origin Classifications on the Face of the Law: Facial race and national origin classifications exist when a law, in its very terms, draws a distinction among people based on those characteristics. There are thee major types of such laws.

- **Race-Specific Classifications that Disadvantage Racial Minorities**

- **Korematsu v. United States (1944)** Civilian Exclusion Order No 34 of the Commanding General of Western Command, U.S. Army excluded all persons of Japanese Ancestry should be excluded from the area.... No question was raised as to the petitioner’s loyalty to the United States. Majority IN THE ONLY CASE WHERE IT UPHOLDS A FACIALLY DISCRIMINATORY LAW, upholds the law because of the context of WW2... “pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”

- **Racial Classification Burdening Both Whites and Minorities**
- **Loving v. Virginia (1967)** VA does not allow mixed race marriages. Couple appeals to SCOTUS, which holds that Equal protection requires race restrictions to be subject to “most ridged scrutiny” and that the distinctions between citizens solely because of the ancestry as being “odious to a free people whose institution’s are founded upon the doctrine of equality.” No rational basis.

- **Palmore v. Sidoti (1984)** Couple divorce, mother gets custody, mother gets black boyfriend, father is upset, and sues for custody, trial court awards custody because it would be harmful for the child to live with the stigma of a mother who lives with a black man.... When the state gets involved, it becomes state action, and the state cannot be responsible for enforcing racial discrimination. EVEN if there is going to be an issue for the child, the rights of the parents are more important in this circumstance.

- **Laws Requiring Separation of the Races**

- **Plessy v. Ferguson (1896)** Separate railcars for the races. Petitioner argues that this creates “badge of inferiority.” But equal protection does not require the intermingling of the races. It just require that there be equal accommodations. So, they can be separated as long as they are treated the same... However, dissent states that equal protection means equal access and equal opportunity, this is neither, “Our constitution is color-blind, and neither knows nor tolerate classes among citizens....

- **The Initial Attack on “Separate but Equal”**

- **Brown v. Board of Education (1954)** At the time of the case, 17-states and D.C. had segregated schools. In a 9-0 decision, the court held that separate but equal is inherently unequal, Plessy overturned. Important to point out that the case hinges on social science that suggests that the separation was responsible for adverse results for black students. It was necessary to get a unanimous court (important for enforcing the decision), but bad because it could be overturned with other data.

- **The Invalidation of Segregation in Other Context**—Brown was utilized to overturn laws segregating public amenities like beaches, bath houses, municipal golf courses, etc.

  - **b. Facially Neutral Laws with a discriminatory Impact or With Discriminatory Administration**

- **The Requirement for Proof of a Discriminatory purpose**

- **Washington v. Davis (1976)** Two black officers who met all other requirements to be D.C. officers denied due to their performance on Test 21. They argue that (1) the number of black officers, while substantial, is not proportionate to the population of the city, (2) a higher percentage of blacks fail the test than whites, (3) the test has not been validated to establish its reliability for measuring job performance as officers. Court held that there was sufficient showing for burden shifting, but no relief. Racial discrimination is justifiable when they meet the high burden of consideration... EXAMPLE, Jackson Mississippi was forced to desegregate the pool, so it closed it. It met the burden to keep it closed because it was legitimately concerned about violence. Also, the government did not prevent them from becoming officers, their failure on the test did. The Court essentially states this might be a violation of Title 7, but NOT a violation of the constitution because the Supreme Court has a higher standard under the Fourteenth Amendment. Dissent argues that the government had a burden to show that Test 21 actually weeds out bad officers...
- **McCleskey v. Kemp (1987)** Criminal Δ facing the death penalty, argues that since the Baldus study shows that as a black man he is 1.1 times more likely to be sentenced to death. Court holds that it is not a violation of equal protection because the legislature does not keep the death penalty in place to discriminate (at least no evidence of that). Dissent points out that most criminal statutes are about as old as slavery. Point out unfair that someone committing the same crime under different circumstances would not be nearly as likely to receive a death sentence.

- **Is Proof of a Discriminatory Effect Also Required? YES, effect must also exist.**

- **Palmer v Thompson (1971)** Jackson Mississippi closed down its pools after it could no longer keep them segregated. State claims it had to in order to prevent violence, but is being accused of doing so to discriminate against blacks. Court cannot define the sole or dominant purpose of a city council or legislature, so looks to if the government’s argument is rational, and it is. Dissent points out the chilling effect on advocating for rights—tells blacks that if they get something desegregated then the state will just shut it down.

- **How is a Discriminatory Purpose Proven?:** The Supreme Court has made it clear that showing such a purpose requires proof that the government desired to discriminate it is not enough to prove that the government took an action with knowledge that it would have discriminatory consequences.

- **Personnel Administer of Massachusetts v. Feeney (1979)** Massachusetts comes up with a law to give veterans a preference in hiring over non vets. Problem is that 98% of vets are male, vets make up 25% of the state’s population. Thus, women feel disadvantaged. Court holds that it is not in violation of the Fourteenth Amendment because it is a preference to vets of either sex over non vets of either sex, not for men over women. Specifically, the court mentioned that a discriminatory purpose—implies more than intent as violation or intent as awareness of consequences, it implies that the decision maker, in this case a state legislature, selected or reaffirmed a particular course of action at least in party “because of” not merely “in spite of” its adverse effect upon and identifiable group.

- **Village of Arlington Heights v. Metro Housing Development (1977)** Company wanted to rezone some land from single family to multiple family. City would not let them. They claimed that since this had a desperate impact on minorities that it was a violation of their Fourteenth Amendment Rights. However, the court held that it was not because there was no foul play, the city had made the zoning map 20 years before, and was committed to single-family zoning... If there had been a history of discrimination then the burden would have shifted back to the city to prove that it was not acting with a discriminatory purpose when it made the zoning.

4. **Remedies: The Problem of School Segregation:** Unlike interracial marriage and jury service, it is not easy to desegregate schools because we have to rely on the schools to fix the problem (principal agent).

- **Introduction: The Problem of Remedies*** the Court did not address remedies in the Original Brown case, so it had to come back to the court a year later.

- **Brown v. Board of Education (1955)** Who should decide the remedies? Federal district courts. The Courts have to make sure that the schools are making a “prompt and
reasonable start.” Apply equitable principals—courts can do what is right/what is fair... The courts can consider the adequacy of any plans the schools may propose to meet theses problems and to effectuate a transition to a racially nondiscriminatory school system. The Courts will retain jurisdiction of the cases.

- **Massive Resistance**
- **Judicial Power to Impose Remedies in School Desegregation**
- **Swann v. Charlotte-Mecklenburg Board of Education (1971)** How far should the remedies go???
  
  (1) **Racial Balances or Racial Quotas:** In this case it was urged that the racial balance requirement of 71%/29%. Because (1) it was expressly found that the district had a two school system in place before, and (2) School had refused to actually do anything meaningful, so the court moved to the ratios last.

  (2) **One-Race Schools:** It is common in metro areas to have races grouped close together, creating neighborhood schools that are naturally segregated due to who lives around them... BUT, schools will have high level of scrutiny to show that they are not manufacturing this one race school result.

  (3) **Remedial Altering of Attendance Zones:** Where there is a history of school districts drawing up attendance maps like gerrymandering, the Courts cannot simply rely upon the school district to inform the Court that it did the most reasonable job making sure that there is a racially natural assignment... But it is fine to gerrymander to have school districts that are diverse.

  (4) **Transportation of Students:** Schools have not always had unlimited transportation by the bus like schools do now.... But in the even it was submitted to the Court that it should not be more than a 7-mile commute for an elementary school student, the Court agrees, but in order to have the desecration the commute time could be extended a little bit, especially for older children.

- **Miliken v. Bradley (1974)** Court limits power from the previous cases here. Detroit needed a remedial plan that involved 54 districts around the city. Court held that since the other 53 districts are not acting inappropriately, they should not have to be involved. Dissent points out that it is the state that is ultimately responsible for all of the problems, so why not involved all of the districts.

- **When Should Federal Desegregation Remedies End?** In the 1990s the Supreme Court decided that after a school district does something to counter its previous segregation laws, it could not be revisited on the basis of people moving (so it is not necessary to keep making sure that the schools are desegregated, if they become segregated again due to migration patterns, then so be it).

- **Board of Education of Oklahoma City Public Schools v. Dowell (1991)** Between 1963 and 1972 the school board fought the court on desegregation. Now, after 13-years of implementing the desecration, 6 years after it has been in full effect, it wants to not have to maintain the remedial measure.... The Court holds that the federal courts should return decision making to the locals as soon as it can, thus this case was remanded to see if the district was fully conforming, and if so no longer needed the remedial
measure. Dissent mentions that the school should have to comply longer in order to remove the remedial measure.

- **Parents Involved in Community Schools v. Seattle School District 1 (2007)** Can a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignment? No. Even though the classifications meant that only a handful of students didn’t get to go to the school of their choice... the Court held that the strict scrutiny applied in race case, and it meant that the school had to have a compelling interest in achieving a unitary school system. **But, 4 dissenters and 1 concurrence (so 5 justices, a majority) say that race can be a compelling interest in k-12 education, therefore the true test is (1) the difference between de jure and de factor segregation, and (2) the presumptive invalidity of the state’s use of racial classifications to differential its treatment of individuals... IT is still not easy to draw a categorical line, we have to look at the content, what is really happening, is there an effort to segregate...**

So, going forward you can have school boards pursuing the goal of brining together students of diverse backgrounds and race through other means including....

1. Strategic site selection of new schools.
2. Drawing attendance zones with general recognition of the demographic so f neighborhoods
3. Allocating resources for special programs
4. Recruiting students and faculty in a targeted fashion
5. Tracking enrollments
6. Performance
7. And other stats.

****Dissenters point out that applying strict scrutiny is too difficult of a burden to overcome for a program that avoids the segregation that is trying to be prevented...

5. **Racial Classifications Benefiting Minorities**

   **UCLA v. Bakke (1978)** UCLA med school had a quota to fill seats in the school with minorities. Justice Powell applied strict scrutiny, and struck down the quota, but did find diversity as a compelling interest. 4 justices concurred striking down the quota on the basis of “reverse discrimination” based upon the Civil Rights act of 1964, but did not find diversity to be compelling interest, and 4 justice dissented would have upheld the quota under intermediate or other lower standard of review. Did not bother to find diversity to be a compelling interest, because they were not applying strict scrutiny.

So, what we got from this is that Diversity IS a compelling interest, So college’s began to use a softer, race conscious admission process.

***THREE QUESTIONS:***

1. What level of scrutiny should be used for racial classifications benefiting minorities? (strict scrutiny).
2. What purpose for affirmative action programs are sufficient to meet the level of scrutiny?
3. What techniques of affirmative action are sufficient to meet the level of scrutiny? (plus factor).
- **The Emergence of Strict Scrutiny as the Test**

  **Richmond v. J.A. Corson Co. (1989)** Richmond VA is trying to undo some of its discriminatory past by creating forced incentive to hire blacks for public projects. But after applying strict scrutiny, the court holds that there was no prima facial case for the district court to make the determination that the industry what been preventing blacks from entering it before... which is necessary in order to have a remedial action.... ****MUST SHOW past, **particularized** discrimination. Not enough to show the history of discrimination in general, must be tied to the industry that the affirmative action created for. In concurrence, Scalia stated that Constitution is color blind, and should only account for race when removing a racially biased practice. Not when trying to make up fro past racial bias. Dissenting, Marshall stated that not only is there plenty of evidence of past discrimination, but intermediate scrutiny should have been the test instead, because these are remedial actions, not the same odious types of discrimination that strict scrutiny is designed to protect us from.

