CONSTITUTIONAL LAW OUTLINE

CHAPTER 5: THE STRUCTURE OF THE CONSTITUTION'S PROTECTION OF CIVIL RIGHTS AND CIVIL LIBERTIES

I. THE APPLICATION OF THE BILL OF RIGHTS TO THE STATES
   a. By its terms, the Bill of Rights only limits the federal government
      i. Before the Civil War:
         1. *Barron v. Mayor & City Council of Baltimore*
            a. City ruined man’s wharf by diverting streams and making the water too shallow for his boats. He sued under 5th Amendment (takings clause).
            b. **Issue:** Is the city bound by the 5th Amendment? (Does Bill of Rights apply to the States?)
            c. **Holding:** No
            d. **Why?** No Amendment in the Constitution contains anything that indicates that it (the amendments) should apply to state government.
      ii. After the Civil War:
         1. The Supreme Court thought that at least *some* of the Bill of Rights *should apply* to the States.
            a. To try to do this, *Slaughterhouse Cases* were brought under the Privileges and Immunities clause
               i. **Privileges and Immunities Clause (14th Amendment):** No State shall make or enforce any law that shall abridge the privileges and immunities of citizens of the United States.
                     a. **Facts:** LA passed law giving monopoly to slaughterhouse & butchers; plaintiffs said this violated the 14A Privileges and Immunities because the monopoly “abridged their privileges and immunities.”
                     b. **Held:** Privileges and Immunities do not apply to the States.
            b. However, the Supreme Court found in the *Slaughterhouse Cases* that the Privileges and Immunities clause should **NOT** be interpreted as applying the Bill of Rights to the States.
               i. They reasoned that since the Constitution distinguished between “state citizenship” and “national citizenship,” it was not fair to apply it under the Privileges and Immunities clause.

Based on a **textualist** approach, the Privileges and Immunities Clause only includes citizenship of the United States and doesn’t include citizenship of individual States; therefore, the Privileges and Immunities does not apply individual liberties to the States.

II. THE INCORPORATION OF THE BILL OF RIGHTS INTO THE DUE PROCESS CLAUSE OF THE 14TH AM
   a. In the first 8 amendments, **all but 4** have been incorporated:
      i. **The Non-Incorporated Amendments**
         1. 3rd: Quartering Soldiers
2. **5th:** Grand Jury  
   a. In federal court, a grand jury must be present  
   b. In state court, this is not necessary

3. **7th:** Civil Jury  
   a. In federal court, a civil jury must be provided if requested  
   b. In state court, this is not deemed to be important

4. **8th:** No Excessive Fines

b. **THE INCORPORATED AMENDMENTS**  
   i. “Nor shall any State deprive any person of life, liberty, or property, without Due Process of the law.”
   ii. Equal Protection also applies in the reverse to the federal government  
       1. The federal government cannot deprive people of their
   iii. What allows amendments to be incorporated?  
       1. The word “Liberty”: By the very nature of the Bill of Rights it falls under life, liberty, or property and therefore the various amendments to the Bill of Rights have been incorporated.

c. **SELECTIVE INCORPORATION**  
   i. **Process of Incorporation** (4 Factors)  
      1. Would neither liberty nor justice exist if the right were sacrificed?  
      2. Does “right” involve principles of justice so rooted in the American tradition and conscious of our people to be so fundamental?  
      3. Is right “implicit in our ordered concept of liberty?”  
      4. Does violation of this “right” offend those canons of decency and fairness, which express the notions of justice of English speaking people?  
         a. If YES to all 4 factors, then the right is incorporated

   ii. Content of the Bill of Rights  
      1. Virtually all of the Bill of Rights that are incorporated are applied the same way to the States that they are to federal government. (“Jot for Jot”)  
      2. Exceptions  
         a. Federal court must have 12 member juries; State courts do not mandate this  
         b. Federal courts have to have unanimous jury decisions; State courts can be 11-1 or 10-2  
            i. States with 6 member juries must have unanimous decisions

III. **THE APPLICATION OF THE BILL OF RIGHTS AND THE CONSTITUTION TO PRIVATE CONDUCT**

a. **STATE ACTION DOCTRINE**  
   i. In general, the 14th Amendment’s Protection of “Individual Liberties” and “Equal Protection” generally applies to government (state’s) conduct; private conduct generally does NOT have to comply with the Constitution.  
      1. **Civil Rights Cases** (State Action Doctrine in Action)  
         a. **United States v. Stanley**  
            i. **Facts:** Civil Rights Act says that all people have the right to enjoy public things...people who violate this are subject to punishment. Black people are prevented from being let into hotels. They claim violations of equal protection of their individual liberties. Managers argue that the Constitution is supposed to control state/public action, and not their private discrimination.
ii. **Holding:** Congress itself does NOT have the power to regulate private conduct, because this regulation would be left to the state or local government. Under the Constitution, it expressly says, “no state shall make or enforce...nor shall any state deprive...” It is written like this to protect people from a tyrannical government. The Supreme Court interpreted the word state literally, so Congress itself has no control over private action.

ii. **Exceptions to State Action Doctrine (When Constitution DOES Apply to Private Conduct)**

1. 13th Amendment: Slavery cannot exist. (This regulates private conduct).
2. Federal and State statutes can sometimes impose constitutional standards on private actors. For example:
   a. Public accommodation statutes (if you have a public business, you cannot discriminate.)
      i. Sometimes, people argue this violates right of association, but this determination is held under strict scrutiny.
3. **The Public Functions Exception**
   a. **PRIVATE ACTORS ASSUMING PUBLIC FUNCTIONS**
      i. Private entity must comply with the Constitution if it is performing a task that has been traditionally, exclusively done by the government.
         1. The more an owner of property opens it up to the public, the more his rights become circumscribed
            a. **Marsh v. Alabama** (Expansive Definition)
               i. **Facts:** Company builds a company town (uses federal mail system, assumes police and fire responsibilities, and allows other people to drive on its streets); tries to have woman removed for passing out religious flyers to its residents. Company argues right to exclude from private property.
               ii. **Holding:** No. A state cannot, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments of the Constitution, impose criminal punishment on a person for distributing religious literature on the sidewalk of a company owned town contrary to regulations of the town’s management, where the town and its shopping district are freely accessible to and freely used by the public in general. People still use the company town as a public square, and it is virtually indistinguishable from public function.
            b. **Jackson v. Metro Edison** (Narrow Definition)
               i. **Facts:** Metro Edison is private light company, providing electricity to a remote city in PA. A woman was late on her payments, tried to put the bill in her son’s name, and Metro shut her off.
               ii. **Holding:** The utility company is not performing public functions that would make
IV. **The doctrinal point is mere licensing or regulation is not enough to lead to state action delegation**

a. It can be a factor, but there needs to be more.

a. **ELECTIONS**
   i. Pre-primary serving as primary through private actors is unconstitutional and subject to state action doctrine.
   
   ii. **Terry v. Adams**
       1. **Facts:** Political organization looking to keep blacks from voting in primaries held *pre-primaries*, and excluded blacks from allowing them to participate in the pre-primaries, but vote in the primaries. The pre-primaries would mostly only send one person to the primary, so blacks didn’t really get to vote. The political group said the pre-primary was a private, self-governing organization and should be subject to state action.
       2. **Holding:** This type of action is merely a circumvention of the 15th Amendment (prevention of voting discrimination) and this is what the state action doctrine seeks to prevent.

b. **PRIVATE PROPERTY IN PUBLIC FUNCTION**
   i. **Evans v. Newton**
       1. **Facts:** Man dies, leaves land for a park to be built for whites only, and named the city as a trustee. The city opened it up to be used for blacks, because they could not enforce segregation of a public park. The board of managers tried to remove the city as a trustee, so the will could be properly executed.
       2. **Holding:** This is a public function, even though it was privately devised and executed. As long as the city is taking care of it (cutting the grass; maintaining the swimming pool), it is a public function, and subject to nondiscrimination.
   
   ii. Is a private golf club a public function?
       1. If it is a small group, then it is likely not subject to the 14th Amendment.

   • Court is saying that so long as the park remains under municipal control, this is a public function, despite that it is private property
   • The trustees maintained it for so long but the court says that they cannot say “The mere substitution of trustees instantly transferred this park from the public to the private sector”
   • Implicit is that overtime, they may not have to comply.
      ○ BUT, then they compare it to Marsh and say that the purpose and public character of the park makes it a public function
   •

   2. **Entanglement Exception**
      a. Private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.
      
      ii. Precedent insists the conduct causing deprivation of a federal right be “fairly attributable to the state.”

i. **JUDICIAL LAW AND ENFORCEMENT ACTIONS**
   1. **Shelly v. Kraemer**
a. **Facts:** Kraemer's were a white couple who owned a residence in a neighborhood governed by a restrictive covenant to prevent blacks from owning/living there. The Shelley's were a black couple who wanted to live there. The Kraemer's went to court to try and enforce the restrictive covenant. They argued that since the covenant was a *private contract*, state action should apply.

b. **Holding:** Even though the covenant is technically valid and private, judicial *enforcement* of it would be state action. If enforced, the Shelley's would be denied equal protection of the laws.
   
   i. Under this theory, anything could be considered state action (because any contract between private citizens could be subject to judicial intervention), so court selectively applies it. Only use it in *preemptory challenges* and *prejudgment attachment*.

