

- I. **DUE PROCESS:** The Due Process protects 1) Deeply rooted traditions and 2) A careful description of the asserted fundamental liberty interest.
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a. **Procedural:** The safeguards of notice or hearing available when there is a serious deprivation of life, liberty, or property.

i. **Mathews v. Eldridge:** Held that although social security disability benefits constitute a statutorily created property interest protected by the 5<sup>th</sup> Amendment.

1. Mathews v. Eldridge TEST:

- a. The court must determine that there is a protected right at stake.
  - b. The court must then determine the importance of the interest.
  - c. Under the policy, how much risk is there of an erroneous decision?
  - d. The fiscal and administrative burdens? A balancing test between the Government vs. P.
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b. **Substantive:** Insists that the law itself be fair and reasonable and have an adequate justification regardless of how fair or elaborate the procedures might be for implementing it.

i. **Economic:** The courts use the rational basis test to determine whether a governmental deprivation of property or economic liberty is unreasonable. Under the rational basis test, the question is whether there is some legitimate end that a rational legislature might have thought the law would further.

1. **Nebbia v. New York:** New York established a milk control board with the power to fix maximum and minimum retail prices. Nebbia, a grocery store, was convicted of selling milk below the minimum set price. The court abandoned the strict scrutiny test that it applied in *Lochner* and applied rational basis. The court held that a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare.

ii. **Fundamental Rights:** Strict Scrutiny is applied.

1. **Privacy:** (implied)

a. **Contraception:**

i. **Griswold v. Connecticut:** The court established the right to use and purchase contraception. A law invading marital choice about contraception violated the due process clause.

b. **Abortion:**

i. **Planned Parenthood v. Casey:** States may not prohibit abortion, but may regulate abortion as long as they do not create undue burden on the woman's ability to obtain an abortion.

ii. **Roe v Wade:** The court decided to use the trimester approach is determining the constitutionality of abortions. In the 1<sup>st</sup> trimester the government may not prohibit an abortion. In the 2<sup>nd</sup> trimester, (assuming the fetus is not viable) the government may not prohibit an

abortion, but may regulate to protect mother's health. In the 3<sup>rd</sup> trimester, (assuming the fetus is viable) the government may prohibit abortions.

**c. Marriage:**

- i. **Zablocki v. Redhail**: Marriage is a constitutionally fundamental right. However, the court does point out, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.

**d. Procreation:**

**e. Education:**

- i. **Pierce v. Society of Sisters**: An OR law said a children had to go to public schools. S.C. decided it was a violation of substantive due process.

**f. Relations (Family):**

- i. **Moore v. East Cleveland**: The court established the right to keep the nuclear family together. When the government intrudes on choices concerning family living arrangements, this court must examine carefully the importance of the government interests advanced and the extent to which they are served by the challenged regulation. In other words, strict scrutiny is applied. (Note: Restrictions regarding the living arrangements of unrelated people have been upheld.)

**g. Non-Fundamental Rights:**

- i. **Bowers v. Hardwick**: Fundamental rights include liberties that are implicit in the concept of ordered liberty & liberties that are deeply rooted in this nation's history and tradition. Neither of these rights would extend a fundamental right to homosexuals to engage in consensual sodomy.
- ii. **Washington v Glucksberg**: Suicide is not a deeply rooted tradition in this nation's history and as a result it is not a fundamental right.

**2. Travel:**

**a. Interstate:**

- i. **Shapiro v Thompson**: (Statute that denied welfare benefits to residents who had lived in the state less than a year.) Equal Protection denies such a statute.

**b. International:**

- i. **Zemel v. Rusk**: The US was refusing to issue passports to Cuba. The court affirmed denial of the passports. The requirements of due process are a function of (1) the extent of the governmental restriction imposed and (2) the extent of the necessity for the restriction. Because travel to

Cuba might involve the nation in dangerous international incidents, the Constitution doesn't require the issuance of passports to Cuba.

**3. Vote:**

**a. Denial of the Right to Vote:**

- i. **Kramer v Union Free School District**: Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government. Therefore, if a statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies it to others, the court must determine whether the exclusions are necessary to promote a compelling state interest.

**b. Dilution of Votes:**

- i. **Reynolds v Simms**: Individual vote dilution is subject to strict scrutiny. Each person is entitled to cast a vote that carries the same weight as others in the same election. There must also be an equal ratio of elected officials to population.
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## II. EQUAL PROTECTION:

- a. **Classifications v Class:** Courts look at the classification more so than the class.
- b. **Equal Protection overview:** A P bringing an Equal Protection challenge must show impact & purpose.