- **The Arguments for and Against Strict Scrutiny**
  
  **FOR:** Scalia and Thomas, remedying past discrimination can virtually never meet strict scrutiny, and affirmative action places a badge of handicap upon minorities. Sees the two types of laws as morally the same...
  
  **AGAINST:** Stevens, there is a difference between invidious discrimination and benign affirmative action laws. No moral similarity between law seeking to undo cast system and the invidious laws that got us there.

- **The Use of Race to Benefit Minorities in College and University Admissions**
  
  Court goes onto hold in these cases, that it is ok for colleges’ and universities to take into consideration for admission a student’s race, but it cannot afford a significant amount of admission points to the student just for being that particular race.

- **Grutter v. Bollinger (2003)** U-M admission policy for the law school... School seeks a critical mass of students from various backgrounds (in addition to incredibly difficult standards). O’Connor holds that Strict scrutiny is th test, and that it was met, because in Bakke, Powell said that diversity could be a compelling interest, and in this case it was successful. WHY? Because it was just a “plus factor.” Dissenters don’t see why U-M needs to be an elite school since it is public....

- **Fisher v. UT-Austin (2013)** School creates that same “critical mass” idea is the U-M case. ***With regard to the lower courts, did it appropriately give deference to the school? YES, it was proper for the lower Court to defer to the school’s authority on what diversity is necessary. BUT where the lower courts messed up was that the deference was extended to the means of the diversity program, and the court has to undergo the searching inquire about the means test (least restrictive alternative, ect.)→You should presume that the school is acting in bad faith, or at the very least NOT good faith, which is what the lower court did in this case, and why it needed to go through the process again. Dissent states that the school should be given deference that it makes good faith policy choices.

- **Drawing Election Districts to Increase Minority Representation:** Another form of affirmative action is in the form of drawing election districts so as to increase the
likelihood that minority groups will be able to choose a representative. Done by grouping races together. Also, strict scrutiny.

1. In each case, the Court ruled that the use of race in drawing election districts must meet strict scrutiny.

2. Court indicated two ways in which it can be demonstrated that race was used in drawing election districts and thus strict scrutiny is to be applied. ONE is if a district has a “bizarre” shape that, in itself, makes clear that race was the basis for drawing the lines.

3. The Court considered what justifications are sufficient to meet strict scrutiny. For example, the Court held that §5 of the VRA which requires that the justice department approve changes in election systems in state where there has been a history of race discrimination with regard to voting, does not justify the use of race in districting.

D. Gender Classifications

1. The Level of Scrutiny

- Early Cases Approving Gender Discrimination: There have been arguments for strict scrutiny, however, women are not a small and insular minority, in fact they are the majority, so they have only gotten up to intermediate scrutiny.

- The Emergence of Intermediate Scrutiny—First time to happen was Reed v. Reed (1973). Although the court claimed to only be using rational basis review...

- Frontiero v. Richardson (1973) Women in the military claiming that it was a 5th amendment violation to make her prove her husband’s dependency on her to get benefits, while men do not have to prove that their wives are dependent to get benefits. Court holds for her because the government’s argument for efficiency (most military wives are dependents, but most military husbands are not, more paperwork or more free benefits), does not suffice. Concurring options would have found the same way under rational basis review.

- Craig v. Boren (1976) State of OK has different alcohol laws for young men and women (lets women get low percentage drinks as teens). Majority holds that intermediate scrutiny applies to men being discriminated against as well, and holds that the law is invalid because it does not meet the standard. Dissent argues that there should not be heightened scrutiny for men claiming to be discriminated against. And argues that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives is not supported by prior case law. BUT, this is now the standard for all sex based discrimination cases.

- United States v. Virginia (1996) Women were not allowed into the coveted VMI, home of the “citizen soldiers.” They were instead offered a similar program through another school. In majority opinion, Ginsburg used “exceedingly persuasive justification” for that action. This appears to be higher scrutiny than intermediate. In dissent, Scalia points out that this ignores long standing traditions, and failure to use precedent on the standard of review.

2. Proving the Existence of A Gender Classification

(1) The gender classification can exist on the fact of the law; that is, the law in its very terms draws a distinction among people based on gender.
If a law is facially gender neutral, providing a gender classification requires demonstrating that there is both a discriminatory impact to the law and a discriminatory purpose behind it.

- **When is it “Discrimination”?** ***Both a discriminatory impact and purpose.” It has to be becomes of.***

- **Geduldig v. Aiello (1975)** CA disability covers a myriad of things, but not pregnancy. Since only women can get pregnant isn’t it a violation of equal protection (under intermediate scrutiny?). NO, because it is pregnant vs non-pregnant people, not a men vs women issue. Majority holds that all things offered to men are also offered to women, and since this is a state run insurance program it has limited funds and cannot afford to provide this to all pregnant women. Dissent points out that there are things that are only provided to men, and that since only women can become pregnant this is a form of sex discrimination.

3. **Gender Classifications Benefiting Women**
   (1) Gender classifications benefiting women based on role stereotypes generally will not be allowed.
   (2) Gender classifications benefiting women designed to remedy past discrimination and differences in opportunity generally are permitted.

- **Gender Classifications Based on Role Stereotypes**
  - **Orr v. Orr (1979)** Alabama will not allow a man to receive alimony from his wife solely because he is a man. Since this is based on stereotype, it cannot be permissible.
  - **Mississippi University for Women v. Hogan (1982)** Man living in a town that has an all female nursing school wants to become a nurse without having to move. School argues that it needs to be available to protect women’s interest in the career field. But the court holds that it does not meet scrutiny... Important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. Dissent points out that the women attending that school likely did so because they wanted single sex education, otherwise they would have gone to one of the 7 coed schools in the state, which is what this male student should have done if he wanted to become a nurse.
  - **Rostker v. Goldberg (1981)** Women are exempt from signing up for the draft... but the Court holds that it meets equal protection scrutiny because ***Congress is afforded deference in decision making—especially when it is a matter of military/national security, and it has decided that only men can serve in combat positions, and since the draft is primarily to fill combat positions, there is no reason to have women enter the draft. Dissent argues that there is no justification, because women could be performing other jobs in the military that would free up more men for combat roles.

- **Gender Classifications Benefiting Women as a Remedy:** The Court has indicated that gender classifications benefiting women will be allowed when they are designed to remedy past discrimination or differences in opportunity.
  - **Califano v. Webster (1977)** SSID benefits allow women to factor three more years than men into what they should be paid. Not a violation of equal protection because the more favorable treatment of women is to make up for the discrimination in the
workplace, NOT based in any stereotypes of women as a weaker sex. ***Remedy the past discrimination of lower paying jobs and inhospitable work environment.

- **Gender Classifications Benefiting Women Because of Biological Differences Between Men and Women**
- **Nguyen v. INS (2001)** Law for a parent obtaining citizenship when they have a child born in the USA is permissible under the Equal Protections Clause... Here the majority articulate the test as intermediate scrutiny, whereas the dissent emphasizes that there also must been an “exceedingly persuasive justification” for the gender classification; the dissent emphasizes that only “actually” legislative purposes are sufficient, whereas the majority does not; and the majority and the dissent differ as to whether the law is based on stereotypes or biological difference between men and women.

E. **Alienage Classifications**: Protections against xenophobia, equal protection clause explicitly says that no “person” shall be denied equal prediction of the laws. The clause does not mention the word “citizen,” although it is used in the Privileges or Immunities Clause, which also is found in §1 of the Fourteenth Amendment. State laws that discriminate against someone’s alienage can usually be challenged by preemption, because the federal government has made it clear that it occupies the entire field of immigration. Also, the Supreme court has made it clear since 1886 that the Fourteenth Amendment covers everyone within the United States, regardless of alienage.

1. **Strict Scrutiny as the General Rule**
- **Graham v. Richardson (1971)** AZ law prohibits a non-citizen alien to receive disability benefits if they have not resided in the state for at least 15-years. However, the court holds that it would be unconstitutional for a state to condition welfare benefits either upon the beneficiary’s possession of United Sates citizenship, or if the beneficiary is an alien, upon his having resided in this country for less than a specified number of years. ****States have strict scrutiny, but the Congress and President have rational basis in light of the political and economic circumstances, BECAUSE the federal government make immigration laws (while states do not), thus the Federal Congress can make laws only having rational basis review. So, if this had been about federal benefits, the law would have been upheld.

2. **Alienage Classifications Related to Self-Government and the Democratic Process** ***“A democratic society is ruled by its people.” Hence, the Court has declared that a state may deny aliens the right to vote or hold political office or serve on juries. ***Rational Bias is applied. WHY??? Because, sacred democratic idea that only citizens can participate in governance. “Membership has its privileges,” people who are citizens get to govern themselves.

- **Foley v. Connellie (1978)** NY says “no person shall be appointed to the NY state police force unless he shall be a citizen of the United States.” Foley is an alien eligible in due course to become a naturalized citizen, who is lawfully in this country as a permanent resident alien. He has all the qualifications to be a police officer, except citizenship. Court holds that it is not a violation of Equal Protection to deny him the job (until he becomes a citizen), because the court holds that being a police officer is part of the
democratic process. Majority makes distinction between “important non-elective executive, legislative, and judicial positions,” held by “officers who participate directly in the formulation, execution, or review of broad public policy.” So should officers, because while they do not formulate policy per se, they are clothed with authority to exercise an almost infinite variety of discretionary powers (like a county judge). Dissent finds that state trooper does not fall into this category because they have no authority to make policy, rather they only execute policy (like a SOS employee).

3. **Congressionally Approved discrimination:** The Supreme Court has ruled that the federal government’s plenary power to control immigration requires judicial deference and that therefore only rational basis review is used if Congress has created the alienage classification or if it is the result of a presidential order. ***States have strict scrutiny, but the Congress and President have rational basis in light of political and economic circumstances. WHY?? Because, the federal government make immigration laws, thus federal congress can make laws only having rational basis review.

4. **Undocumented Allies and Equal Protection**

   - *Plyer v. Doe (1982)* TX argues that it should not have to provide education to the children of undocumented aliens. The Court recognizes that it cannot apply strict scrutiny since undocumented aliens are in violation of the federal immigration law (which is not a constitutional irrelevancy) AND education is not a fundamental right. So it looked at rational basis review, and found that Education did = substantial state interest standard, which is a hybrid of rational basis and intermediate scrutiny in order to find against all of the state’s arguments. “in light of these countervailing costs the discrimination contained in the state statute can hardly be considered rational unless it furthers some substantial goal of the state.” (SOUNDS LIKE INTERMEDIATE SCRUTINY). Dissenters point out that the while it is bad that the state is trying to deny these kids an education (which they desperately need to learn the language and be productive members of any society), the fact is that the state is being forced to spend limited money available on people who do not have a right to the education. (Not irrational because money).

   - **F. Discrimination Against Non-Marital Children—Intermediate Scrutiny**
     1. Laws that provide a benefit to all marital children, but no non-marital children always are declared unconstitutional.
     2. Laws that provide a benefit to some non-marital children, while denying the benefit to other non-marital children, are evaluated on a case-by-case basis under intermediate scrutiny.