2. **PREJUDGMENT ATTACHMENT**
   
   a. **Lugar v. Edmonson Oil**
   
   i. **Facts:** Lugar leased a gas station and fell behind on his payments. Edmonson issued a prejudgment attachment against him for failing to repay his debts (so he couldn’t get rid of his property to defeat his creditors). The judge granted the writ of attachment, which was executed by the county sheriff (meaning he couldn’t sell it.) This was done “ex parte,” meaning the property was attached as a security interest for the unpaid bill. A trial judge later dismissed the attachment because Edmonson did not establish statutory grounds for the initial attachment. As a result, Lugar sued, saying that Edmonson had acted jointly with the State to deprive him of his private property (because Edmonson was unable to show why the property was attached [since the judge found that there was no basis for attachment]).
   
   ii. **Holding:** This is state action. Comes up with a test:
   
   a. **LUGAR TEST**
      
      i. Deprivation is caused by the exercise of some right/privilege created by state (or by person for whom the state is responsible); and
      
      ii. Deprivation is performed by a “state actor” or official.
   
   b. **EXCEPTION TO LUGAR EXCEPTION:**
      
      i. Where the government itself is a party to the contract, the Court will *apply heightened scrutiny* and presume *unconstitutionality*.
c. Lugar Test Applied to Edmonson
   i. Deprivation was caused by the ability for prejudgment attachment (which is a right under state law). Property was deprived because since the judge ruled that there was no basis for the attachment, he was deprived of it for no reason.
   ii. Deprivation was performed by the judge and the sheriff.

3. PREEMPTORY CHALLENGES
   a. Edmonson v. Leesville Concrete Co.
      i. Facts: Leesville used 2 of its 3 preemptory challenges to get rid of black jurors. Edmonson himself is black, requested an explanation on why those two jurors were removed.
      ii. Holding: Yes, there is state action because the equal protection is violation of the juror who has been violated.
   b. Lugar Test Applied to Edmonson
      i. Deprivation is caused by the exercise of some right/privilege created by state → Yes, acts with state because this jury selection process wouldn’t even happen without the courts.
      ii. Deprivation is performed by a “state actor” Courts are a state actor.
         (1) extent to which the actor relies on governmental assistance; (2) whether the actor is performing a traditional governmental function, and (3) whether the injury caused is aggravated by the incident.
         ^ can be used to determine whether the state action is direct”

4. GOVERNMENT REGULATIONS
   Gov’t regulation usually is not sufficient unless there is other gov’t encouraging or facilitating of unconstitutional conduct
   a. Burton v. Wilmington Parking Authority
      i. Facts: Man brings suit saying that a coffee shop refused to serve him because of his race. He claimed state action because the coffee shop leased its space from the city, and was attached to a city-parking garage.
      ii. Holding: Lugar test applies. Yes, there is deprivation caused by some right or privilege created by the state (discrimination). Yes, a state actor performs deprivation; state collects rent from this “private” actor, so actor is not technically private. When a state leases public property in the manner and for the
purpose as shown to have been the case here, to the proscriptions of the 14th amendment must be complied with by the lessee as certainly as though they were binding covenants written into the agreement.

b. *Moose Lodge 107 v. Irvis*
   i. **Facts:** Black man was a guest of a white man at the private Moose Lodge. Moose Lodge only accepts people by referral or invitation. They did not want to let in the black man on the basis of race. Black man argued that since the Moose Lodge had a liquor license and was the only place with a liquor license for several hundred miles, and it was given to them by the state, that the lodge should be subject to state action.
   ii. **Holding:** Licensing alone is not enough to invoke state action. It is private property, and therefore not subject to regulation by the state.
      ▪ Diff from previous bc not on PP and not open to the public
      ▪ Gov’t subsidies alone are not enough to make something state action

2. **The Entwinement Exception**
   a. *Brentwood Academy v. Tennessee HSAA*
      i. **Facts:** THSAA is a non-profit athletic association. Most of the school in the association are members, but not required to join. The organization suspended Brentwood from participating for 5 years in the playoffs because of “undue influence” by the coaches. When penalties were distributed, all of the board and legislative members were there, made up of administration from member schools. Brentwood sued the association and its executive director in federal court, claiming that enforcement of the rule was state action and a violation of the first and fourteenth amendments.
      ii. **Holding:** Is a state action because since the people who were main actors of the association were involved with the state, and their relationship was so close that it was “entwined.” *There have not been many cases decided with the “entwinement”*
      iii. ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.”
CHAPTER 6: ECONOMIC LIBERTIES

I. THE APPLICATION OF THE BILL OF RIGHTS TO THE STATES

a. ECONOMIC SUBSTANTIVE DUE PROCESS
   i. Due Process Clauses
      1. 5th Amendment: Applies to Federal Government
         a. “Nor shall any person... be deprived of life, liberty, or property, without due process of law...”
      2. 14th Amendment: Applies to State and Local Government
         a. “Nor shall any State deprive any person of life, liberty, or property, without due process of law...”
      3. Contracts Clause
         a. Prohibits impairments of existing contracts; government can limit the creation of contracts and future contracts
         i. This clause only applies to the state and not the federal government
      4. Takings Clause (5th Amendment)
         a. Government cannot take property without just compensation
   ii. Types of Due Process
      1. Procedural Due Process: Procedures that government must follow when it takes away a person’s life, liberty, or property
         a. In particular, the government must provide adequate notice and hearing.
      2. Substantive Due Process: Whether the government has an adequate reason for taking away a person’s life, liberty, or property
         a. Economic Substantive Due Process
            i. Protects economic liberties
               1. (i.e.: right to contract freely, without excessive government interference)
               2. As of today, economic substantive due process does NOT give any extra protection; might even say it no longer exists
                  a. Court gives RATIONAL BASIS review (blue sheet) to laws affecting economic rights
                     i. Prior to this, the court had a very laisse faire attitude regarding economic regulation.
                     ii. Lochner era. During this time, the Supreme Court used the Fourteenth Amendment to strike down hundreds of laws aimed at restricting the economic liberties of individuals in all sorts of areas, including maximum hours, minimum wage, unionizing, and general consumer protection laws. They used SS.
                     iii. Now, court gives great deference to government economic regulation. Since 1937, not one state or federal economic regulation has been found unconstitutional as infringing liberty of contract (economic substantive Due Process) as protected by the Due Process so long as they are rationally related to a legitimate government purpose.
                  iv. Government regulation (law) is upheld so long as the law is rationally related to a
**legitimate gov’t interest,** and is not **arbitrary or unreasonable.** There is a presumption of constitutionality.

v. Laws that might/will be protected under rational basis (deferential treatment to government) are laws regarding: minimum wage, maximum hour laws, minimum hour laws, etc.

vi. Look at the “health, safety, morals, and welfare” of the people

---

b. **Williamson v. Lee Optical of Oklahoma, Inc.**
   
i. **Facts:** A statute was passed so that an optician (someone who makes lenses, fills prescriptions, and fits frames) could not duplicate lenses without permission from an ophthalmologist (specialty eye doctor) or an optometrist (non-treating eye doctor). The practical effect was that no optician could fit old glasses into new frames or supply new or duplicate lenses. Plaintiff argued that this violated Due Process by interfering with the optician’s rights to do business.

   
   ii. **Holding:** It is within the police power of the state to make this law, even if the court does not agree with the outcome. Legislature can pass this law because it is held to the rational basis test (rationally related to a permissible state purpose, and is not arbitrary or unreasonable.)

   - They say it may not be logical, but it needs to be reasonable - there is such a high level of deference
   - Court says this isn’t our job to look at whether it was actually rational in hindsight, but if the legislature might have thought it was rational - this is pretty deferential

   c. **State Farm Mutual Automobile Insurance Co. v. Campbell**
   
i. **Facts:** State Farm was sued and lost. The jury awarded extreme punitive damage amounts to the plaintiffs in the case. State Farm is claiming a violation of their economic substantive due process because of the excess punitive damages (the damages for the case was $1 million dollars).

   ii. **Holding:** In making their decision, the jury looked at State Farm’s practices around the country and not just in this case. The jury wanted to “teach State Farm a lesson.” Court says juries cannot consider this, and cannot punish for this. More importantly, punitive damages cannot be too much in excess of compensatory damages. These things together *did* show a violation of economic due process.

   
   d. **Non-economic Substantive Due Process**
   
i. Protects privacy and autonomy rights
   - Non-Economic SDP gives extra protection to SOME rights
   - i.e., Court gives HEIGHTENED review (STRICT SCRUTINY) to some rights.