The P must show that:

- i. The law has a disproportionate or disparate impact on a particular group, and
- ii. The impact on this particular group is intentional in the sense that it results from a discriminatory purpose or design.

1. **De Jure Discrimination:** A statute with a discriminatory purpose.

- a. **Yick Wo v. Hopkins:** A SF ordinance made it unlawful to operate a laundry without consent from the board of supervisors. A Chinese alien couldn't get approved by the board because 240 of 320 laundries were owned by Chinese. The statute amounts to a denial of equal protection.

2. **De Facto Discrimination:** A statute with no discriminatory purpose.

- a. **Washington v Davis:** (D.C. cop test case) A facially neutral statute violates the equal protection clause only if motivated by a discriminatory purpose.

c. **How do You Determine the Level of Scrutiny:**

### SUSPECT CLASS TEST:

**Class:** Before determining the level scrutiny, one must first discover whether the class is suspect, quasi-suspect or neither.

- 1. **Are Hispanics a minority (fewer than half)?** Yes.
- 2. **Are Hispanics an insular minority (are they separated from the rest of society)?** There are cultural & geographic insularities.
- 3. **Are Hispanics a discrete minority (either you are a Hispanic or not)?** Yes
- 4. **Is there a history of discrimination against Hispanics?** Yes
- 5. **Do Hispanics have a lack of political power?** Yes.
- 6. **Do Hispanics have an unalterable characteristic (something about them they cannot change or were born with)?** Yes.
- 7. **Should Hispanics be considered a suspect class?** Based on the above, it should be a suspect class.

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- 1. **Women a minority?** No
  - 2. **Women Insular?** No
  - 3. **Women Discrete?** Yes, Women have a more difficult meeting heightened scrutiny than Hispanics.
  - 4. **Is there a history of discrimination against women?** Yes
  - 5. **Do women have a lack of political power?** No – they have a majority of the voters.
  - 6. **Do women have an unalterable characteristic (something about them they cannot change or were born with)?** Yes.
  - 7. **Should women be considered a suspect class?** The court considers it a quasi-suspect class because it isn't a fully discriminated class.

- d. **Strict Scrutiny (suspect):** A law or practice that is subjected to strict scrutiny under the Equal Protection Clause will pass constitutional muster if it can be demonstrated that the challenged classification is: 1) justified by a compelling governmental interest and 2) narrowly tailored to furthering that interest.

i. **Race:**

- 1. **Korematsu v. US:** The court held that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say they are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

ii. **Alienage:** Courts have ruled that strict scrutiny applies to aliens except where there is a political function.

1. **Ambach v. Norwick:** The court ruled that a teacher meets the political function exception, as a result the rational basis test needs to be applied rather than strict scrutiny.

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a. **Intermediate Scrutiny (quasi-suspect class):** Intermediate scrutiny must show an “exceedingly persuasive justification”. Intermediate scrutiny requires the statute to (1) further an important governmental objective. (This part of the test is likely to be met as long as the objective is reasonable), (2) the goal of the statute was the actual purpose for the discrimination. (Difficult to meet), and (3) it must be demonstrated that the discriminatory means are substantially related to the objective.

iii. **Gender:**

1. **US v Virginia:** (VMI case) Parties who seek to defend gender based government action must demonstrate an exceedingly persuasive justification for that action. The burden of justification lies with the state. The state must show at least that the challenged classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

iv. **Illegitimacy:**

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e. **Rational Basis (not suspect class):** The rational basis requires that there is only a conceivable reason for the challenged classification. One example when a law will get struck down under the rational basis test is when it doesn't advance a given or stated purpose. (It must be rationally related to the government objective)

i. **Mental Retardation:**

1. **Cleburne v. Cleburne Living Center:** Mentally retarded are not a quasi-suspect class, therefore rational basis applies.

ii. **Sexual Orientation:**

1. **Romer v Evans:** If a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.

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### III. 1<sup>st</sup> AMENDMENT FREEDOM OF EXPRESSION & ASSOCIATION:

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- a. **Content Based Restrictions:** These are restrictions based on the message of the speech. Content based restrictions are subject to strict scrutiny with the following exceptions.
- i. **Fighting Words:** are defined as those words which by their very utterance inflict injury or tend to incite an immediate breach of the peace. Fighting words are deemed to be a type of speech that falls outside the 1<sup>st</sup> Amendment's protection. The applicability of the fighting words doctrine depends largely on the context in which the harmful or provocative words are used.
    1. **Chaplinsky v. New Hampshire:** Fighting words are words that tend to incite an immediate breach of the peace and have no social interest.
    2. **Cohen v California:** D was convicted of violating a CA statute for disturbing the peace when he wore a shirt that read "Fuck the draft" into a courthouse where women and children were present. He did not wear it to threaten violence. The conviction rested on asserted offensive words. The SC ruled that the state lacks power to punish Cohen for the underlying content of the message, if there was no showing of intent to incite disobedience.
  - ii. **Hate Speech:** Since state imposed limitations on hate speech are by definition content based, they must satisfy rigorous 1<sup>st</sup> Amendment standards. Courts have been reluctant to uphold such measures.
    1. **RAV v City of St. Paul:** The SC struck down a city ordinance that prohibited the display of any symbol that arouses anger, alarm or resentment in others on the basis of race, religion, or gender. The court said this was invalid as a content based restriction on speech since the proscription depended on the message being communicated by the fighting words.
      - a. **Ex:** One who states that blacks are inferior is contributing to public discussion. However, one who gets up and shouts racial terms is not contributing to public discussion and is using unprotected fighting words.
  - iii. **Commercial Speech:** The court exercises what is essentially mid-level scrutiny when examining laws that restrict speech because of its content. Commercial speech receives less protection than political speech.
    1. **Virginia Board of Pharmacy v Virginia Consumer Council:** Virginia had a law that prohibited pharmacists from advertising prescription drug prices. The prohibited speech was commercial. The court held commercial speech was protected by the 1<sup>st</sup> Amendment, but it can be regulated.
    2. **Central Hudson Gas & Electric v Public Service Commission:** This decision established the test to determine whether commercial speech is protected under the 1<sup>st</sup> Amendment.

- a. Step 1: Is the commercial speech relating to a lawful activity or misleading? If it is either, not protected. If it is neither, the government may regulate if three additional standards are met.
- b. Step 2: Is the asserted governmental interest substantial?
- c. Step 3: Does the regulation directly advance the government's interests.
- d. Step 4: Is the restriction narrowly tailored?

**iv. Sexually Explicit Speech:**

1. **Pornography**: Pornography is speech within the meaning and protections of the 1<sup>st</sup> Amendment. Content based restrictions on pornography will generally be evaluated under the traditional standards of strict scrutiny. In two contexts the court has not applied strict scrutiny to content based restrictions, zoning laws that regulation of pornographic movie houses and child pornography.

- a. **Young v. American Mini Theaters**: Detroit had an ordinance that prohibited adult theaters and bookstores within 1000 feet of other listed businesses. The 1<sup>st</sup> Amendment doesn't allow for total suppression of erotic materials, the state may use the content of these materials as the basis for placing them in a different classification from other motion pictures. This type of speech (sexual speech) does not receive the protection that political speech garners.

2. **Obscenity**: Obscenity is completely unprotected under the 1<sup>st</sup> Amendment, while pornography is entitled to constitutional protection.

a. **Vagueness**:

b. **Overbreadth**:

c. **Roth v. US**: Obscenity is not protected under the 1<sup>st</sup> Amendment.

d. **Miller v. California**: Miller was convicted of mailing pictorial advertisements of sexual activities which was illegal under CA law. The court (a) affirmed the holding in Roth that obscene material is not protected under the 1<sup>st</sup> Amendment, (b) held such material can be regulated, (c) obscenity is to be determined by applying community standards, not national standards.

i. **Miller Test**: The test to determine whether material is obscene.

- 1. Whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest. - This element is satisfied if a reasonable juror applying community standards could conclude the material induces inappropriate sexual longing. (Local Standard)
- 2. Whether the work depicts or describes, in a patently offensive way sexual conduct specifically defined by the applicable state law. - This element is satisfied if a reasonable juror

applying community standards could conclude the material induces inappropriate sexual longing. (Local Standard)

3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. This element is measured by a national reasonable person standard.
4. **Note:** The test focuses on the quality of the speech, not its effect.

v. **Indecent or Vulgar Speech:** Is protected under the 1<sup>st</sup> Amendment.

1. **Cohen v California:** D was convicted of violating a CA statute for disturbing the peace when he wore a shirt that read “Fuck the draft” into a courthouse where women and children were present. He did not wear it to threaten violence. The conviction rested on vulgar speech. The SC ruled that the state lacks power to punish Cohen for the underlying content of the message, if there was no showing of intent to incite disobedience.

**b. Content Neutral Restrictions:**

i. **Time, Place, and Manner Restrictions:** Time, place, and manner restrictions are constitutional as long as they are: (1) justified without reference to the content of the regulated speech, are (2) narrowly tailored to serve a significant governmental interest, and (3) leave open ample alternative channels for communication of the information.