   - **Laws Denying Benefits to All Non-Marital Children**

   - **Laws that Provide a Benefit to Some non-marital Children:** Laws have been upheld that limit a non-marital child to make a claim for inheritance before the parent dies in order to establish paternity (prevent fraud). AND if the law is a divide between martial and non-marital children, the law will likely be invalidated by the court, HOWEVER, if the law is between two different groups of non-marital children, then it can be upheld, but it will have to meet intermediate scrutiny.

G. **Other Types of Discrimination: Only Rational Basis Review**
1. **Age Classifications**—despite the history of discrimination against the elderly, there is still only rational basis review.

   - *Massachusetts Board of Retirement v. Murgia (1976)* State law forces a cop to retire at 50. Court holds that this does not violate equal protection because it is rational that the state wants to insure that it will not have cops who are not physically up to the task. Dissent points out that work is an essential freedom, and it fails rational basis because the cops are already forced to undergo checkups every 2-years to be reevaluated (too Overinclusive, even for rational basis).

2. **Discrimination Based on Disability**—Rational Basis test, although, this is also a contentious issue. Dissenters argue that “discriminate against individuals with mental retardation” should require heightened scrutiny.

3. **Wealth Discrimination**—Court has upheld a TX law that funded schools based upon property tax, which in effect allowed wealthy areas to tax low and have lots of money for schools, and forced poor areas to tax high, and still have little money for schools. The Court’s refusal to make wealth a higher level of scrutiny is that it is not immutable. However, the poor as a group do share many characteristics with groups that are protected by intermediate and strict scrutiny. The poor lack political power, especially in a political system where money is crucial for influence. Additionally, there is a long history of discrimination against the poor in many areas. AND some prominent scholars have argued that there should be a right to minimum entitlements under the Constitution; every person should be assured of food, shelter, and medical care to survive.

4. **Discrimination Based on Sexual Orientation**
   - *Romer v. Evans (1996)* Supreme Court invalidated an amendment to CO’s constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation.
   - *Lawrence v. Texas (2003)* Supreme Court overrule *Bowers*, holding that laws making same-sex intimacy a crime “demean the lives of homosexual persons.”

### IV. Chapter 8 Fundamental Rights Under Due Process and Equal Protection

   A. **Introduction**

   - The Concept of Fundamental Rights***Strict scrutiny used for ALL fundamental rights
   - The Ninth Amendment: “The enumeration in the Constitution of certain rights, shall not be construed to disparage others retained by the people.” Who gets to decide what rights are fundamental? The court or the legislature? We still don’t have a consensus.

   - **Procedural Due Process:** The existence of a right triggers two district burdens on the government.

   (1) **Substantive:** The government must justify an infringement by showing that its action insufficiently related to an adequate justification.

   (2) **Procedural:** When the government takes away a person’s life, liberty, or property, it must provide adequate procedures.

   B. **Framework for Analyzing Fundamental Rights**

   (1) Is there a fundamental right (or constitutionally-protected liberty interest)?
      → If YES, strict scrutiny applies; go to 2.
(2) Is the right infringed—assume this is met.?
   → I.e., is infringement “substantial & direct”?
   → If YES, go to 3.
   → If NO, rational basis applies, go to 3.

(3) Is the standard of Review met? APPLY BLUE SHEET.
   → Is there sufficient justification (purpose) for the government action?
   → Is the means sufficiently related to the purpose?

****Here, there is only strict scrutiny or rational basis test, with some hybrid cases.

- First Issue: Is There a Fundamental Rights

Fundamental Rights Recognized by the Court
- Rights expressly protected in the Bill of Rights
- Rights related to family autonomy
   → Right to marry
   → Right to custody of one’s own children
   → right to keep family together.
   → Right to control upbringing of children.
- Rights related to reproductive autonomy
- Rights related to medical care decisions
- Rights related to sexual activity
- Right to travel
- Right to access of courts.

- Second Issue: Is the Constitutional Right Infringed?: When considering the whether or not a right is infringed “the directness and substantiality of the interference” will be looked at.

- Third Issue: Is There a Sufficient justification for the Government’s Infringement of a Right? There is no test for what a compelling interest is, but the Court has recognized “winning a war” and providing health care to children.

- Fourth Issue: Is the Means Sufficiently Related to the Purpose?
  C. Constitutional Protection For Family Autonomy: NO TEST FOR THIS, Not enough for the government to prove a compelling purpose behind a law; the government also must show that the law is necessary to achieve the objective. This requires that the government prove that it could not attain the goal through any means less restrictive of the right. In comparison, under rational basis review, the means only has to be a reasonable way to achieve the goal and the government is not required to use the least restive alternative.
  1. The Right to Marry
- **Loving v. Virginia (1968)** Does a prohibition on interracial marriage violate due process? YES, marriage is one of the “basic civil rights of man,” fundamental to our very existence and survival. Thus, cannot be limited based upon race classifications.
- **Obergefell v. Hodges (2015)** Do state laws that limit marriage to one man and one woman violate the Fourteenth Amendment rights to liberty of homosexuals who seek marriage? YES, marriage is a fundamental right, fundamental rights are not up for a vote, and a couple of the same sex cannot be denied the ability to marry under the due process and equal protection clauses of the Fourteenth Amendment.

2. **The Right to Custody of One’s Children**

- **Lehr v. Robertson (1983)** “When an unwed father demonstrates a full commitment to his responsibilities of parenthood by coming forward to participate in the rearing of his child, his interest in personal contact with his child acquires substantial protection under the due process clause . . . But the mere existence of a biological link does not merit equivalent constitutional protection.”
- **Michael H. v. Gerald D. (1989)** Child is born to a marriage and husband assumes he is the father, and rears the child for some time. Couple separates, mother seeks to prove that ex husband is not the actual father, GAL argues that it is in the child’s best interest for both fathers to have parenting rights. Scalia writing for the majority states that you cannot force the state to recognize two fathers. But the state is free to do what it believes is best. Dissent argues that the court is inserting its own morals, and failing to realize that both fathers meet the constitutional parental rights standards (Gerald, the father since birth, always been in the role, but Michael, taking on the role for a while and is the bio dad).

3. **The Right to Keep the Family together:** The Supreme Court has recognized a fundamental right to keep the family together that includes an extended family.

- **Moore v. City of East Cleveland (1977)** City ordinance says that homes can only be occupied by one family. Mrs. Inez Moore lives with her son, grandsons who are first cousins (not brothers). Due to this situation she was in violation (facing 5 days in jail and a $25 fine). City argues that these ordinances have been upheld in previous cases, and that the city has a rational basis: prevent overcrowding, minimizing traffic, paring congestion and avoidance of an undue financial burden on East Cleveland Schools, HOWEVER, this fails to recognize the long history of this country and the role that aunts and uncles cousins etc. have played.

4. **The Right of Parents to Control the Upbringing of their Children**

- **Meyer v. Nebraska (1923)** Nebraska had a state statute that prohibited the teaching of any language other than English to a student who did not first pass 8th grade English. Court held that this was an unconstitutional infringement of the parent’s ability to choose what their child could learn.
- **Pierce v. Society of the Sisters of the Holy Name (1925)** Oregon law required all 8-16-year-olds to attend public school. Private school sues arguing that parents should be able to decide to send their kids to private religious school. Court held for the private school.
- **Troxel v. Granville (2000)** Washington permits “any person” to petition a superior court for visitation rights “at any time,” and authorizes that court to grant such visitation
rights whenever “visitation may serve the best interest of the child.” Grandparents (who’s son was the father who is now dead) sue to get more custody of their grandchildren than the mother of the children wanted to allow. Trial court grants this without consideration for the mother’s determination. Court holds that this is a violation of the right to parent because “some special weight has to be given to the decision of the parent.” Concurrence aggress, but would not have applied strict scrutiny, dissenters do not see problem with rights given to the grandparents (but agree law was poorly written).

**D. Constitutional Protection for Reproductive Autonomy:** procreate, purchase and use contraceptives, abortion.

1. **The right to Procreate**

   - **Buck v. Bell (1927)** Supreme Court upholds a VA law that allowed for forced sterilizations of mentally feeble people. People subject to this were later found to not suffer from mental disability (because science discovered that it was not necessarily a heritable trait) BUT THIS HAS NEVER BEEN OVERTURNED.

   - **Skinner v. Oklahoma (1942)** OK law forced sterilization on someone who obtains 2 felonies. Court holds that it would be a violation of the criminal’s fundamental right to procreate. Criminal behavior is not an inheritable trait, and thus there is no compelling government interest in preventing them from enjoying their fundamental right (strict scrutiny).

2. **The Right to Purchase and Use Contraceptives**

   - **Griswold v. Connecticut (1965)** The Court holds that married couples have a fundamental right to use contraceptives because the marriage is within a zone of privacy created by the bill of rights penumbra of freedoms.

   **First Amendment:** the right of association.

   **Third Amendment:** in its prohibition against quartering of soldiers “in any house” in time of peace without the consent of the owner is another facet of that privacy.

   **Fourth Amendment:** explicitly affirms the “right of the people to be secure in their person, house, papers, and effects, against unreasonable searches and seizures.”

   **Ninth Amendment:** provides “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”

   ***THE marital bed is a private place,*** and there is no room for the police to be investigating for the use of contraceptives.

   **Justice Goldberg’s Concurrence:** a judicial construction of the ninth amendment, that unremunerated rights are not protected by the constitution are violating the ninth amendment of the constitution in and of itself.

   **White’s concurrence,** this is actually a deprivation of liberty under the Fourteenth amendment. State failed to argue how contraceptive is bad for people.

   **Dissent:** bad law, unenforceable, but not the role of the court to strike it down. Privacy is important, however, the government can always invade your privacy when it has done so through the democratic process and not violating enumerated rights.

   - **Eisenstadt v. Baird (1972)** Court holds that unmarried couples have a right to contraception as well. “If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be
equally impermissible. It is true that in *Griswold* the right of piracy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person the decision whether to bear or beget a child."

3. The Right to Abortion
   a. The Recognition and Reaffirmation of the Right to Abortion
      - *Roe v. Wade (1973)* Is there a fundamental right for a woman to seek an abortion? YES, TX law forbids the practice, major claim is to protect prenatal life (believing that life begins at conception). Court holds that states do have a legitimate interest in protecting life, HOWEVER, that can only begin at the point of viability, until then it is a fundamental right of a mother to seek abortion. Substantive due process right (first time SDP is used in post *Lochner* era). VIABILITY = after second trimester in this case. Dissent does not find this to be a privacy issue, and only applies rational basis test. Holds that if the mother’s life is in jeopardy, then it would not be rational to prevent her from having an abortion, but otherwise the law would be valid.

      - *Planned Parenthood v. Casey (1992)* Penn law requires certain information at least 24 hours before an abortion can be performed. Also, married women seeking abortion have to notify husband, minor seeking abortion has to get parental or judicial consent. Maintains Roe’s essential holding that abortion is protected privacy right, but does away with the trimester framework for a viability framework that is left up to the states to decide on. HOLDINGS: (1) apply an undue burden analysis. If the state law creates an undue burden to obtaining an abortion, then it is not constitutional. Substantial obstacle preventing her from obtaining an abortion. (2) reject the trimester framework. (3) States may enact regulations to further the health or safety of a woman seeking an abortion. HOWEVER, unnecessary health regulations that seek to place undue burden on the woman are not constitutional. (4) a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability. (5) after vitality, the state in promoting its interest in the potentially of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary for the health of the mother.

   b. Government Regulation of Abortions.

   c. Governmental Restrictions on Funds and Facilities for Abortions:
      Government is not required to subsidize the cost of an abortion.