---

b. **THE CONTRACTS CLAUSE**
   
i. **Article I §10:** No State shall pass any law impairing the obligation of contracts.

   ii. Applies to:
   
   1. Existing contracts **only**
   2. State & Local Governments only
iii. GOVERNMENT INTERFERENCE WITH PRIVATE CONTRACTS

1. Three Part Test for Determining When Government Can Interfere in Private K’s
   a. Is there a substantial impairment of the contractual provisions?
      i. Look at whether this industry is traditionally heavily regulated
   b. Does the impairment serve a significant and legitimate interest? (Rational basis test)
   c. Is the law reasonably related to the legitimate state purpose?

2. Application of Interference Test
   a. Home Building & Loan Association v. Blaisdell
      i. Facts: During the Great Depression, MN passed a law declaring that there was an emergency, and extended the time that borrowers could repay their mortgages. As a result, the plaintiff’s period to collect on the loans was extended, impairing the existing contract between it and the borrowers.
      ii. Holding: This law is not a breaking of the contract. It is a limited, temporary, measured, reasonable, and appropriate fix to an economic emergency. The court used rational basis to determine this. It cannot be a permanent impairment to a contract, but since this one was temporary and regulated, this law is acceptable to impair the contract. Court found that there is no absolute right to privately contract.
      i. Facts: Plaintiff had a Kansas Power that allowed gas prices to increase if federal regulations increased the price of gas. The new price term would be the same as the regulation’s prices. Kansas passed a law preventing private parties from increasing contracted gas prices even if federal government did. (Basically making this kind of contract illegal.)
      ii. Holding: Court applies the three-part test. 1. Yes, there is substantial impairment to this contract. 2. Yes there is a significant a legitimate purpose – keeping down prices for citizens and not allowing the prices to fluctuate just because regulations go up. 3. Yes, this law is rationally related to state end. This is law is upheld.
   c. Allied Structural Steele Co. v. Spannaus
      i. This is the only case that has been found to be a violation of substantial economic Due Process.
         1. Do we need to know this case?
            a. Contracts clause does not give any extra protection

• The Contract Clause gives little extra protection
  • i.e., the standard of review for the State/Local law affecting a contract is RATIONAL BASIS
  • EXCEPTION: where the government itself is a party to the contract, the Court will apply HEIGHTENED SCRUTINY
iv. GOVERNMENT INTERFERENCE WITH GOVERNMENT CONTRACTS

1. When the government interferes in other government contracts, there is a heightened scrutiny. This is because the government has an obvious reason to change the contract to fit itself and its own interest.

2. United States Trust Co. v. New Jersey
   a. **Facts:** The state of New York and the state of New Jersey formed a Port Authority. They sold bonds to support it, and planned on tolling it to support the bondholders. The Port Authority took over a train track that had been in financial trouble, but made contract that they would not use the toll money to support the train. However, later on, both states passed laws allowing the use of the toll money to be used on the train. Bondholders argued that the new legislation in both states impaired their right to payment on the bond.
   b. **Holding:** When a state impairs its own contract, it must be subject to heightened scrutiny, because the court is aware that it might do so in its own self-interest. States cannot impair their debts because they would prefer to spend their money in a different manner. The repeal was not necessary or a reasonable way to get people to take the train instead of cars. A less drastic alternative was available.
      - On the surface, it's the same test but the deference is different, there is less deference
      - They look into the necessity of the impairment
        - This is the same language in strict scrutiny
        - Whether this is strictly necessary
      - If there is a less drastic plan that could have achieved the same thing, then the law will be struck down

   c. THE TAKINGS CLAUSE
      i. **Three Part Taking Analysis**
         1. Is there a taking?
         2. Is it for public use?
         3. What is just compensation? (Typically, fair market value).
CHAPTER 7: EQUAL PROTECTIONS

I. A FRAMEWORK FOR EQUAL PROTECTION ANALYSIS
   a. 14th Amendment (Equal Protection Clause): Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.
   b. This applies to:
      i. Federal government under 5th Amendment Due Process
         1. The court interpreted the 5th Amendment as including an implicit requirement for equal protection. The court said that, “discrimination may be so unjustifiable as to be violative of Due Process.”
      ii. State government under 14th Amendment
         1. “No state shall...deny to any person within its jurisdiction the equal protection of the laws.”

   c. EQUAL PROTECTION ANALYSIS
      i. What is the Classification?
         1. If classification exists on the face of the law, go to 2.
         2. If the law is facially neutral, level of scrutiny is rational basis, go to step 3.
            a. unless discriminatory purpose is shown, go to step 2.
      ii. What is the Appropriate Level of Scrutiny?
         1. Strict Scrutiny (Heightened Scrutiny)
            a. Race, National Origin/ Alienage, Immutable Characteristics, History of Mistreatment
            b. Fundamental Right: Right to Vote, Bill of Rights, etc.
               i. Government has burden to show that means are:
                  1. Narrowly tailored (necessary) to a compelling government interest.
               ii. Presumed unconstitutional.
         2. Intermediate Scrutiny
            a. Gender, Non-marital Children
               i. Government has burden to show that means:
                  1. Substantially advances an important government interest.
                     a. Presumed unconstitutional
               ii. Non-Married Children
                  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.
         3. Rational Basis (default standard)
            a. Everything else
               i. Challenger has burden to show that means are NOT:
                  1. Rationally related to a legitimate government interest. (Must show that the law is arbitrary and unreasonable).
                     a. Presumed constitutional
                     b. Age, disability, wealth, sexual orientation
      iii. Does the Government Action Meet the Level of Scrutiny?
         1. Whether the “means to an end are satisfied”
         2. Government must be using the least restrictive alternative
         3. Court focuses on the degree to which a law is under-inclusive or over-inclusive.
a. A law is **under inclusive** if it does not apply to individuals whom are similar to those to whom the law applies. (For example, a lot of it excludes kids under 16 from having a license is over inclusive, because some younger drivers do not have the physical ability to be effective drivers.)

b. A law is **over inclusive** if it applies to those who need to not be included in order for the government to achieve its purpose. (The law unnecessarily applies to a group of people; For example, the government’s decision to evacuate and intern on Japanese-Americans during World War II was over inclusive.)

   i. A lot can be both under and over inclusive. The fact that our law is such, does not mean that it is sure to be invalidated. Most laws are both.

iv. **RATIONAL BASIS TEST** (in analysis, often must do due process analysis to see if it’s a fundamental right ex. Romer v evans)

   1. **What Constitutes A Legitimate Purpose**
   
      i. **Holding:** Conceivable legitimate purpose is enough; it doesn’t have to be the actual purpose. Just because the actual purpose doesn’t make “sense” in its application, if there is a conceivable legitimate purpose, then the law holds up.

II. Legit purpose if it advances a traditional ‘police’ purpose: protecting safety, public health, or public morals.

III. Virtually any goal that isn’t forbidden by the constitution is sufficient to meet the rational basis test

   - Moreno case with foods stamps and unrelated people. Held no legit purpose (even if they accepted the purpose was to decrease fraud...) the means were unreasonable because it wasn’t rationally related to achieving that.
   - May look @ legislative history

**IV. CLASSIFICATIONS BASED ON RACE AND NATIONAL ORIGIN**

a. **Dred Scott v. Sandford**

   i. **Facts:** Scott was a slave, gained his freedom, moved north and he was re-enslaved. He sued, under the Due Process clause, saying this was a violation of his granted liberty.

   ii. **Holding:** Under the Constitution, Scott was not a citizen, and he was not entitled to the protections and liberties granted to citizens under the Constitution.

b. **RACE AND NATIONAL ORIGIN CLASSIFICATIONS ON THE FACE OF THE LAW**

   i. Race Classifications That Disadvantage Racial Minorities

      1. **Korematsu v. United States**

         a. **Facts:** Military tried to kick out all the Japanese people from the U.S. because they might have ‘loyalty’ to Japan in wartime.

         b. **Holding:** Classifications that single out a certain race are immediately suspicious, but in this case, it was not to be antagonistic to a group, but mere “caution” in military time. Court found this to be acceptable; “Public necessity” in this case, is ok even under the strictest scrutiny according to Supreme Court.

            i. **Remember:** This order is overinclusive. This is the only race case to hold up under strict scrutiny post Civil War

   ii. Race Classifications That Disadvantage Both Whites and Minorities

      1. **Loving v. Virginia**

         a. **Facts:** Interracial couple married (it was illegal), and they were sentenced to jail. It was upheld in appellate court because “God did not intend the races to mix”
b. **Holding:** Supreme Court said no, there must be a legitimate purpose/compelling interest... there is not one here. The court says the purpose is white supremacy; this is not ok.
   i. **Marriage** is a basic human civil right, to deny this freedom on so insupportable basis as racial classification deprives all the states citizens of liberty without due process of law.
   1. Substantive due process = Liberty (right to marry) $\rightarrow$ strict scrutiny

2. **Palmore v. Sidoti**
   a. **Facts:** State court divested a natural mother of child because she remarried someone black. State said child would grow up and get teased; social stigma
   b. **Holding:** Court reversed; Constitution cannot give private biases effect. The Constitution cannot control such prejudices but neither can it tolerate them.

iii. Laws Requiring the Separation of the Races
   1. **Plessy v. Ferguson**
      a. **Facts:** Man was 7/8 white, and 1/8 black. He was riding on a train where he black people were supposed to sit in the back. He sues, under equal protections
      b. **Holding:** Court holds that “separate but equal” is ok – it’s the same thing
         i. They said equality doesn’t mean “intermingling of races,” just requires equal accommodation
      c. **Harlan Dissent**: Everyone knows that the purpose of the statute was to exclude the colored people from coaches occupied by whites. The Constitution is color-blind. It neither knows nor tolerates classes among citizens.