1. **Hill v. Colorado:** A statute prohibited people from unknowingly approaching another with the purpose of passing a leaflet and protesting in front of health care facilities. The court ruled this was a public forum. The court looked at this as a time, place, and manner argument. The court viewed this as content neutral because the statute banned all protestors. There was an important governmental interest and it wasn't over restrictive.

ii. **Symbolic Speech:** Delivering a speech giving your views is pure speech. Burning your draft card is symbolic speech. Both are protected under the 1<sup>st</sup> Amendment.

1. **US v. O'Brien:** O'Brien burnt his draft card on the steps of the court house and was arrested. This punishment was premised on the manner in which he conveyed his message, not for the content of the message. Therefore this is content-neutral regulation.

a. **O'Brien Test:** Government regulation is sufficiently justified if: (1) It furthers an important governmental interest. (2) The governmental interest is unrelated to the suppression of free expression. (3) The incidental restriction on alleged 1<sup>st</sup> Amendment freedoms are no greater than is essential to the furtherance of that interest.

b. **Note:** The O'Brien Test is nothing more than a time, manner, and place test that the court generally applies to content-neutral regulations of speech. Both tests apply mid-level scrutiny if the governmental regulation is not directed at the content of the speech, and neither test is used if the regulation is content-based.

- c. **Prior Restraints:** Courts have been suspicious of prior restraints. Prior restraints occur in one of two contexts: (1) governmental licensing or permit schemes and (2) injunctions against publication. The key to identifying a prior restraint is to focus on the timing of the government's intervention. If the government intervenes to prevent an expressive act, then the government's action is a prior restraint. In comparison, subsequent punishment involves the government intervening after the act of communication. Prior restraints present a more serious invasion of 1<sup>st</sup> Amendment liberties.
- i. **Near v. Minnesota:** A news paper published articles that criticized public officials as incompetent for various reasons. The articles were possibly defamatory. The trial court held the publishers were disallowed from publishing a defamatory newspaper. The Supreme Court held this was not a punishment for those publications, but for future publishing activities. The order was a prior restraint and the trial court's decision was highly suspect. Only under the most exceptional circumstances will a prior restraint pass constitutional muster. The exception can be seen as "very strict scrutiny".
  - ii. **NY Times v. US:** The executive branch prohibited the NY Times from publishing classified info concerning policy decisions concerning the Vietnam War. US claimed this would jeopardize its war efforts. The SC said the US had a heavy presumption and didn't meet it. The government's claims of national security did not meet the very strict scrutiny test.
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**d. Defamation of Private Figure:**

1. **Gertz v. Robert Welch, Inc:** Respondent published an article falsely stating information about Gertz. In Gertz' liable action there was evidence that the information was not known to be false. The SC held states may impose liability for defamatory falsehood injurious to a private individual. This extends no further than compensation for actual injury. Respondent argued the petitioner is a public figure. The court defined a public figure as an (1) individual who achieves fame or notoriety. (2) An individual injects himself into a public controversy. The court held, even though P has been involved in public affairs, absent clear evidence of fame or notoriety in the community an individual should not be deemed a public personality.
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**e. Defamation of Public Figure:**

1. **NY Times v. Sullivan:** Sullivan was a police commissioner. He sued the NY Times alleging libelous statements in an advertisement to defend MLK. The statements were untrue in several respects. Witnesses testified they understood the statements to refer to Sullivan. The SC ruled, that debate of public officials & ideas, if committed without malice, is constitutionally protected. Actual malice is with knowledge that is false or with reckless disregard for the truth. Actual malice must be established with convincing clarity.
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**f. Government Property & the Public Forum:**

**i. Foundation Cases:**

1. **Hill v. Colorado**: Held that even in a public forum the government may impose reasonable restrictions on the time, place, and manner of the protected speech, provided the restrictions are without reference to the content.

**ii. Media:**

1. **FCC v. Pacifica Foundation**: This case dealt with vulgar words over the radio. The court held that the content of vulgar speech through the media is not entitled to absolute 1<sup>st</sup> Amendment protection. However, offensive words may get protection in different contexts.