      - *Maher v. Roe (1977)* Is it constitutional for the Medicaid to fund child birth but not abortion? Yes—wealth classifications are not subject to scrutiny, so if the state wants to make child birth a more attractive offer to indigent women, then it can. Dissent points out how absurd this is to tell indigent people that they have a fundamental right to abortion but not to cover it and price them out of it.


   d. Spousal Consent and Notice Requirements: If the state does not have the veto power (over a woman’s choice to obtain an abortion then the state
cannot delegate that veto power that it does not have to the husband or father or whatever to veto the ability of the mother to obtain an abortion.

- **Planned Parenthood v. Danforth (1976)** MO law prohibited a woman from obtaining an abortion without the prior written consent of her husband. Court held it to be unconstitutional, focused on threat of spousal abuse because the only women who would be forced against their will to get the consent would be the ones who are at risk for abuse (as opposed to all other women who would certainly being informing their husband anyway). But, Rhenquist’s dissent in Casey comes to the opposite conclusion, that since so few women have a problem with this that it is no big deal.

- **Planned Parenthood v. Casey**
  e. **Parental Notice and Consent Requirements**: States may require parental consent, SO LONG AS there is judicial bypass. If good cause is shown, then the minor can obtain consent to obtain an abortion from a judge. REMEMBER, children have rights under the constitution but they are limited. (1) the peculiar vulnerability of children, (2) their inability to make critical decisions in an informed, mature manner, (3) the importance of the parental role in child rearing.

- **Planned Parenthood v. Casey (1992)** AGAIN It would be repugnant to our society to force women to have to obtain permission from their husbands in order to have an abortion. Slippery slope that could allow husbands to have considerable control over women’s actions involving fertility. Dissent applies rational basis test and argues that husband should have a right try to influence his wife to not abort.

- **Bellotti v. Baird (1979)** A pregnant minor is entitled to a proceeding to show either: (1) that she is mature enough and well enough informed to make her abortion decision in consultation with her physician independently of her parent’s wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interest. The proceeding in which this showing is made must assure that a resolution of the issue, and any appeals that may follow, will competed with anonymity and sufficient expedition to provide an effective opportunity for an abortion to be obtained. Dissent argues that this still gives someone veto power over a young woman’s choice to abort.

**E. Constitutional Protection for Medical Care Decisions**

- **Right to Refuse Treatment**
  - **Cruzan v. Director of Health (1990)** Woman was on life support, and her parents argued that she would not want to be kept alive on life support and asked for her to be taken off so that she could die. HOWEVER, a friend of the woman came forward and argued that she would want to be kept alive. MO law requires a finding by clear and convincing evidence that the person on life support would want to be taken off life support, and due to the conflicting testimony does not find it here. **SUPREME COURT holds that the MO law is a legitimate concern of the state to protect someone in this situation, and it is a legitimate, constitutionally permissible action of the state to require a clear and convincing evidence standard in order to achieve that protection.** Concurrence points out that someone can have a surrogate who’s word is automatically sufficient. Dissent
points out that the court all agrees on heightened scrutiny, but how high? People should be able to die with dignity, so the law should not make it this difficult.

- **Right to Physician-Assisted Death**
- **Washington v. Glucksberg (1997)** Criminal statute for assisting someone with suicide. Court holds that it does not violate the Fourteenth Amendment. ***While all 9 justices voted to uphold the state laws that prohibited assisted suicide, 5 justices wrote concurring opinions that the law is not completely restricted, and opened the door to situations where the laws could be found unconstitutional. ALSO, they opened the door to state statutes that could make assisted suicide constitutional. ***In fact, some states have enacted assisted suicide laws since this case and are valid.

  F. **Constitutional Protection for Sexual Orientation and Sexual Activity**
  - **Lawrence v. Texas (2003)** TX law made homosexual intimacy criminal. Court held that it was a violation of the due process clause under the Fourteenth Amendment and overturned *Bowers v. Hardwick*. The TX statute is not just unconstitutional because it discriminates against homosexuals, but it is also unconstitutional because it infringes upon the liberty of all people to engage in this type of intimacy. In a post *Planned Parenthood v. Casey* world “one’s own concept of existence... of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” Concurrence states that the law should only be invalidated as discrimination against homosexuals, and would otherwise uphold a butt sex ban. Dissent believes that there is no right for homosexual intimacy (or ability of the court to prevent the state from criminalizing it...)

  G. **Constitutional Protection for Control over Information** ***Issue is rarely taken up by the Supreme Court...***
  - **Whalen v. Roe (1977)** State makes a law to keep track (data) of who is prescribed what medication and what classification the medication has in an effort on the war on drugs (prescription drugs). The court holds that it is not a breach of the zone of privacy, because the only way the private information comes out is if the state employees breach their confidentiality duties, or if there is an accusation of a violation of the law, or if the patient voluntarily releases the information... and the fact that there are sever penalties for breach of confidentiality is enough protection.

  H. **Constitutional Protection for Travel**
  I. **The right to Vote**
  1. The Right to Vote as a Fundamental Right
  2. Restrictions on the Ability to Vote ***Strict scrutiny.***
  - **Poll Taxes ***Prohibited by the 24th amendment.*****
  - **Harper v. Virginia State Board of Elections (1966)** State elections, while not covered by the 24th amendment, is still unlawful, because the right to vote (unencumbered by a fine) is now recognized as a fundamental right.
  - **State Legislature v. Arizona Independent Redistrict Commission (2000)** In order to get rid of gerrymandering, state referendum creates an independent redistricting commission, to oversee redistricting of the state following the next census. State legislature sues the commission arguing a violation of Art. I §4 clause 1. The court holds
that it is ok for the commission to perform the redistricting. The crux of the case is on the term legislature, in the elections clause of the Constitution extends to the people. If the definition is only that the term must be narrowly interpreted to only account for those who are in the elected legislature of the state, then the clause would have prevented the people from delegating this role away from the elected officials. However, it seems more appropriate that the time the term legislature, as it is used in the Constitution, and as it was used at the time of writing the constitution, to interpret the term to men the people from the state when voting. Dissent points out that the 17th amendment had to be written in order to delegate power to the people to vote in their own senators because of the constitution’s use of the word legislatures.

- **Property Ownership Requirements**
  - *Kramer v. Union Free School District (1969)* Property ownership requirements are unconstitutional, with narrow exception for cases where there is a legitimate reason (like water board elections, because only people who own property in the jurisdiction that the water board has control over should have owner... but even that seems strange.

- **Literacy Tests:** As of 1915, was found to be constitutional, however, no longer exist because of various federal statutes.

- **Prisoners’ and Convicted Criminals’ Rights to Vote:** States cannot deny the right to vote to those being held waiting for trial and, in fact, must provide them absentee ballots if they have no other way of voting. HOWEVER, once a person has been convicted of a felony, a state may permanently disenfranchise the individual. But not crimes of moral turpitude where discriminatory purpose behind the law to disenfranchise minorities.

- **Requirement for Photo Identification for Voting**
  - *Crawford v. Marion County Election Board (2008)* Indiana creates a voter ID law. Indiana only offers ID’s at certain locations across the state and there is a small charge. However, majority points out that after balancing the election roll process and the voter fraud history of the state finds that the law is not excessively burdensome and only imposes a limited burden on voters rights. He also dispenses with the fact that the law passed on all republic votes for it and all democratic votes against it. Decided that based upon NVRA and HAVA that Congress would prefer it, and that even though the state has almost no history of voter fraud, the fact that the rolls consistently have more than 100% of the voter eligible age of people on them is a concern and even though obtaining the ID is somewhat difficult, the burden is not so great when compared to the benefits to the system. Concurence points out that it would be a violation of due process if the state changed polling places without proper notice, or failed to provide adequate voting opportunity for the disabled. Dissent points out how difficult it might actually be for people, only 21 BMV’s and 91 counties... Also without a history of voter fraud, does not find the law necessary. ***Court holds that voter ID laws are not such a heavy burden to make it unconstitutional (at least not on its face).***

3. **Dilution of the Right to Vote**

- *Reynolds v. Sims (1964)* AL state senate is 1 member/county. Court holds that both chambers in a state must be apportioned on a population basis. One person = one vote. Dissent points out that this should not be justiciable (argument about what a republic
form of government looks like) and that states have always been allowed to do this under Art 4 §4. 

- **Wesberry v. Sanders (1964)** GA case, how close does the apportionment have to be? 20% was too much, court has allowed as much as 9.9%.


- **Bush v. Gore**

- Issues to Consider Concerning Bush v. Gore
  
  J. Constitutional Protection for Access to Courts
  
  K. Constitutional Protection fro a Right to Education ***SCOTUS refuse to recognize a fundamental right to education.

- **San Antonio Independent School District v. Rodriguez (1973)** TX had a tax and spend program for schools where 80% was covered by state tax and then 20% by local tax. This created a huge disparity between affluent and poor regions. Court applied rational basis test and it passed because it is up to the state to determine how to allocate tax dollars for schools. Dissent points out that “as a nexus between the specific constitutional guarantee and the non-constitutional interest draw closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly.” Since education is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment, that nexus should be met... think of the interest on a spectrum, the closer to an enumerated fundamental right, the stricter the scrutiny should be applied....

L. Procedural Due Process

(1) Is there a deprivation?

→ Government Negligence—NO 
→ Government Failure to ACT—NO 
→ Governmental reckless indifference—YES (can be).

→ Unless it is an emergency, in which case—NO 
→ Unless there is arbitrary government act that “shocks the conscience”—YES. (i.e., a purpose to cause harm unrelated to legitimate government interest). Recourse against an intentional act.

(2) Is there a deprivation of “life, liberty, or property”?

(3) What procedures are required?

→ Adequate “Notice and Hearing”

TO DETERMINE ADEQUACY OF HEARING, ASK:

→ What is the PRIVATE interest?

→ What is the risk of error with the current process, and probable value of additional process?

→ What is the GOVERNMENT interest? (three part test from Mathews v. Eldridge).

1. What is a “Deprivation”?

(1) Is the government negligence sufficient to create a deprivation, or must there be a reckless or intentional government action?
When is the government’s failure to protect a person from privately inflicted harms a deprivation?

- **Is Negligence Sufficient to Constitute a Deprivation?:** Government negligence is insufficient to state a claim under the due process clause.

- **Daniels v. Williams (1986)** Prisoner slipped and fell on a pillow negligently left on the stairs by a guard, sues the prison. Court holds not enough negligence to sustain a procedural due process clause claim...Mere negligence is not enough.

- **County of Sacramento v. Lewis (1998)** Police chase of a motorcycle. Officer was within 100 feet traveling close to 100mph when motorcycle flipped, one of the passengers was then killed by the police car. Court holds that governmental reckless has to shock the conscience and violate the decencies of civilized conduct. Police were acting in heat of moment, they an act with reckless indifference without shocking the conscience. **Thus,** only a purpose to cause harm will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.

- **When is the Government’s Failure to Protect a Deprivation?**

- **DeShaney v. Winnebago County Department of Social Services (1989)** Child was repeatedly abused by father, child went to hospital numerous times, CPS was called numerous times, but case fell through cracks and nothing was ever done about it. Child ends up with sever disability after final beating. Is state responsible for preventing the harm to the child when it knew? **NO,** State only has duty to protect people when they are in the State’s custody. State never took custody thus not liable. **STATEs** can still create a system to make themselves liable, but not under the constitution. Dissent is moved by sympathy for the child and mother.