2. **Brown v. Board of Education**
   a. **Facts:** Attack on Plessy’s separate but equal
   b. **Holding:** Separate but equal is inherently unequal, because separate schools leads to sense of inferiority of black students, which is an unequal result. School, to this court, was essential public function. Court was criticized because it didn’t say racism is “morally” wrong, but used data etc.
      i. Courts are allowed to step in and actively regulate the schools, etc to ensure the integration plans.
      ii. The “separate but equal” doctrine has no application in the field of education and segregation of children in public schools based solely on their race violates the equal protection clause.

c. **FACIALLY NEUTRAL LAWS WITH A DISCRIMINATORY IMPACT OR WITH DISCRIMINATORY ADMINISTRATION**
   i. Showing a violation of Equal Protection Clause on facially neutral laws requires:
      1. Must show **discriminatory effect**
      2. Must show **discriminatory purpose or intent**
         a. Law must be enacted “because of,” not “in spite of” discrimination to be unconstitutional.

   ii. **REQUIREMENT FOR PROOF OF A DISCRIMINATORY PURPOSE**
      1. **Washington v. Davis**
         a. **Facts:** Black men wanted to be police officers, cited equal protections saying that the outcomes (blacks w/ lower test scores) is unequal.
         b. **Holding:** If law is facially neutral, then requires proof of purposeful discrimination. Rational basis test applies. Unintended effects cannot be the basis of a violation.
2. **McCleskey v. Kemp**
   a. **Facts**: Black man involved in crime, was sentenced to death; his lawyers pointed to study that black men are more likely to be sentenced to death for killing white man than a white man is a black man
   b. **Holding**: Had to show that the jury had to show that the jury intended to discriminate against HIM specifically (the fact that he got the death penalty just shows effect)

iii. **IS PROOF OF A DISCRIMINATORY **EFFECT** ALSO REQUIRED?**
   1. Yes, this must exist. Court has never addressed this but has never ruled on a case without this being shown.
   2. **Palmer v. Thompson**
      a. **Facts**: After integration, city closed down pool instead of desegregating it.
      b. **Holding**: Can't make the city reopen the pool, because there was the same "non-discriminatory effect" (even if there were discriminatory purposes)
         i. Cant look at the motivation of the legislation, must look at what actually happened as a result

iv. **HOW IS A DISCRIMINATORY PURPOSE PROVEN?**
   1. **Personnel Administrator of Massachusetts v. Feeney**
      a. **Facts**: Woman claimed a veteran preference was really a dressed up 'male' privilege
      b. **Holding**: It was meant to give benefit to veterans, not discriminate against women.
         i. Discrimination violations must be because of legislation, not in spite of legislation
         ii. Does knowledge of a discrim impact constitute a violation? Nope.
   2. **Village of Arlington Heights v. Metropolitan Housing Development Corp**
      a. **Facts**: Company applied for zoning changes from upper class to lower class; city says no because of zoning. Developers say effect is that is affects disproportionately minorities.
      b. **Holding**: Is not enough because it does not survive rational basis \( \rightarrow \) is not discriminating against minorities, this just happens to be an effect of it. You must show discriminatory purpose by proof that a discriminatory purpose is a motivating factor for legislature. Show this motivating purpose by:
         i. Historical background of the decision
         ii. Legislative or administrative history
         iii. Clear pattern of discrimination where the only explanation is discrimination (even if neutral on face)
            1. Once one of these factors are shown, the burden shifts to the other person and it has to show why they would’ve made the same decision absent this discriminatory purpose

d. **REMEDIES: THE PROBLEM OF SCHOOL SEGREGATION**
   1. **Brown v. Board 2**
      1. **Facts**: Local officials have the authority for integrating schools. If they don’t do that, then the fed district courts will have to be involved
2. **Holding**: Court remands these integrations issues to lower courts, with the stipulation that
   a. "Equitable principles" → a court is allowed to do what is "right/fair"
      i. This has the potential to depart from black letter law (too judicially active)
         1. Gives the power to the district court the power of equity and give them the opportunity to get involved
         2. For a long time, the courts didn’t get involved

ii. **WHAT REMEDIES ARE ACCEPTABLE?**
   1. **Swann v. Charlotte – Mecklenberg Board of Education**
      a. Can racial **balance or quotas** be used to correct segregation?
         i. NO, this is just a starting point, rather than an inflexible requirement
      b. Should **all-black or all-white schools** be eliminated in order to get rid of segregation?
         i. Courts should SCRUTINIZE "all black" or "all white" schools to determine whether or not this segregation was based on present or past discriminatory action on behalf of the school.
      c. What are the limits on **rearranging school districts**?
         i. NO - Assignment plans are not acceptable because they seem to be neutral.
         ii. Gerrymander – there are limits.
      d. **Use of transportation to correct segregation**
         i. An objection to transportation of students may have validity when the time or distance of travel is so great as to either risk the health of the children or significantly impinge on the educational process.

2. The constitutional mandate to desegregate public schools did not require all schools in a district to reflect the district's racial composition, but the existence of all-black or all-white schools **must not be shown to be the result of segregation policies**.
   a. Here, it is ruled that racial quotas (albeit to a limited extent), and busing are acceptable forms of remedies to accomplish desegregation

3. **Milliken v. Bradley**
   a. **Facts**: Remedy by district court in Detroit schools was to make a super-district, including the surrounding districts to prevent segregation by race (to prevent single race schools).
   b. **Holding**: Remedies can only be ordered when there has been a constitutional violation shown in that jurisdiction → Court said that they didn’t see a constitutional violation.
      i. Court points out that integration of 54 district would be really hard administratively to do this and this does not outweigh and interest in proactive prevention of segregation.

iii. **WHEN SHOULD FEDERAL DESEGREGATION REMEDIES END?**
   1. **Board of Education of Oklahoma City v. Dowell**
      a. **Facts**: If this district has desegregated, the mandate to desegregate will be removed.
      b. **Holding**: Lower court says yes this has been achieved – mandate was lifted (even though there are still some ‘single race schools’). This had been met, according to the court. Looks at
         i. Assignment of teachers
         ii. Services between schools
They got rid of it. As a result, this has led to a resegregation of sorts in 90s and since.

- In deciding whether a sufficient showing of compliance was made, the District Court should ascertain whether the Board (D) complied in good faith with the desegregation decree and whether the vestiges of past segregation have been eliminated to the extent practicable.

2. **Parents Involved in Community Schools v. Seattle School District #1**
   - **Facts:** School adopted a school assignment plan that assigned black and white students to other schools to provide diversity demand.
   - **Holding:** Do not need to do this because there is no more segregation. The compelling interest in this mandate would be to remedy past discrimination but the court finds that this no longer exists. Also, this is not an issue because this is primary and secondary education, and not college.
     - Court finds that there is a higher interest in diversity in higher education.
     - the only two compelling interests recognized by the Court in the context of racial classifications in schools have been remedying past segregation and promoting diversity in higher education.

iv. **RACIAL CLASSIFICATIONS BENEFITTING MINORITIES**
   1. **Affirmative Action - THREE QUESTIONS**
      - **What level of scrutiny should be used for racial classifications benefiting minorities?**
        - Strict scrutiny
      - **What purpose for affirmative action programs is sufficient to meet the level of scrutiny?**
      - **What techniques of affirmative action are sufficient to meet the level of scrutiny?**

2. **Richmond v. J.A. Croson Co.**
   - **Facts:** Virginia adopted the minority Business Utilization Plan, which required government supported construction contractors to set-aside 30% of its subcontracts to one or more Minority Business Enterprises (affirmative action).
   - **Holding:** The race-based initiative is unconstitutional and cannot withstand strict-scrutiny.
     - Strict scrutiny is not met because the Plan failed to consider race-neutral measures that would encourage more minority participation in the construction program. Also, the 30% quota allowed by the Plan was not “narrowly tailored to any goal, except perhaps outright racial balancing.”
     - Didn’t look at any less restrictive means or alternatives

V. Only .67% of the city's prime construction contracts had been awarded to minority businesses
   - But they say that there was no direct evidence of race discrimination on the part of the city in letting contracts or any evidence that the city’s prime contractors had discriminated against minority-owned subcontractors
     - Must show past purposeful discrimination.
1. **Diversity in college admissions** is a compelling government interest. (Is "discriminatory on its face because it goes against white people")

ii. **USE OF RACE TO BENEFIT MINORITIES IN COLLEGE ADMISSIONS**

1. *Regents of California v. Bakke*
   a. **Facts:** 16% of the 100 medical seats at U Cal medical school had to go to minorities.
   b. **Holding:** Diversity is a compelling interest but the means are not narrowly tailored. Basically, racial quotas are impermissible.