- g. Clear & Present Danger Test:** (Inciting a group that likes you) Applies where a speaker is trying to incite a crowd.
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**h. Freedom of Association:**

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#### IV. FREEDOM OF RELIGION:

**a. Establishment Clause:** Limits governmental action concerning:

- i. Action that discriminates between religions, and
- ii. Action that promotes religion in general.
  1. **Lee v Weisman:** (School officials invited clergy members to offer prayers at high school graduation ceremonies) The court said that not every state action implicating religion is invalid if one or a few citizens find it offensive. The court held the conformity required in this case was too high and violated the Establishment Clause.
    - a. **Coercion Test:** Has the government coerced conformity to the doctrines of that religion.
  2. **Wallace v Jaffree:**
    - a. **Endorsement Test:** Governmental action that assists religion in general, but that does not place a stamp of approval on religion will not violate the separation of church & state.
  3. **Lemon v Kurtzman:** The court held the state could not give salary supplements to teachers of secular subjects at private schools.
    - a. **Lemon Test:** Separationist view of church & state. The Lemon Test requires that a law have a nonreligious purpose.
      - i. Government Action must have a secular purpose.
      - ii. Government action must have a primary effect that neither advances nor inhibits religion; and
      - iii. Government action may not foster an excessive entanglement with religion.
- iii. **Preferred Status/Disfavored Status:** All Three tests are violated if the government gives a religion, preferred or disfavored status.
- iv. **Nondiscriminatory Promotion of Religion:**
  1. **Public Aid to Parochial Schools:** Adopts a more Endorsement/Coercion Test approach.
  2. **Prayer in Public Schools & Other Contexts:** Adopts a more Lemon Test approach.

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**b. Free Exercise Clause:** This protects the right of an individual to adhere to whatever religion doctrine or faith that individual chooses to believe.

- i. **Religious Belief:** This is the case when a law focuses on an individual's thought processes or on mental conclusions. Individuals are entitled to believe anything they choose to believe.
  1. The right to profess one's beliefs freely falls under free speech.
  2. Strict Scrutiny is applied.
- ii. **Religious Conduct:** This applies when a law is directed at the external actions triggered by the thoughts.
  1. Laws that **purposefully** suppress religious conduct: Strict scrutiny applies.

2. Laws that **non-purposefully** suppress religious conduct: The Free Exercise Clause does not protect religion, unless it can be established that the ordinance was designed to prohibit the religious practice. See **Employment Division v. Smith**.
  3. Laws that **incidentally** burden religious conduct: Strict scrutiny applies. However, an exception applies when the government is conducting purely internal operations.
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- V. **STATE ACTION:** Is the state sufficiently implicated in the challenged activity to warrant an application of the 14<sup>th</sup> Amendment?
- a. **Is the state permitting a private party to exercise what is a government power?** The private performance of a government function may qualify as a state action.
- i. **Marsh v Alabama:** (A town completely owned and governed by a private company prohibited the distribution of literature by Jehovah's Witnesses on its streets.) The court held that despite private ownership and governance, an entity that has taken the character of a government actor is subject to the same restraints applicable to state and local governments.
  - ii. **Jackson v Metropolitan Edison Co:** (P was suing D, a privately owned electric company, under the due process clause when her electricity was shut off because she did not pay her bills.) The court held that state action is present in the exercise by a private entity of powers traditionally exclusively reserved to the state.
    - 1. **Rule:** The issue is not whether the government has funded the private activity, but whether the activity can be characterized as traditionally and exclusively the prerogative of the state.
- b. **Is there a judicial enforcement of a private agreement?** This in limited circumstances meet the state action requirement.
- i. **Shelley v Kraemer:** (In a subdivision, the sale of property was strictly limited to whites.) The court held that the private agreement to discriminate did not violate the 14<sup>th</sup> Amendment; however, the enforcement of the covenant by a judicial officer brought power of the state into the action. This involvement was sufficient to establish the presence of a state action.
- c. **Is there joint activity between a state and a private party:** If a private party and a state engage in joint activity that results in the deprivation of another's constitutional rights, the activity of the private party may be deemed state action, thus subjecting the private actor to the same restrictions under the 14<sup>th</sup> Amendment as are applicable against the state.
- i. **Burton v Wilmington Parking Authority:** (A restaurant located in a city owned building discriminated on the basis of race.) The court held the mutually beneficial relationship was sufficient as a state action.
  - ii. **Moose Lodge v Irvis:** (P challenged racial discrimination practices of private club, because the state issued liquor license created a sufficient relationship between the parties.) The court held the critical element is the interdependence of the state and private actor. In this case, the benefits were insufficient to satisfy the state action doctrine.
- d. **State endorsement of private conduct:** State encouragement of private conduct violates the 14<sup>th</sup> Amendment if engaged in by the state.
- i. **Reitman v Mulkey:** (CA had a provision that legalized private acts of racial discrimination in the sale or rental of housing. The issue was whether the private act of discrimination under this provision constituted state action.) The court held the provision authorized and encouraged acts of racial discrimination, and as a result was a state action.
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