- **Town of Castle Rock v. Gonzales (2005)** Mother has PPO against father, she notices kids missing, police wont do anything about it even though the PPO instructs them to (it even says **SHALL**). All three daughters ended up being killed by the father. Mother sues police for not acting when the PPO required them to. Court holds that police need discretion, so just because probable cause necessary to make an arrest is there, dos not meant hat an officer will be liable for damages when they fail to act. Scalia says that CO needed to make a tort for it. Dissent argues that the PPO already did, and that the CO legislature already did by putting **SHALL** in the PPO....

2. **Is It a Deprivation of “Life, Liberty, or Property”?**

- **The “Rights-Privileges” Distinction and its Demies:** Until the last thirty years, a government-bestowed “privilege” was not a basis for requiring due process. This meant that a police officer could be fired for expressing his political views, not because he had no right to be a police officer in the first place. Now we would argue that he ha a right to remain employed and not be fired for expressing his first amendment right. *****Procedural due process is the firs step in the due process violation.**

- **Goldberg v. Kelly (1970)** People receiving welfare benefits had their benefits cut off without any warning. While benefits are not rights, was it a violation to cut them off without a pre-termination evidentiary hearing? **YES.** These benefits are so important to the day to day life of the person that relies on them that the government has to respect it as a property interest. **ALSO,** keep in mind that for substantive due process, benefits...
are not fundamental rights, so instead of heightened scrutiny, the government will only have to look at rational basis test for revoking (but this case is really about notice).

- **What is a Deprivation of Property?** (Fourteenth Amendment) “Nor shall any State deprive any person of life, liberty, or property, without due process of law.”

- **Board of Regents v. Roth (1972)** Without tenure, is a college processor entitled to being provided with cause before termination? NO. His contract did not make it necessary to rehire or keep hire. Instead the school just failed to provide a reason to not keep him which was fine. Worth noting that if the school had given him a reason (that would hurt his reputation, then he would be entitled to a hearing so that he could refute that). Dissent argues that public entitles are restricted from acting with arbitrarily, and that all public employees are entitled to a reason or be in violation of procedural due process

- **What is a Deprivation of Liberty?**
  - (1) Are harms to reputation a liberty interest?
  - (2) When do prisoners have liberty interests?

- **Reputation as a Liberty Interest**

- **Goss v. Lopez (1975)** HS students suspended 10-days without hearing violates due process. Students must be informed of everything he is being accused of and an opportunity to refute it. Dissent argues that this is too speculative transitory and insubstantial to justify imposition of a constitutional rule.

- **Paul v. Davis (1976)** Police decide to give local merchants list of names of people who have been caught shoplifting. Police accidentally included names of people who have only been charged and not just convicted. Court holds that reputation alone is not a liberty interest, because he did not lose any life or property or liberties... must be reputation and _____. Dissent points out that this amounts to an ex parte punishment.

  3. **What Procedures Are Required?** ***REMEMBER FROM CIV PRO: Mullane v. Central Hanover Bank (1950), the big notice case, “Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case.”

- **Mathews v. Eldridge (1976)** Eldridge was receiving medical disability benefits. His condition did not improve, but he was informed without hearing that his benefits would cut off. Court holds that there is no due process violation because this is less critical than welfare and because if Eldridge wins he will get back pay benefits. Thus the government interests in giving out too many benefits and giving out benefits during a long fact heavy trial can be avoided. Meanwhile, it is an easy case for the beneficiary because they are entitled to know all of the government’s arguments ahead of time. Dissent points out that losing these benefits has the same effect as welfare beneficiaries. ***Matthews balancing test is essentially ad hoc... but if you think about it inter s of striking a balance between what the government might actually be able o rightfully save by not extending benefits during the appeal process, or not granting a full evidential hearing, compared to the likelihood of hardship by people who should rightfully have benefits but are being denied.

- **Government employment—Three Prong Test:**
(1) Continued employment by the government is a “significant” interest for the individual.

(2) Informational pre-termination proceeding was essential to avert erroneous terminations.

(3) Any pre-termination proceeding would entail costs to the government. BUT the court said that the importance of the interest to the individual and there need to avoid errors justified requiring an informational pre-termination proceeding despite these costs.

***Pre-termination hearing, though not elaborate, needs to happen.

- **Family Rights**: Courts must have clear and convincing evidence in order to terminate parental rights. Courts must pay for blood tests in paternity cases for the indigent, because otherwise they would lack a “meaningful opportunity to be heard.”

- **Substantive and Procedural Due Process: The Relationship**

- **District Attorney’s Office v. Osborne**

V. **Chapter 9: First Amendment: Freedom of Expression**

A. **Introduction**

1. **Historical Background**

   **FIRST AMENDMENT**: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”

   **KEY QUESTIONS:**

   (1) **Does it regulate “speech”?**

   ➔ Two-part inquiry:

   a. **Is “Conduct” communicative?**

      i. Speaker intends to convey a particular message.

      ii. Likelihood is great that message is understood by those who view it.

   b. **When may government regulate communicative conduct (U.S. v. O’Brien)?**

      i. Within power of government.

      ii. Furthers an important, substantial government interest.

      iii. Government interest is unrelated to suppressing speech.

      iv. Restriction is no greater than essential.

   (2) **Is it content-based or content-neutral?**

   ***Content-based** can be based either on

   THE **SUBJECT of the speech; and or**

   THE **VIEWPOINT** of the speech.

   a. If content-based, strict scrutiny applies.

   b. If content-neutral, intermediate scrutiny applies.

      i. Reasonable “time, place, and manner” restrictions (alternatives) may be used.

   ***Knotty issues:
a. “Secondary Effects” End route around the content-based distinction. Because, HOW can we figure out the intent for the law without bringing up issues for the Court. Renton. IF THE COURT USED THIS TOO MUCH IT WOULD SWALLOW THE RULE... But only used in context of adult theaters.

b. Where government must make choices based on content (e.g., subsidy)—cannot be “viewpoint”—based.

c. First Amendment does not apply to government speech (e.g., permanent monument in park).

(3) Is it vague and overboard?
***Vague: if a reasonable person cannot tell what is and is not being regulated.
***Overbroad: if it regulates substantially (important because the law is struck down on its face, and that is “strong medicine”) more speech than the Constitution allows.

(4) Is it a prior restraint?
***Defined: a court order or administrative order that prevents speech from occurring in advance of the time the speech occurs (e.g., licensing).
***Licensing is allowed, ONLY IF:
  a. Government has important reason for licensing
  b. Clear standards leaving almost no discretion to the government
  c. Procedural safeguards

(5) Does it regulate less-protected or unprotected speech?
  a. Unprotected (still protected, just not any heightened scrutiny... so, low burden on government, not even intermediate scrutiny):
    i. Incitement of illegal activity
       “Clear and Present Danger” Test: Brandenburg Interpretations
          ➔Likelihood (with intent) of causing
          ➔Imminent
          ➔Seriously harmful lawless action.
    ii. Fighting words; hate speech
    iii. Obscenity (“Miller” test); child pornography
       a. Whether average person, apply local community standards,
          would find the work, as a whole, appeals to ‘prurient interest’;
       b. Whether the work depicts, in patently offensive way, sexual conduct specifically defined by state law; and
       c. Whether the work, as a whole, lacks serious literally, artistic, political, or scientific value (using a national standard).
    iv. Defamation (libel and slander—false statements about other people, NY Times v. Sullivan, speaker (e.g., speech is unprotected) ONLY IF:
       a. P has clear and convincing evidence.
b. P proves falsity of D’s statement
c. P proves D had “actual malice.” Requires the speaker to have actual doubt of the truth of what they are publishing (so even if the reporter did a poor job of fact checking, and this is a protective standard to the press and speech).
v. IIED (intentional infliction of emotional distress).
b. Less-protected (special test, a form of intermediate scrutiny).
i. Low-value sexual speech (e.g., nude dancing; zoning context)
ii. Profanity and “indecent” speech (but only in some media—e.g., broadcast, WHY????? Because there are a limited number of frequencies, so the government has always had the legitimacy to regulate it, AND the captivity of the audience is important, people will be sifting through channels and do not want to unwittingly come upon profanity).

iii. Business speech/Commercial Speech (deemed less vital... NOT protected at all until 1976 when court decided that there is some value in protecting it).
1. Is it “Commercial speech?” (Bolger test, elements test)
   AND, if YES,
   →Does it advertise?
   →Does it refer to a specific product?
   →Is there an economic motivation?
2. Is the regulation acceptable? (Under Central Hudson intermediate scrutiny like test)?
   Central Hudson Test: Four types of government regulations of commercial speech.
   (1) Laws that outlaw advertising of illegal activities?
   **If YES, speech is unprotected.
   **If NO, following “intermediate scrutiny + applies”
   (2) Is there a substantial government interest? AND
   (3) Does the law directly advance the government’s interest? AND
   (4) Is restriction no more extensive than necessary?
   (interpreted as “narrowly-tailored,” not “least restrictive.”).

iv. Expressive conduct. It CAN get full protection when it is made to express things like political speech, BUT GENERALLY it is not given full protection.

(6) Forum analysis.
a. Public Forum—full First Amendment Protection
 *(E.g., public parks and sidewalks).
*Public Forum—Government Regulation
 →Must be Content-Neutral (or, if content-based, overcome Strict Scrutiny).
Must be reasonable time, place, manner restriction that serves:
***Important government Interest
***Leaves open adequate alternative.
→If licensing/permit must meet requirements.
→Must be narrowly-tailored. (but need not be least-restive alternative rather, must not burden “substantially more speech than is necessary to further government’s legitimate interest”).

b. Designated Public Forum—Full First Amendment Protection
***e.g., public property that hasn’t traditionally been open for speech but which government voluntarily opens for speech).

c. Limited/Non-Public Forum—Limited First Amendment Protection
***e.g., public property not traditionally open for speech, and which government either does not open for speech or opens only to certain groups or dedicated solely to certain subjects).

d. First Amendment Protection is limited in some environments (e.g., Military, Prions, Schools).

SCHOOLS: Students retain (lesser) First Amendment Protection
a. With non-school sponsored speech—may punished or ban speech that:
   (1) Substantially interferes with the work of the school; or
   (2) Impinges upon the rights of their students (Tinker).

   *****NOTE: more deference to school if speech is “low-value” (Frasier) or promotes illegal drug use (Morse).

b. With School-sponsored speech—may punish or ban speech when:
   (1) Reasonably related to a
   (2) Legitimate pedagogical concerns (Hazelwood).

RULE:
   i. Time, Place manner restrictions are okay;
   ii. Government may BAN speech, so long as the ban is:
      (1) Reasonable; and
      (2) No viewpoint based.

The Issues in Free Expression Analysis
(1) Evaluating any government action restricting freedom of speech
(2) Types of speech that are unprotected by the First Amendment or less protected.
(3) The place that are available for speech.
(4) Freedom of association
(5) Freedom of the Press.