2. *Gratz v. Bollinger*
   a. **Facts:** Michigan undergrad uses race as a factor and automatically lets in minorities qualified for the program to increase diversity, while denying other white students with higher qualifications.
   b. **Holding:** Though diversity is a compelling state interest, letting all minorities in does not survive strict scrutiny because this is not a narrowly tailored means to achieve this end.

3. *Grutter v. Bollinger*
   a. **Facts:** Michigan law school tried to increase diversity (doesn't only use race – but it is a plus factor). Law school argues “critical mass” in the interest of diversity (meaning there needs to be a good amount of diverse students; there is no set number of students because minority applicant differ every year.) Student was waitlisted/denied admission claiming that she had higher scores than people of a different race.
   b. **Holding:** Court held that under strict scrutiny, *diversity is a compelling government interest* that can use race in its application procedures. Since race was *not the only factor and merely a plus factor*, then this is acceptable because of the compelling state interest. This is going to be ‘limited in time’ where this might not need to occur in the future

   • Extremely deferential to law school statement of diversity

4. *Fisher v. University of Texas at Austin*
   a. **Facts:** Said school discriminated against her by not accepting her based on her race because she was in the top 12% and not the top 10%. UT used race as a plus factor again.
   b. **Holding:** SS should be applied. Upheld.

   • When it comes to diversity as a goal, some deference is proper in a higher education context
   • Strict when it comes to the means - no deference when it comes to that - must meet narrow tailoring requirement

• Fisher I put forth three standards:
  1. Race may not be considered by a university unless the admissions process can withstand strict scrutiny
  2. Educational benefits from student body diversity is appropriate but not complete judicial deference is proper, but there should be some. - should be no quotas
  3. No deference is owed when determining whether the use of race is narrowly tailored to achieve the university's permissible goals

   • Had minimal impact but this is actually reflective of narrow tailoring.
   • Just because there are alts does not mean they would suffice to achieve the level of diversity they wanted
iii. REDISTRICTING TO INCREASE MINORITY REPRESENTATION
   1. This practice must meet strict scrutiny
   2. There are 2 ways in which it can be demonstrated that race was used to draw
election districts, and strict scrutiny should be applied
      a. If it was a “bizarre” shape
      b. If the use of race in districting cannot be inferred from the shape of the
district, strict scrutiny is justified if it is proven that race was a
“predominant factor” in drawing the lines.
         i. Must show that other legit districting principles were subordinated
to race.
         ii. Made because of race, not in spite of race
   3. What justifications meet strict scrutiny
      a. DOJ must approve changes in election systems where there is a history of
race discrimination (does not justify the use of race in districting)

VI. GENDER CLASSIFICATIONS
   a. LEVEL OF SCRUTINY
   1. Level of scrutiny - intermediate
   2. How gender discrim can be proven
      • Either on the face of the law or if a law is neutral, show that there is a discrim impact and purpose
   3. Gender classifications benefiting women - Mutability of the characteristic
      • If bc of stereotypes, no
      • To make up for past discrim, okay

  . *Frontiero v. Richardson*
   1. **Facts:** Woman wants to claim benefits for her husband but would have to prove
dependency on her; men are not held to that same standard and are all allowed to
claim
   2. **Holding:** establishes intermediate scrutiny because there is a history of
discrimination against women, but this is only a plurality opinion so strict scrutiny
is not the standard.

ii. *Craig v. Boren*
   1. **Facts:** The State of Oklahoma prohibited the sale of “non-intoxicating” 3.2% alcohol
beer to men under the age of 21 and women under the age of 18. Suit was brought
against the State, alleging the law violated the Equal Protection clause of the
Fourteenth Amendment of the Constitution
   2. **Holding:** Establishes *intermediate scrutiny*. Must be an *important government
objective* and means must be *substantially related to government interest*.

iii. *United States v. Virginia*
   1. **Facts:** VA has an all male military school (was the only single sex school in VA). To
combat this, the state made a separate women’s school, but it had less courses and
was not in line with the basic military training system.
   2. **Holding:** This school was separate and unequal. Women’s school wasn’t a proper
remedy because it wasn’t giving the same opportunities to women that it was to
men, so it was not equal. (Different resources, different money, different courses,
and different training).
Said this required an exceedingly persuasive justification - this is a pretty high standard

a. Court applied intermediate scrutiny, but uses “exceedingly persuasive justification”
   i. It is not clear which scrutiny to use in a gender discrimination case. The Court uses it to raise suspicion for gender classification laws and steer it more in direction of SS without making it SS standard of review.

b. PROVING THE EXISTENCE OF A GENDER CLASSIFICATION
   i. When Is It Discrimination?
      1. **Geduldig v. Aiello**
         a. **Facts:** Woman wants pregnancy to be covered in disability; CA will not pay disability for pregnancy
         b. **Holding:** The law has to draw the line somewhere; the budget is not unlimited. Pregnancy excluded from gender disparity. Classification separated into “pregnant people” and “non-pregnant” people. Because of this classification, (it is not gender based) which makes it a rational basis test.
            i. Congress overrules this in the Pregnancy Discrimination Act

c. GENDER CLASSIFICATIONS BENEFITTING WOMEN
   i. **Orr v. Orr**
      1. **Facts:** Women didn’t have to pay alimony. Men did. Man was ordered to pay alimony. This is discriminatory on its face (intermediate scrutiny).
      2. **Holding:** Court says these are important government interests. The statute is subject to scrutiny under the Equal Protection Clause because it provides that different treatment be accorded on the basis of sex. To withstand such scrutiny, the classifications by gender must serve important governmental objectives and must be substantially related to achieving those objectives.
         • Interest was to provide for a needy spouse but their means of doing this was not related to achieving it.

   ii. **Mississippi University for Women v. Hogan**
      1. **Facts:** UW is the only single-sex collegiate institution maintained by the State of Mississippi. The Respondent was otherwise qualified for admission to the school’s nursing program, but he was denied admission on the basis of being male. School says this is remedying discrimination against women.
      2. **Holding:** No; because women are not discriminated against in the profession; women did not lack opportunity in the field of nursing. When applying intermediate scrutiny, must apply exceedingly persuasive justification → not clear when this standard applies, it seems to only be analyzed when it is brought before the court.

   iii. **Rostker v. Goldberg**
      1. **Facts:** The MSSA requires all males between the ages 18 to 26 to register with the Selective Service. The purpose of the MSSA is to allow the armed services to select men in the event that a military draft is necessary. Women are not required to register with the Selective Service. (This is brought under 5th Amendment Equal Protection and not 14th because it is federal equal protection and not under the states.)
      2. **Holding:** Not a violation because this is an important government interest; since women couldn't register for combat and were not combat ready, they should not be drafted. Congress has the power to regulate this. Set on military policy.
d. ALIENAGE CLASSIFICATION
   i. Subject to *strict scrutiny*
      1. *Graham v. Richardson*
         a. **Facts:** Richardson was denied welfare benefits because he wasn’t a resident alien in Arizona for 15 years yet. He says that this 15-year law violates the 14th Amendment Due Process, because they are discriminating against him since he is an alien.
         b. **Holding:** Not going to discriminate...person means person. Equal Protection clause says “person” and not the word “citizen.”
            i. This includes non citizens
            ii. They had an interest in preserving their resources but The saving of welfare costs cannot justify an otherwise invidious classification
   ii. EXCEPTIONS TO STRICT SCRUTINY FOR ALIENAGE (when it involves self-governance or the democratic process)
      1. *Foley v. Connelie* (EXCEPTION #1)
         a. **Facts:** New York law prohibited non-citizens from becoming state police officers. When the Appellant was denied the opportunity to sit for the state police exam because of his resident alien status, he sued, alleging denial of equal protection (he claimed me strict scrutiny)
         b. **Holding:** Court: this is not true always, nation has a right to be governed by the people as opposed to aliens
            i. Policing is something that state can protect because U.S. membership has its privileges to the extent that citizenship is self-governing.
               1. Policymaking positions or if someone is running for office. They say policing belongs to that because it involves discretionary decision making and they have a lot of discretion on how they fulfill their duties and it has a large impact on individuals
      2. **Congressionally Approved Discrimination** (EXCEPTION #2)
         a. An exception to the usual role of strict scrutiny for alienage classifications is where the discrimination as a result of federal law.
         b. Supreme Court: federal government’s plenary power to control immigration requires judicial deference and that therefore there only rational basis review is used if Congress has created the alienage classification or if it is the result of a presidential order.
            i. Does not apply to administrations
      3. **Undocumented Aliens and Equal Protection** (EXCEPTION #3)
         a. *Plyler v. Doe* (hybrid standard of review)
            i. **Facts:** A revision to the Texas education laws in 1975 allowed the state to withhold from local school districts state funds for educating children of illegal aliens. This was because undocumented aliens are not citizens, Texas argues that they are not persons able to assert their rights.
            ii. **Holding: they are persons,** and therefore allowed 14th Amendment protections.
               1. You cannot apply strict scrutiny because education is not a fundamental right, and these people still are breaking the law because they are lawbreakers.
               2. Rational basis test applies here...
                  a. Its not the children’s fault that they are here, and they have no control over their status
b. While education is not a fundamental right, but it is important to the individual in whether they can be a productive member of society.

c. As long as the children are here, state shouldn’t limit access to education because federal government is the one w/ control over deportation, and their illegal status.

d. They say legit interest but the means test fails bc implementing this isn’t going to make that much of a difference – illegal immigrants don’t come here for education, they come for jobs

e. DISCRIMINATION AGAINST NON-MARITAL CHILDREN
   i. Applies *intermediate* scrutiny (only one other than gender)
      1. Laws that provide a benefit to all marital children but no non-marital children are always declared unconstitutional
      2. Laws that provide a benefit to some non-marital children, while denying benefits to other non-marital children are evaluated on a case-by-case basis and are under intermediate scrutiny

f. OTHER TYPES OF DISCRIMINATION
   i. *AGE:* is not a suspect class → is rational basis
   ii. *DISABILITY:* is not a suspect class → is rational basis (ADA balances this out)
   iii. Only use SS when the classification impermissibly interferes with a fundamental right or to the peculiar disadvantage of a suspect class
CHAPTER 8: FUNDAMENTAL RIGHTS UNDER DUE PROCESS AND EQUAL PROTECTION

I. INTRO
   a. THREE MAIN ISSUES
      i. Fundamental Rights
         1. The Constitution protects rights and liberties which are:
            a. Deeply rooted in this nation's history and tradition
            b. Implicit in the concept of ordered liberty, such that
            c. Neither liberty nor justice would exist if they were sacrificed
      ii. The Ninth Amendment
         1. The enumeration of the Constitution of certain rights, shall not be construed to disparage others retained by the people
         2. Is used as a way for the Supreme Court to protect non-textual rights
      iii. Procedural Due Process
         1. Government must provide adequate procedures when it takes away someone’s right.

II. FRAMEWORK FOR ANALYZING FUNDAMENTAL RIGHTS (DUE PROCESS ANALYSIS)
   a. IS THERE A FUNDAMENTAL RIGHT or const protected liberty interest?
      i. If yes, strict scrutiny; go to 2
      ii. If no, rational basis; go to 3
   b. IS THE CONSTITUTIONAL RIGHT INFRINGED?
      i. Is the infringement “substantial and direct?”
         1. If yes, SS applies, go to 3
         2. If no, rational basis applies, go to 3
   c. IS THE STANDARD OF REVIEW MET?
      i. Is there sufficient justification (purpose) for the government action?
      ii. Is the means sufficiently related to the purpose?

   • If a right is safeguarded under due process, constitutional issue is whether the gov't interference is justified by a sufficient purpose - best groups if the law is denied for everyone
   • If right is protected under equal protection, issue is whether the gov't discrimination as to who can exercise the right is justified by a sufficient purpose - better if discrim against some and not others

III. RIGHTS AND INTERESTS PROTECTED
   1. Rights protected in the Bill of Rights
   2. Right to Family Autonomy
      a. Right to Marry
      b. Right to Keep Family Together
      c. Custody of One’s Own Children
      d. Right to Control Upbringing of Children
   3. Right to Reproductive Autonomy
      a. Right to procreate
      b. Right to purchase/use contraceptives
      c. Right to abortion* - this right is "const. protected liberty interest where "hybrid" test os applied"
   4. Rights related to medical care decisions
      a. Right to refused unwanted medical treatment * applies undefined form of heightened scrutiny
      b. Right to physician assisted suicide – NO – not fund right.
   5. Right to Travel
   6. Rights to sexual activity
      a. Right to privacy of sexual activity *
   7. Right to Vote
a. **RIGHT TO MARRY**
   i. *Obergfell v. Hodges*
      1. **Facts:** Group of same sex couples in different states sued their respective states, saying that the banning of gay marriage was an equal protection violation (under the 14th Amendment). The U.S. Court of Appeals for the Sixth Circuit reversed and held that the states’ bans on same-sex marriage and refusal to recognize marriages performed in other states did not violate the couples’ 14th Amendment rights to equal protection and due process.
      2. **Holding:** Marriage is a fundamental right that all states MUST recognize
         a. It is inherent in the idea of individual autonomy
         b. Marriage is such a fundamental core institution in the nation because it goes to human desire not to want to be alone
         c. Protecting families and safeguarding children
         d. Marriage is the keystone of social order (Privileges and benefits come from marriage)

   ii. **Paternal Rights** (Biological Fathers v. Marital Fathers)
      1. Biological link alone does not give a father rights; but someone who actually takes care of the child does have that constitutional right.

b. **RIGHT TO KEEP FAMILY TOGETHER**
   i. *Moore v. City of East Cleveland, Ohio*
      1. **Facts:** Ms. Moore and her son, and her grandson (and another grandson) live together. Her son died, but there were only categories of people that could live together. The other grandson did not fall in the category of the zoning ordinance (immediate nuclear family can only live together). They put grandmother in jail and fined her for this.
      2. **Holding:** Family is one of the most important things to protect as a tradition in this country. The State must advance a compelling interest to infringe upon the choice of relatives of a close degree of kinship to live together. The tradition of having family members live with others in their extended family is long and representative of the basic values underlying our society. As such, the decision to move in with extended family or move extended family in with one’s nuclear family may be regarded as a fundamental right.
         - Family inst is deeply rooted in hist and tradition – SS
         - There was not a close relationship to the interest and not narrowly tailored

c. **RIGHT TO CONTROL UPBRINGING OF ONE’S OWN CHILDREN**
   i. *Meyer v. Nebraska*
      1. **Facts:** Plaintiff was convicted for teaching a child German under a Nebraska statute that outlawed the teaching of foreign languages to students that had not yet completed the eighth grade. The Supreme Court of Nebraska upheld the conviction
      2. **Holding:** Education is a fundamental liberty interest that must be protected, and mere knowledge of the German language cannot be reasonably regarded as harmful. It is not acceptable for this law because it is within the rights of the parents to control the upbringing of their children, and within the right of the teacher to teach.
         a. Parenting decisions are NOT absolute; government may require certain things (like school – because education is so fundamental regardless of what the parents may think). Parents are given heavy deference though.
d. **RIGHT TO PROTECTION OF REPRODUCTIVE AUTONOMY**
   
i. **Three Main Rights:**
   1. The right to **procreate**
   2. The right to **purchase and use contraceptives**
   3. The right to **abortion**

ii. **THE RIGHT TO PROCREATE**
   1. The right to procreate is a fundamental right and therefore government imposed involuntary sterilization must meet strict scrutiny
   
   2. **Skinner v. Oklahoma**
      a. **Facts:** Under a “moral turpitude” law, Oklahoma passed a law forcing the sterilization of someone who had been convicted of two or more crimes.
      b. **Holding:** The right to have offspring is a fundamental right, requiring a compelling state interest (strict scrutiny) to interfere with it. Sterilization of habitual offenders in no way guarantees that new offenders will not be born. Furthermore, there is no guarantee that habitual offenders would spawn offenders themselves.

iii. **THE RIGHT TO PURCHASE AND USE CONTRACEPTIVES**
   1. **Griswold v. Connecticut**
      a. **Facts:** Griswold was the Executive Director of the Planned Parenthood League of Connecticut. She gave information, instruction, and other medical advice to married couples concerning birth control. Griswold was convicted under a Connecticut law, which criminalized the provision of counseling, and other medical treatment, to married persons for purposes of preventing conception.
      b. **Holding:** Though the Constitution does not explicitly protect a general right to privacy, the various guarantees within the Bill of Rights create penumbras, or zones, that establish a right to privacy. Together, the First, Third, Fourth, and Ninth Amendments, create a new constitutional right, the right to privacy in marital relations. The Connecticut statute conflicts with the exercise of this right and is therefore null and void.
   