2. Why should Freedom of Speech Be a Fundamental Right?
a. Self-Governance: People need the ability to have open political discussions about topics if they are giving to be informed voter’s. Some (Bork) would argue that only political speech should be covered by the First Amendment, but no one else follows that.
b. **Discovering Truth:** Discovery of truth, according to Justice Oliver Wendell Holms is the “marketplace of ideas” and wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.” **HOWEVER,** several problems with this idea… example, this means that the loudest might prevail (because the truth might not always be the loudest or always reveal as the most widely accepted), AND because it might allow the wealthy to have greater access to speech (limiting the say of the poor).

c. **Advancing Autonomy:** Some will argue that personal autonomy is allowing someone to utilize speech to align with what they believe in, define themselves publically, and fulfill an aspect of the political process. **HOWEVER,** critics argue that there is no inherent reason to find speech to be a fundamental right compared with countless other activities that might be regarded as part of autonomy or that could advance self-fulfillment.

d. **Promoting Tolerance:** If we are tolerant of other people’s right to speak, then we are living by an important principal of reaching higher level of living/reasoning.

e. **Conclusion:** It is an absolute right, so any law that limits speech is presumed invalid. WE look to reasonable TIME, place and Manner for limitations. **SO LONG AS** the law is applied Neutrally.

3. The Issues in Free Expression Analysis

B. Free Speech Methodology

1. The Distinction Between Content-Based and Content-Neutral Laws

   - **Content BASED:** regulations are presumed invalid. Heavy burden that the state has to meet in order to have them practically cannot meet it. More likely that the government will insist that it is actually a content neutral law. STRICT SCRUTINY.

   - **Content NUTRAL:** means that the regulation does not decide that the content of the speech is unlawful but the way in which the speech is delivered. INTERMEDIATE SCRUTINY.

   a. **The Importance of the Distinction**

   - **Turner Broadcasting System v. FCC (1994)** FCC creates a must carry provision for cable companies to carry local networks. Court holds that it is a content neutral issue, and after applying intermediate scrutiny, remands the case to be re-litigated. Content based would have been mandating what is on the channels, but setting aside the channels is content neutral. The dissent/concurrence declares that it is content based but that it meets strict scrutiny, because citizens need their local news. IN THE END case came back to supreme Court which held that it met intermediate scrutiny.

   - **Stolen Valor Act:** was declared unconditional. Congress cannot make a law that prohibits people from lying about their military awards because that would be content-based, and does not meet the extremely heavy burden.

   b. **How is it Determined Whether a Law is Content Based?** A law will be found to be content-based and must meet strict scrutiny if it is either a
viewpoint of a subject-matter restriction. Viewpoint-neutral means that the government cannot regulate speech based on the ideology of the message. For example, it would be unconstitutional to say that one group can have a protest but the counter group cannot.

- **Boos v. Barry (1988)** D.C. had a law that prohibited display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into “public odium” or “public disrepute.” Law was challenged for being a content based. Court held that it was content based unconstitutional, and held that the government could only have a content based restriction if it was SUBJECT MATTER NEUTRAL meaning that the government cannot regulate speech based on the topic of the speech.

- **Republican Party of Minnesota v. White**
  c. Problems in Applying the Distinction Between Content-Based and Content-Neutral Laws

- **City of Renton v. Playtime Theaters (1986)** City has ordinance that prohibits adult theaters within 1,000 feet of any residential zone... On its face, it would seem content based, but the court is able to read into the law that it is actually a content-neutral issue because the law is aimed at the secondary effects of an adult theater. The court holds that it meets intermediate scrutiny because the city has an interest in attempting to preserve the quality of urban life, which has to be afforded high respect. Dissent points out that this is an end run around the first amendment (but it might have met strict scrutiny), instead the law should be struck down for being Overinclusive... what about all of the other things in town that have negative secondary effects on the urban life, like bars, adult bookstores, massage parlors, etc.)

***The court has been inconsistent in applying Renton UNLESS there is a persuasive argument that the secondary effect is substantially bad (like public nudity).***

**DIFFICULT Content based decisions:**
*When a prof has his or her wiring reviewed for the propose of tenure at a public university.*
*when the government owns a theater or concert hall and has to decide which shows,*
*when the government is subsidizing some speech over others (limited funds) or*
*public libraries purchasing certain books over others.*

- **National endowment for the Arts v. Finley (1998)** Congress placed restrictions on what could be approved by the National Endowment for the arts due to some outrage over some provocative pieces in the past. Some provocative pieces are now challenging their denial. Court holds that as long as there is no evidence that a particular viewpoint is being suppressed that the law is ok (so everyone who is denied now has to have their own lawsuit). Because if the court did find that the law on its face was unconstitutional this would be “strong medicine” while as applied challenges do not strike down the law, but rather, changes the outcome of that particular instance. Dissent points out that the law penalizes any view disrespectful to any belief or value espoused by someone in the American populace... The First amendment does not give the Congress the ability to do that because it is a form of favoring one speech over another with money.
- **Pleasant Grove v. Summum (2009)** Summum is a religious organization that wants to put its statute in a park in Utah (just like the 10-commandments that is already there). They argue that the park denying their request is content based discrimination in violation of the First Amendment because the government should have to give a reason before denying a privately paid for statue. But the court holds that The **Government Speech doctrine** does not mean that there are no restraints on government speech. EX government speech must comport with the Establishment Clause. The involvement of public officials in advocacy may be limited by law, regulation, or practice and a government entity is ultimately “accountable to the electorate and political process. But a government entity may exercise the same freedom of expression to express its views when it receives assistance from the private source for the purpose of delivering a government-controlled message……. REMEMBER, requiring all of these jurisdiction’s to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate, and public parks can only accommodate a particular number of statutes. Unlike people who wish to utilize the park to spread their message, handout leaflets, etc., a statute occupies the land forever, preventing anyone else from ever using that public land to convey any other message. A City must have some discretion as to which statutes it is going to have occupying its park space... thus, this is not a free speech issue. The **FIRST amendment does not apply to government speech, and permanent monument in a park IS government speech (due to permanence).**

- **Observer test:** Would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monumental character is of a piece with the one for spotting forbidden governmental endorsement of religion in the Establishment Clause cases.

  2. **Vagueness and Overbreadth**

     a. **Vagueness:** A law is unconstitutionally vague if a reasonable person cannot tell what speech is prohibited and what is permitted. It is important to emphasize that unduly vague laws isolate due process whether or not speech regulated.

- **Coates v. City of Cincinnati (1971)****There is no litmus test for laws being too vague. But in this case, a city ordinance that “three or more persons to assemble. . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by.” Was way to vague, what does annoying mean? Or Who judges?

     b. **Overbreadth:** A law is unconstitutionally Overbreath if it regulates substantially more speech than the constitutional allows to be regulated, and a person to whom the law constitutionally can be applied can argue that it would be unconstitutional as applied to others.

- **Schad v. Borough of Mount Ephraim (1981)** The strip show owner can represent the interest of the third party (all of the people who the law will apply to, specifically the ones who the law will unfairly apply to) and the court held that the law is overbroad because it prohibits a wide array of speech that has long been held as constitutionally permissible, such as political and artistic speech.

- **TWO major aspects to the overbreadth doctrine**
(1) A law must be substantially overbroad; that is, it must restrict significantly more speech than the Constitution allows to be controlled.

(2) A person to whom the law constitutionally may be applied can argue that it would be unconstitutional as applied to others. REMEMBER, the usual rule of standing is “that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in other situations not before the court.” BUT overbreadth is an exception to this rule.

c. Relationship Between Vagueness and Overbreadth: The concepts of vagueness and overbreadth are closely related; laws often are challenged under both of these doctrines simultaneously. But vagueness and overbreadth involve facial challenges to laws. But these concepts are best understood as overlapping, not identical.

- Board of Airport Commissioners v. Jews for Jesus LAX prohibited First Amendment action. Rep of the church was distributing leaflets. While there is good reason to have some limits (don’t want to congest the heavy traffic with protests) you cannot prohibit everything (like political buttons).

3. Prior Restraints

a. What Is a Prior Restraint?: The most serious and least tolerable infringement on the First Amendment Rights... any system of prior restrings of expression comes to this our bearing a heavy presumption against its constitutional validity...

b. Are Prior Restraints Really so Bad?: A person violating an unconstitutional law may not be punished, but a person violating an unconstitutional prior restring generally may be punished.

i. Court Orders as a Prior Restraint—Collateral Bar Rule: provides that “a court order must be obeyed until it is set aside, and that person subject to the order who disobeys it may not defend against the ensuing charge of criminal contempt on the ground that the order was erroneous or even unconstitutional. Necessary in order to maintain respect for the judicial system and enforcement of court orders. If we allow people to violate court orders at their own discretion then people will always feel able to disregard court orders because they do not believe them to be enforceable. ***BUT we don’t apply the collateral bar rule to administrative orders because we do not care as much about agencies especially when we’re talking about licensing , than we are about court orders.

- Near v. State of Minnesota ex rel Olson (1931) City placed a ban on a magazine (which was publishing anti-semitic news stories) until it could show to the city that its issue would not be obscene. The court found that this was not permissible under the First Amendment because it was a prior restraint. EVEN THOUGH the censor was for a good reason... because it was too broad... the statute cannot be justified by its good motives.
ii.  **Court Orders to Protect national Security:** Court orders—like the defense department trying to prevent the pentagon papers from being published.

-  **New York Times v. United States (1971)** in a 9-0 per curium (with several opinions) the court held that the Pentagon papers (Vietnam War) could be published against the defense department wishes. This case begs the question, what, if anything, can be prevented to prevent from publication for national security???

iii. **Court Orders to Protect Fair Trials**

-  **Nebraska Press v. Stuart (1976)** a family is killed; court wants to censor the news story until after the trial to prevent jury tampering. Court holds that this is unconstitutional, goes to three factors.
  (1) **The nature and extent of pretrial new coverage**—Court agrees, this is met.
  (2) **Whether other measure would likely mitigate the effects of unrestrained pretrial publicity**—Court disagrees, this is not met... Could change venue, postpone trial, searching question on jury, emphatic and clear instruction to not use it as evidence.
  (3) **How effetely a restraining order would operate to prevent the threatened danger**—Court agrees, this is met.

iv. **Court Orders Seizing the Assets of Business Convicted of Obscenity Violations**

-  **Alexander v. United States**
  c. **Licensing as a Prior Restraint:** Classic Restraint (what they had in England that USA wanted to get rid of with the First Amendment).

-  **Lovell v. City of Griffin (1938)** City ordinance makes it illegal to hand out flyers without a permit. Court holds that it is facially invalid, there is no other requirement in terms of time or space for the enforcement of the permits. Therefore, this is a blanket prohibition on all speech that is not first permitted by the city. This would restore the system of license and censorship that England had that the founding fathers wanted to get away from.

-  **Watchtower Bible v. Village of Stratton (2002)** city of Stratton has a door to door solicitation permit requirement, is that constitutional? No says the Court. Because (1) Would prevent people from canvassing anonymously, (2) it would place a burden on speech of religious views, (3) there is a significant amount of spontaneous speech that is effetely banned by the ordnance... Dissent argues that this is just a small town trying to protect itself from creeps who could be out to murder them (the law was written in response to a murder of a family in the area when people posing as canvassers attacked, but the problem is that could still happen....)

i. **Important Reason for Licensing:** A licensing board, like that for parades for a town, are constitutionally permissible in order to prevent areas from becoming double booked or overrun, so long as the board is not acting with arbitrary power or an unfettered discretion.

ii. **Clear Standers Leaving Almost No Discretion to the Government**

-  **City of Lakewood v. Plain Dealer Publishing:** Also, there must be clear standards leaving almost no discretion to the licensing authority. The Court is very concerned that **(1) the**
mere existence of the licensor’s unfettered discretion, coupled with the power of the
prior restring, intimidates parties into censoring their own speech, even if the
discretion and power are never actually abused because a newspaper feel pressure
from the licensor and refrain from writing on a topic, and (2) the absence of express
standards make it difficult to distinguish “as applied” between a licensor’s legitimate
denial of a permit and it illegitimate abuse of censorial power, because the standards
provide the guideposts that check the licensor and allow courts quickly and easily to
determine whether the licensor is discriminating against disfavored speech... WITOUT
which the licensor can just give post hoc rationales.

iii. Procedural Safeguards: In order for a licensing or permit system to
be constitutional, there must be procedural safeguards. Any
system of prior reprints must have a prompt decision made by the
government as to whether the speech will be allowed; there must
be a full and fair hearing before speech is prevented; and there
must be a prompt and final judicial determination of the validity of
any preclusion of speech.