   2. **Eisenstadt v. Baird**
      a. **Facts:** Baird was convicted under a Massachusetts State law for exhibiting contraceptive articles and for giving a woman a package of Emko vaginal foam. The Massachusetts Supreme Court set aside the conviction for exhibiting contraceptives on the grounds that it violated Appellee’s First Amendment rights, but sustained the conviction for giving away the foam. The law permitted married persons to obtain contraceptives to prevent pregnancy, but forbid single persons from obtaining them.
      b. **Holding:** The dissimilar treatment of similarly situated married and unmarried persons under the Massachusetts law violates the Equal Protection Clause. First, the deterrence of premarital sex cannot be reasonably regarded as the purpose of the law, because the ban has at best a marginal relating to the proffered objective. Second, if health is the rationale of the law, it is both discriminatory and overbroad. Third, the right to obtain contraceptives must be the same for married and unmarried individuals.

iv. **THE RIGHT TO ABORTION**
   1. **The Recognition of the Right to Abortion**
a. **Roe v. Wade**
   i. **Facts:** A state law that absolutely prohibited elective abortions was challenged as unconstitutional.
   ii. **Holding:** The right to personal privacy includes the abortion decision, **but the right is not unqualified and must be considered against important state interests** in regulation. Court does not decide to define when life begins but specifies State doesn’t have interest in women’s health until later in pregnancy when abortion procedures are riskier. Bringing child into stable home, not forcing childbirth, mental health, notes long ancient history of women having right to choose.
      1. Court doesn’t really make a defined holding but says this:
         a. Must be left to medical judgment of pregnant woman’s physician until the end of the first trimester.
         b. From that point on, in promoting interest in health of mother, it may, if it chooses, to regulate abortion procedure in ways reasonably related to women’s health.
         c. After viability, State in promoting interest in potentiality of human life, if it chooses, to regulate and even ban abortion, except where it is necessary, in appropriate medical judgment for preservation of life or death of mother.
      2. This holding uses **substantive** Due Process.
   iii. Uses this under intermediate scrutiny.

b. **Planned Parenthood v. Casey**
   i. **Facts:** The Pennsylvania Abortion Control Act imposed several obligations on women seeking abortions and medical practitioners.
   ii. The Act exempted compliance with the obligations in the event of a medical emergency.
   iii. **Holding:** Right to choose before viability is preserved but no trimester distinction. No statute may put **undue burden on women to have substantial obstacle in her path to seek abortion before viability.**
      1. Some of the obligations of the statute are upheld like:
         a. Informed consent of alternatives
         b. 24 hour wait period
         c. Parental consent
         d. Reporting
            - Casey modifies roe v wade because they look to viability, get rid of SS and use undue burden and get rid of trimester framework of roe v wade
            - **The hybrid undue burden test**
               - A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a **nonviable fetus**
                  - Undue burden - state place's a substantial obstacle in woman's path
2. **Government Regulation of Abortions**
   a. **Waiting Periods**
      i. Court uses “undue burden test” (and not strict scrutiny) \(\rightarrow\) waiting period is constitutional
         1. Is not an undue burden on abortion access
            a. Under the “undue burden standard” a state is permitted to enact pervasive measures that favor childbirth over abortion, even if those measures do not further a health interest.
            b. While the waiting period does not limit a physician’s discretion, that is not a reason to invalidate [the statute.]
   b. **Informed Consent Requirements**
      i. After *Casey*, more likely that these statutes will be upheld
         1. laws that require that women be advised about the fetus and its characteristics at the stage of pregnancy

3. **Government Restrictions on Funds and Facilities for Abortions**
   a. Government is NOT constitutionally required to subsidize abortions even if it is paying for childbirth
   b. **Maher v. Roe**
      i. **Facts**: The State Welfare Department limits funding for first trimester abortions to those abortions that are “medically necessary.” Indigent women brought suit, claiming that the statute denies them their constitutional right to an abortion.
      ii. **Holding**: There is no “constitutional right to an abortion.” Rather there is a constitutional right to have the government not unreasonably interfere with a woman’s decision to have an abortion. Connecticut may make childbirth a more attractive option for the indigent by paying for a pregnancy taken to term, but the state has put no obstacle in the way of an indigent woman procuring an abortion. The Supreme Court is in no position to review the State’s policy choice.

4. **Spousal Consent and Notice Requirements**
   a. The government cannot require either spousal consent or spousal notification as a prerequisite for a married woman obtaining an abortion.
   b. **Planned Parenthood v. Danforth**
      i. **Facts**: Missouri law required spousal consent for an abortion in the first 12 weeks unless in an emergency.
      ii. **Holding**: A state may not constitutionally require the consent of the spouse, because The husband’s interest in continuing the pregnancy
of his wife (under this law) always outweighs any of her interests; this is unconstitutional.

c. Casey
- Spousal notification was unconst.
- Considered a substantial obstacle
- Looks at domestic violence
- Woman is more directly effected bc she has the burden of carrying the child

5. Parental Consent and Notice Requirements
a. Belotti v. Baird
   i. Facts: Massachusetts’s required unmarried, minor women to obtain parental consent from both parents before allowing her to acquire an abortion. In the event that she was unwilling or unable to obtain such consent, she could petition in superior court for a determination that she is mature enough to make this decision, or even if she is not, the abortion is in her best interest.
   ii. Holding: Children (under 18s) can be prohibited from accessing abortion without parental notice and consent as long as there is an alternate procedure with the minor going before the judge to determine if the abortion is in the minor’s best interest, or by concluding that the child is mature enough to decide for herself.

e. CONSTITUTIONAL PROTECTION FOR SEXUAL ORIENTATION AND SEXUAL ACTIVITY*
   i. Lawrence v. Texas
      1. Facts: Police found two men engaged in sexual conduct, in their home, and they were arrested under a Texas statute that prohibited such conduct between two men.
      2. Holding: While homosexual conduct is not a fundamental right, intimate sexual relationships between consenting adults are protected by the Fourteenth Amendment Due Process clause. This is a liberty.
         - Heightened scrutiny but not SS
         - Liberty protects the person from unwarranted gov’t intrusions into a dwelling or other private places. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct

f. CONSTITUTIONAL PROTECTION FOR MEDICAL CARE DECISIONS
   i. Two Issues:
      1. Right to Refuse Treatment
      2. Right to Physician Assisted Suicide
   ii. RIGHT TO REFUSE TREATMENT
      1. Cruzan v. Director, Missouri Dept. of Health
         a. Facts: Nancy Cruzan was involved in a car accident, which left her in a “persistent vegetative state.” After it became clear that Cruzan would not improve, her parents requested that the hospital terminate the life-support procedures the hospital was providing. The hospital and subsequently the State court refused to comply because “clear and convincing evidence was not shown” that Nancy herself would have wanted that.
         b. Holding: A competent person has a constitutionally protected liberty interest in refusing medical treatment under the Due Process Clause. But incompetent persons do not enjoy the same rights, because they cannot make voluntary and informed decisions.
i. The right to terminate life-sustaining treatment of an incompetent, if it is to be exercised, must be done for such incompetent by a surrogate. *Missouri’s interest in the preservation of life is unquestionably a valid State interest.*

ii. The Due Process Clause protects an interest in life as well as a right to refuse life-saving treatment. Missouri may legitimately safeguard these personal decisions by imposing heightened evidentiary requirements.

iii. Not SS but heightened scrutiny

2. RIGHT TO PHYSICIAN ASSISTED SUICIDE
   a. *Washington v. Glucksberg*
      i. **Facts:** It is a crime to assist suicide in Washington. Glucksberg is a group of physicians who practice medicine in Washington. They occasionally treat terminally ill patients and claim that they would help these patients end their lives if not for ban on assisted suicides
      ii. **Holding:** Assisting suicide is not a liberty or fundamental right. The Constitution requires the state ban to be rationally related to legitimate government interests. Washington’s interest in protecting the integrity and ethics of the medical profession, as well as an interest in protecting vulnerable groups from abuse, neglect and mistakes outweighs patient’s liberty in requesting suicide.
         1. **Rational basis**
         2. **WHAT IS A FUND RIGHT?**
            a. *The three standards – deeply rooted, implicit, neither liberty nor justice*

   b. *Vacco v. Quill p 1045*
      i. **Holding:** It ruled 9-0 that a New York ban on physician-assisted suicide was constitutional, and preventing doctors from assisting their patients, even those terminally ill and/or in great pain, was a legitimate state interest that was well within the authority of the state to regulate. In brief, this decision established that, as a matter of law, there was no constitutional guarantee of a "right to die." On the other hand, patients may refuse even lifesaving medical treatment.

   g. CONSTITUTIONAL PROTECTION FOR CONTROL OVER INFORMATION
      i. *Whalen v. Roe*
         1. **Facts:** New York was collecting personal information regarding individuals prescribed drugs for which there is a legal and an illegal market. The statute also criminalized unauthorized release of any such information. Roe said this violates privacy rights.
         2. **Holding:** Uses rational basis standard because no zone of privacy violated. Statute stipulates protection of info and no facial violation or grievous threat of leaking of private info. Legit government interest is public welfare/health, preventing or regulating misuse of certain drugs.
            ▪ Court says there is no substantial and direct infringement even though there is a fundamental right

h. THE RIGHT TO VOTE
   i. Must meet *strict scrutiny*
      1. The right to vote is regarded as fundamental because it is essential to a democratic society; it is through voting that people choose their government and hold it accountable.
2. Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.