4. What is an Infringement of Freedom of Speech?: A wide variety of
government actions sufficiently burden speech so as to be considered an
infringement and thus be subjected to First Amendment scrutiny. A finding
that a law substantially burdens or infringes speech does not, of course, mean
that it is automatically unconstitutional, but it does mean that the law will
have to meet heightened scrutiny unless it regulates a category of unprotected
speech****General Rule: content-based regulations of speech must meet
strict scrutiny, while content-neutral regulation must be intermediate
scrutiny. ***Laws that significantly burden speech are ones that allow civil
liability for expression: Prevent compensation for speech, compel expression,
condition a benefit on a person’ foregoing speech, that pressure individuals
not to speak.

- Civil Liability and Denial of Compensation for Speech**Whether denying it or denying
  the compensation for it. Unconditional.
- Prohibitions on Compensation
- United States v. National Treasury Employees Union
- Compelled Speech
- West Virginia State Board of Education v. Barnette (1943) Can the school make the
  students say the pledge of allegiance?? No says the court. Dissent does not agree that
  “liberty” secured by the due process clause gives the court authority to deny the state
  the ability to make good citizens.
- Unconstitutional Conditions: The principle that the government cannot condition a
  benefit on the requirements that a person forgo a constitutional right. The corollary is
  that the “government may not deny a benefit to a person because he exercise a
  constitutional right.” Supreme Court is inconsistent on this point.
- Speiser v. Randall (1958) CA gave a tax benefit to vets. Put in some language about
  them having to swear to never overthrow the government. But that essentially took
  away their right to say that they would ever over throw the government in exchange

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for the money (or that that they do promise (compelled speech) in exchange for the money. This was found to be unconditional. **However, the same argument was made in Regan v. Taxation with Representation of Washington (1983) where there was a condition a ta benefit on the requirement that the recipient forgo engaging in the First Amendment protected speech, and the court upheld the law...

C. Types of Unprotected and Less Protected Speech

**Content-based speech that is not constitutionally protected:** Incitement of illegal activity, fighting words, obscenity.

**Less Protected speech:** Advertisement, sexually orientate speech “low value.”

1. Incitement of Illegal Activity: Some (Bork) have argued that advocacy of law violation should not be protected speech because it impedes upon law enforcement’s job. HOWEVER, the supreme Court has never taken that position. On fact, the court has found, that while not completely protected, civil disobedience and other forms of political speech have protection.

   a. The “Clear and Present Danger” Test: According to Justice Holms, is only the present danger of immediate substantive evils that the United States constitutionally may seek to prevent. Justice Brandies added even advocacy of violation, however reprehensively morally, is not a justification for denying free speech were the advocacy falls short of incitement and there is nothing to indicate that the advocacy would be immediately acted on.

   - Schenck v. United States (1919) Schenck passed out a flyer to ask people not to go off to fight in the war. He was found in violation of the Espionage Act because he was encouraging the insubordination within the military, as well as helping our enemies. Court holds that this speech would normally be protected but for the fact that we were at war made it not protected (like yelling fire, vs. yelling fire in a crowded theater).

   b. The Reasonableness Approach

   - Gitlow v. New York

   c. The Risk Formula Approach: the court must ask whether the gravity of the evil discounted by its improbably, justifies such invasion of free speech as it is necessary to avoid the danger.

   - Dennis v. United States (1951)  ’s were convicted under the Smith Act for being part of a communist party and seeking to overthrow the government. Majority upholds the conviction stating that the gravity of the evils discounted by its improbably justifies such invasion of free speech as it is necessary to avoid the danger... But, the dissenters apply the same rule, and come to the opposite conclusion because the communists had no plan, they were just reading the books on Marxs and Stalin talking about what they’d like to do, not what they will do (books protected by the First Amendment).

   d. The Brandenburg Test: (1) Imminent harm, (2) a likelihood of producing illegal action, (3) intent to cause imminent illegality. **However, Brandenburg does not explain how imminence and likelihood are to be appraised.

   - Brandenburg v. Ohio (1969)  was spouting off about jews and blacks to rile up a crowd of armed KKK members, BUT it was in the middle of a corn field, thus not imminent.
2. Fighting Words, the Hostile Audience, and the Problem of Racist Speech
   a. Fighting Words

   - *Chaplinsky v. New Hampshire (1942)*
     Arrest made of a Jehovah Witness making inflammatory remarks about other people’s religions. The statute, although today would have been void for vagueness, prohibited fighting words, and the application of that law is not unreasonable under the facts, so the court uphold the conviction.

   ***Chaplinsky recognizes two situations where speech constitutes fighting words:***
   1. Where it is likely to cause a violent response against the speaker, and
   2. Where it is an insult likely to inflict immediate emotional harm.

   ***Court has never used Chaplinsky in the last 70 years.***

   INSTEAD—the Court has used three techniques in overturning these convictions:
   1. Applies only to speech directed to another person that is likely to produce a violence response.
   2. The Court frequently has found laws prohibiting fighting words to be unconstitutionally vague or overbroad.
   3. The Courts has found laws that prohibit some fighting words—such as expression of hate based on race or gender—to be impermissible content-based restrictions of speech.

   So, the Court only looks at words that could cause a violent response against the speaker, and then always invalidates the laws because their either UNCONSTITUTIONALY vague or overbroad, OR UNCONSTITUTIONALLY content-based restrictions. Thus, no law has survived.

   i. **Narrowing the Fighting Words Doctrine:** fighting words have to be directed at a particular person...

   ii. **Fighting Words Laws Invalidated as Vague and overbroad:** Every case since Chaplinsky has been overturned.

   - *Gooding v. Wilson (1972)*
     GA had a law that seemed to be written narrow enough to pass the court’s test for vague and overbroad, AND the speech uttered was certainly not constitutionally protected. BUT the court held that the law was too vague (because opprobrious) is not a word most people know off the top of their head.

   iii. **Narrowing Fighting Words Laws as Content-Based restrictions:** A vary narrow fighting words law, like the one the court would prescribed to avoid overbroad and vague, would then be found to be a content-based restriction on speech, and unconstitutional.

     City had an ordinance that was very specific in what speech was prohibited. The Court held that while the law was not vague or overbroad, it was so specific that it was content-based restriction on speech. ***You cannot have distinctions within an unprotected area of speech. SO, doctrinally, you can have impermissible fighting words (AND THIS IS IT). However, the ordinance creates a content-based law, which is impermissible. So, now, a law will only be upheld if it does not draw content-based distinctions among types of speech, such by prohibiting fighting words based on race, but not based on political affiliation. The problem, though, is that it will be extremely difficult for legislation to meet this requirement without being so broad that the law will be invalidated on vagueness or overbreadth.
grounds. ALSO, there is now a strong presumption against content-based discrimination within categories of unprotected speech.... Finally, Scalia says that there are two expectation to content-based constitutionality, (1) when the law is aimed at preventing the consequences (like child porn), however that was in R.A.V. case because the city was trying to prevent race based hate speech, (2) to prevent secondary effects, same against, the MN law was to prevent race fighting.

b. The Hostile Audience Cases: Even in use of the clear and present danger test, the Court has still held that speech that seems to invoke violence cannot be prohibited just because the violence happened. In a couple of examples cases that court notes that there were other reasons why the violence occurred, or was going to occur. ****Speech that causes dispute should be encouraged, instead it I sonly cases that cause a clear and present danger in and of itself.

- **Feiner v. New York (1951)** Police can step in and prevent the violence that speech is likely to cause. Dissent argues that the police instead were charged with the duty of protecting the speaker so that the speaker could utilize his right to talk... DISSENT BECOMES THE PREVAILING VIEW—the police try to control the audience that is threatening violence to, and only ask the speaker to step down f the crowd is impossible to stop and a threat to breach of the peace is imminent.

- **The Problem of Racist Speech (DISTINGUISHED FROM HATE CRIMES)**
  - **Beauharnais v. Illinois** Strongest authority for the government to regulate racist speech, has never been overruled, but question as to whether or not it is still good law. Under the approach to speech in R.A.V. v. St. Paul, it is clear that the conviction in Beauharnais would be overturned today.
  - **Skokie**, Nazi group that wanted to perform a march in a predominately Jewish (holocaust survivor) town. The group eventually won the right to march including the right to wear their logos after her Court held that the courts could not restrict what the group could wear in terms of their political statements and the courts could not prohibit the march just because it was going to be extra upsetting to the people who lived there... HOWEVER, the court has upheld laws that create greater punishment for hate motivated crimes because of their harms to society (provoking civil unrest).
  - **Virginia v. Black (2003)** Court held that the state of VA could not have a per se prohibition on cross burning because there could be instances of cross burning that are to do with the intent to intimidate any person (which is needed in order to have the law be a permissible prohibition on true threats). The Dissent points out that this is a prohibition on conduct not speech (you cannot burn down a home can call it political speech).

3. Sexually Oriented Speech
   a. Obscenity
      i. Supreme Court Decisions fining Obscenity Unprotected
       - **Roth v. United States (1967)** Ideas have to have some redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have full protection of the guarantees unless excludable because they encroached upon the limited are of more important interests... Dissent thinks that this
rule is too broad because only requires that the content be arousing to sexual thoughts. even though arousing of sexual through and deicers happen in every day normal life in many ways... thus this rule is so broad that it gives the court too much discretion over what is and is not obscene.

- **Miller v. California (1973)** Court holds that nudity alone cannot be obscene, and the value (literary, artistic, political, or scientific) is a NATIONAL standard, because it is based on reasonable person.
  
  ii **Should Obscenity Be a Category of Unprotected Speech?**: Jury is still out. We don’t want thought control, but we don’t want to hurt our communities with the harmful secondary effects of adult theaters or the degradation of women, or the issues that the internet presents.
  
  iii **Should there Be a New Exception for Pornography?**: Some want specific aspects of porn, like those that encourage the dominance of women to be banned.... But that has ailed to gain support thus far.

b. **Child Pornography**: Court held that the government may prohibit the exhibition, sale, or distribution of child porn even if it does not meet the test of obscenity. However, the Court made it clear that for material to be considered child porn, children must be used in the production.

c. **Protected but Low-Value Sexual Speech**

  i. **Zoning Ordinances**: The Court has upheld the ability of local governments to use zoning ordinances to regulate the locations of adult bookstores and movie theaters.

  - **Young v. American Mini Theaters (1976)** Detroit created ordinance that adult theaters could not be within 1,000 feet of residential. Court holds this is constitutionally permissible. Unlike Renton where the court hold that the legislatures secondary effects made the law valid, here they said that it was not content based because the ordinance only limited place (like time place and manner).

  ii. **Nude Dancing**

  - **City of Erie v. Pap’s A.M. (2000)** Law makes it illegal for the erotic dancers to be completely naked... Majority holds that this is content-neutral and permissible. The added clothing’s is a “de-minimis” action that court should not worry about infringing upon the rights of the dancers. Dissenter argue that intermediate scrutiny is not met only rational basis is because the city fails to make the argument for the negative secondary effects that come from completely nude. Also, in another case, it was argued that fully nude could be content based if there is a statement made by nudity.

  iii. **Should There be Such a Category as Low-Value Sexual Speech?**: It seems that there might be a hierarchy because content seems to play a role in this, because not all nude expression is forbidden (think about slight nude scenes in non porn movies). Also, secondary effects test is weak because how do we categories this, if at all, to separate speech that is more likely than other to have negative secondary effects.
d. Government Techniques for Controlling Obscenity and Child Pornography: States have the power to make a morally neutral judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize States’ right to maintain a decently society.” HOWEVER, State’s cannot interfere with the private ownership of porn UNLESS it is child porn.

- **Stanley v. Georgia (1969)** GA had a law that made it illegal to own porn, Court held it to be unconditional. This does not preclude the government from getting involved in the commerce of porn, just the ownership of it...

- **Osborne v. Ohio (1990)** STANLY Does NOT apply to child porn. You can never own child porn. PERIOD.

e. Profanity and “Indecent” Speech: The Court has expressly adopted a medium-by-medium approach, considering indecent speech over the broadcast media (TV and radio) over telephones, over the intent, and over cable TV. Each of these areas is considered differently based upon how captive the audience is, and how private the communication is (like, seeking the speech out vs. being subjected to unwanted speech accidently).

- **Cohen v. California (1971)** “Fuck the Draft” jacket in a courthouse. Protected under offensive conduct test....

  **Under this view**

  (1) The state cannot remove words from the vocabulary of the public, “one man’s vulgarity is another man’s lyric.”

  (2) The court cannot overlook the fact that much linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well.

  (3) We cannot assume that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.

  - i. The internet—the Court has struck down a state law prohibiting indecent speech over the internet.

- **Reno v. ACLU (1997)** Federal government tried to prohibit indecent and patently offensive material from the internet. The Court applied strict scrutiny (recognizing the fact that this is a content based restriction and not merely a time lace or location because this is not the same as other media where the audience is captive). The Court holds that less restive things like warnings before entering a cite that should be age restricted or has material that people might now want to see. In subsequent cases, the Congress wrote a law that utilized the *Miller test* and only applied to cites that cater to children, and even that still failed.

  - ii. Cable TV

4. A New Exception for violent Speech?

- **Brown v. Entertainment Merchants Association (2011)** CA law prohibits the sale of violent video games to minors (they have to get it through their parents). Court holds that it is not the legislature’s job to impose or relate to a new area of protected speech,
RATHER it is the Court’s job to make that determination, MOREOVER it did not create it and applies strict scrutiny and finds no compelling infest.... There is a less restive alternative (the ESRB rating) and the fact that parents are still responsible for making and enforcing what they do and do not allow for their children.

5. Commercial Speech: In 1942, commercial speech was not protected (at all) but by 1975 the court held that being an advertisement did not deny the speech first amendment protection (from what it would have had otherwise).

a. Constitutional Protection for Commercial speech

- Virginia State Board of Pharmacy v. Virginia Citizens Consumers Counsel (1976) State law prohibits drug ads. Court holds that the advertisement speech is protected because people need access to information (draws on market place of ideas argument) but this does not mean that it has full protection (can still limit false advertisements, deceptive, misleading, etc).

- Overview

b. What is Commercial Speech?

- Bolder v. Young’s Drug Products Corp. (1983) It is commercial if: (1) it advertises, AND (2) it refers to a specific product AND (3) there is an economic motivation.

c. The Test for Evaluating Regulation of Commercial Speech

- Central Hudson v. Public Services Commission of NY (1980) Court held that the government can regulate speech under an intermediate like scrutiny test. Has four times when government can regulate speech.

CENTRAL HUDSON TEST:
(1) Laws that outlaw advertising of illegal activities. The Court consistently has held that such advertising is not protected by the First Amendment.

(2) The prohibition of false and deceptive advertising. The Court also has always held that such ads are not protected by the First Amendment.

(3) The Court has indicated that the government may prohibit true advertising that inherently risks becoming false or deceptive. For example, as discussed below, the government can prohibit professionals from advertising and practicing under trade names and can forbid attorneys form engaging in in-person solicitation of clients for profit. In both instances the Court stressed the inherent danger of deception in such speech.

(4) Laws that limit commercial advertising to achieve other goals. Such as enhancing the image of lawyers, decreasing consumption of alcohol or tobacco products, preventing panic selling of houses in neighborhoods, or decreasing gambling.

- Is Least Restrictive Alternative Analysis Applicable?

d. Advertising of illegal Activities

e. False and Deceptive Advertising

f. Advertising that Inherently Risks Deception

- Restrictions on Trade Names

- Friedman v. Rodgers

g. Regulating Commercial Speech to Achieve Other Goals

6. Reputation, Privacy, Publicity, and the First Amendment: Torts and the First Amendment
a. Defamation

FOUR MAJOR CATEGORIES of SITUATIONS:
(1) Where the plaintiff is a public official or running for public office;
(2) Where the plaintiff is a public figure;
(3) Where the plaintiff is a private figure and the matter is of public concern; and
(4) Where the plaintiff is a private figure and the matter is not of public concern.

i. Public Officials as Defamation Plaintiffs: If the plaintiff is a public official or running for public office, the plaintiff can recover for defamation only by proving with clear and convincing evidence the falsity of the statements and actual malice. Actual malice means that the defendant knew that the statement was false or acted with reckless disregard of the truth.

- New York Times v. Sullivan (1964) Times is sued in AL for defamation of the police. Court creates a four part test....

TEST:
(1) The Plaintiff must be a public official or running for public office; Public officials are “at the very least . . . those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” AND “apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it.”

(2) The plaintiff must prove his or her case with clear and convincing evidence; plaintiff has the burden of proving the falsity, and record must establish actual malice.

(3) The plaintiff must prove falsity of the statement; and “under the First Amendment there is no such thing as a false idea. However, pernicious and opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas, But there is no conducional value in false statements of fact.”

(4) The plaintiff must prove actual malice—that the defendant knew the statement was false or acted with reckless disregard of the truth. “The high degree of awareness of their probable falsity.” OR acted with reckless disregard for the truth.

ii. Public Figures as Plaintiffs
(1) Public official, figure → Public issue. → Actual malice for ANY damages: compensatory or punitive.
(2) Private official, figure → Public issue. → Actual malice for punitive damages, BUT NOT necessary for compensatory.

iii. Private Figures, Matters of Public concern
(1) Private official, figure → Private issue. → Actual malice was not necessary for either compensatory or punitive damages.
Only one case, that considered the category of private figures and speech that is not of public concern In this case, the Court ruled that in this category presumed punitive damages do not require proof of actual malice.

b. Intentional Infliction of Emotional Distress

- **Hustler Magazine v. Falwell (1988)** Applied Times test, found that the First Amendment needed breathing space, and that an IIED claim requires actual malice, with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

- **Snyder v. Phelps (2011)** Cannot have an IIED claim where speech is otherwise protected (it was on public land, and they obeyed all of the laws). Dissent points out that the claiming party was denied their fundamental right to a funeral...

c. Public Disclosures of Private Facts
d. Right of Publicity: The right of publicity protects the ability of a person to control the commercial value of his or her name, likeness, or performance. The state’s interest is closely analogy to the goals of patent and copyright law, focusing on the right of the individual to reap the reward of his endeavors.

7. Conduct that Communicates

a. What is Speech: Conduct of all sorts, including but not limited to raising a flag. This means that prohibiting the action would have to meet strict scrutiny.

b. When is Conduct Communicative?: There is likely a kernel of speech in every action (even walking down the street or meeting up with a friend:

- **TWO factors:** an intent to convey a particular message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who view it.

c. When May the Government Regulate Conduct that Communicates?

i. The O'Brien Test

- **United States v. O'Brien (1968)** Burning a draft card. Court holds that you can be punished because Government regulation is sufficiently justified if it is: (1) within the constitutional power of the government; (2) if it furthers an important or substantial government interest; (3) if the government interest is unrelated to the suppression of free expression; (4) and if the incidental restriction on alleged First Amendment Freedoms is no greater than it is essential to the furtherance of that interest.

ii. Flag Desecration

- **Texas v. Johnson (1989)** The law is really only aimed at protecting the flag because people love the flag. BUT we cannot prohibit speech simply because society finds the idea itself offensive or disagreeable.

iv. Spending Money as Political Speech

- **Buckley v. Valeo (1976)**
- **Criticisms of Buckley**
- **The Continuing Distinction Between contributions and Expenditures**
- **When are Contribution Limits Too Low?**
- **First National Bank of Boston v. Bellotti**
- **Citizens United v. FEC**
- The constitutionality of Public Financing Elections
- *Arizona Free Enterprise Club PAC v. Bennett*
- *McCutcheon v. FEC*
  D. What Places Are Available for Speech?
      a. Initial Rejection and Subsequent Recognition of a Right to Use Government Property for Speech
   - *Hague v. Committee for Industrial Organization*
   - *Schneider v. New Jersey*
      b. What Government Property and Under What Circumstances?
      c. Public Forums
         i. Content Neutrality
         ii. Time, Place and Manner Restrictions
   - *Hill v. Colorado*
   - *McCullen v. Coakley*
      iii. Licensing and Permit Systems
      iv. No Requirement for Use of the Least Restive Alternative
  2. Private Property and Speech
  3. Speech in Authoritarian Environments: Military, Prisons, and Schools
   a. Military
   b. Prisons
   c. Schools
   - *Tinker v. Des Moines*
   - *Bethel v. Fraser*
   - *Hazelwood v. Kuhlmeier*
   - *Morse v. Frederick*
      d. The Speech rights of Government Employees
  E. Freedom of Association
   1. Laws Prohibiting and Punishing Membership
   2. Laws Requiring Disclosure of Membership
   - *NAACP v. State of Alabama ex rel Patterson*
   - Campaign Finance Disclosure
      3. Compelled Association
      4. Laws Prohibiting Discrimination
   - *Roberts v. United States Jaycees*
   - *Boy Scouts of America v. Dale*
VI. Chapter 10: First Amendment: Religion
   A. Introduction
      2. History in Interpreting the Religion Clauses
      3. What is Religion?
   - The Attempt to Define Religion Under the Selective Service Act.
   - *United States v. Seeger*
- Requirement for Sincerely Held Beliefs
- The Relevance of Religious Dogma and Shared Beliefs
  B. The Free Exercise Clause
    1. Introduction: Free exercise Clause Issues
    2. The Current Test
  - Oregon v. Smith
    a. Government Benefit Cases
    b. Compulsory Schooling
    c. Cases Rejecting Exemptions Based on the Free Exercise Clause
  - Burwell v. hobby Lobby
    C. The Establishment Clause
    1. Competing Theories of Establishment Clause
      a. Strict Separation
      b. Neutrality Theory
      c. Accommodation
      d. The Theories Applied: An Example
    2. Government Discrimination Among Religions
    3. The Lemon Test for the Establishment Clause
  - Lemon v. Kurtzman