3. The right to vote is a fundamental political right because “it is preservative of all rights.”

ii. DILUTION OF RIGHT TO VOTE (GERRYMANDERING)

1. **Reynolds v. Sims**
   a. **Facts:** The State of Alabama requires itself to redistrict its legislature every ten years. However, the Plaintiffs allege that no such reapportionment has gone on in sixty years. Under the current apportionment, only one quarter of the population lived in districts represented by a majority of the Senate and House of Representatives.
   b. **Holding:** Court CAN decide whether State’s local AND federal elections follow Equal Protection in highly protected voter right interests; diluting some people’s vote is substantial violation, there must be “good faith effort” to exact “one person one vote.”
   c. **SS**

   a. **Facts:** The Arizona Constitution lets voters adopt laws and constitutional amendments by ballot initiative. Arizona voters adopted Proposition 106 in 2000 to address the problem of gerrymandering by creating the Arizona Independent Redistricting Commission (AIRC). The Arizona Legislature sued in 2012, arguing that the creation of the AIRC violated the Elections Clause of the U. S. Constitution, which says “The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations.”
   b. **Holding:** The Court held that "[r]edistricting is a legislative function to be performed in accordance with the State’s prescriptions for lawmaking, which may include the referendum. While exercise of the initiative was not at issue in this Court’s prior decisions, there is no constitutional barrier to a State's empowerment of its people by embracing that form of lawmaking."
   - Court upholds gerrymandering as long as not arbitrary

i. CONSTITUTIONAL PROTECTION FOR THE RIGHT TO AN EDUCATION

   i. The Supreme Court has **refused** to recognize a fundamental right to education.
   
   ii. **San Antonio Independent School District v. Rodriguez**

1. **Facts:** The State of Texas provides for free primary and secondary education for the children of the State. The state provides a set amount of funding for each district based on the number of students in the district. The district makes up the difference in operating expense with funds from local property taxes. This reliance on property taxes results in a large disparity in per student spending between property rich and property poor districts. Respondents allege that this denies the children in poor district Equal Protection of the laws in violation of the Fourteenth Amendment.

2. **Holding:** Wealth (or poor) is not a protected class. **There is no explicit constitutional guarantee to education.** As a result, there is no constitutional right to a certain level of education, or equal education, as long as minimal requirements are met; no way to completely strip inequality in school systems, financing etc.
a. **No aff rights to goods and services** – like education

3. **Dissent:** Nexus Test
   a. As the Nexus between education and right to exercise the enumerated rights draws closer, the scrutiny should heighten.
   b. Education (an admittedly unenumerated interest) is intertwined with constitutional interests and fundamental rights like electoral process, rights of free speech and association.

IV. **PROCEDURAL DUE PROCESS**
   a. **Procedural Due Process:** Procedures that the government must follow when it takes away a person’s life, liberty, or property.
      i. What kind of notice and what forms of hearing the government must provide when it takes a particular action.
         1. Used if plaintiff wants government action declared unconstitutional because of lack procedural safeguards (ex: notice and a hearing)
      ii. **Distinguished from substantive Due Process,** which is whether or not the government had an adequate reason for taking away someone’s rights.

b. **PROCEDURAL DUE PROCESS ANALYSIS**
   i. **Has there been a deprivation?**
      1. **Governmental Negligence** - NO (Prisoner slips on pillow; Cop in chase mistake hits prsn)
         a. Look to statutory tort remedies
         b. No intentionality
      2. **Government Failure to Act** - NO. (State didn’t rescue kid from child abuse (no duty to act))
         a. Due process is a limitation of state’s power to act rather than a guarantee of safety from other parties
         b. Look at entitlement – not entitlement if there is discretion, there must be more than an abstract need or desire for gov’t service
      3. **Governmental Reckless Indifference** - YES. (unless there’s an emergency)
      4. **Government “Emergency”** - NO. When unforeseen circumstances require an officers instant judgment, even if reckless, doesn’t constitute
         a. **Exception:** unless there is arbitrary government action that “shocks conscience” - YES.
            i. Key question: Is there a purpose to cause harm unrelated to legitimate government interest (an “overt action”)
   ii. **Is it of “life, liberty, or property?”**
      1. Financial aid recipients whose benefits were terminated without being afforded a pre-termination hearing → **YES** (a hearing is procedural Due Process under **property**)
         a. **Goldberg v. Kelly**
            i. Welfare benefits, if you deprive you are taking away their survival funds
            ii. Must occur PRE TERMINATION as opposed to post.
            iii. Doesn’t have to be a judicial hearing but must be in a meaningful time and manner
      2. If a professor wants tenure at the end of his contract – NO (no property interest)
         a. Must be more than a unilateral expectation of it
         b. Property interest must arise from an independent source such as state law
         c. Court looks at **whether there is a reasonable expectation to continue receipt of benefit**
      3. If school students are suspended without a hearing – **YES** (reputation plus students have liberty, and school cannot withdraw their right to an education without adequate hearing.)
      4. Store posts mugshot of alleged thief – NO (reputation is not a protected liberty interest)
5. Statute doesn’t mandate that police officers enforce restraining orders – NO (not a property interest, if police doesn't have to enforce it, it is an entitlement, furthermore, no monetary value attached.)

iii. Is it **without “due process of law”?** / What procedures are required?

1. Adequate Notice and hearing  
   a. To determine adequacy of notice and hearing, look to Eldridge Test  
      i. PRIVATE interest that will be affected by the official action (importance of the interest involved)  
      ii. Risk of erroneous deprivation with the current process, and probable value of an additional or substitute process (Degree to which a new program will make a DIFFERENCE)  
         1. To the extent that the private and gov't interest do not outweigh each other, the court will rely on B  
   iii. What is the GOVERNMENT interest? - including the function involve and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail

iv.  
2. **Matthews v. Eldridge**  
   a. **Facts:** Disability benefits ceased with termination notice giving him statement of reasons, and opportunity to submit a written response  
   b. **Holding:**  
      i. Private Interest  
         1. Disability benefits not based on need; he might not be affected at all by the discontinuation of benefits. Additionally, there are other sources of government support (food stamps, welfare.)  
      ii. Will a new program make a significant difference?  
         1. Government’s current procedure avoids error as much as possible with objective medical evidence, evidentiary review, allowing him to respond to termination notice with additional evidence or reasons why benefits should continue.  
   iii. Government Interest  
      1. Costs of increased hearings providing benefits to ineligible recipients would be high  
3. For **government employee** a full hearing is **not** necessary when firing an employee from a government job.
CHAPTER 9: FIRST AMENDMENT: FREEDOM OF EXPRESSION

I. INTRO

a. First Amendment Protects Rights Of:
   i. Religion
      1. Free Exercise
      2. Establishment
   ii. Free Speech
   iii. Free press
   iv. Assembly
   v. Petition
   vi. Implicitly: Association

b. The First Amendment absolute, there is no qualifier.
   i. However, there are limitations imposed on these rights.

c. Why Is Freedom of Speech a Fundamental Right?
   i. Search for the Truth
      1. Marketplace of ideas as a collective helps find the truth
   ii. Self-Governance
      1. First Amendment allows for people to govern themselves, by being able to speak
         freely- covers many forms of thought and expression:
         a. Education
         b. Philosophy and science
         c. Literature and arts
         d. Public discussions and public issues
   iii. Advancing Autonomy (self-fulfillment and autonomy)
      1. Freedom of expression permits and encourages the exercise of central human
         capacity to create and express symbolic systems, such as speech, writing, pictures,
         and music
   iv. Promoting Tolerance

II. FREEDOM OF SPEECH

a. FREE SPEECH METHODOLOGY

i. FREEDOM OF SPEECH ANALYSIS

1. Does It Regulate Speech?
   a. If YES, presumptively invalid (This is content based regulation)
      i. Content-based: Strict Scrutiny
   b. Non-Speech may include conduct (this is usually non-expressive)
      i. IF CONDUCT look to see if
         1. Speaker intends to convey a particular message
         2. Likelihood is great that the message is understood by those
            who viewed it (read broadly)
            a. If yes, go to C.
   c. WHEN May Government Regulate Communicative/Expressive Conduct?
      i. When it is within the power of government
      ii. When it furthers an important, substantial governmental interest
      iii. When government interest is unrelated to suppressing speech
      iv. When restriction is no greater than essential

2. Is It Content Based or Content Neutral?
   a. Content Based (Strict Scrutiny)
i. Subject of Speech

ii. Viewpoint of Speech

1. *Turner Broadcasting v. FCC*
   
a. **Facts:** Federal legislation requires cable television companies to devote a portion of their channels to local programming. Cable companies thought this was a violation of content of speech because it reduced the number of channels they could control.

b. **Holding:** No. The regulation does not force an opinion on to the viewing public or limit access to certain views. Therefore, it is content-neutral and constitutional.

2. *Boos v. Barry*
   
a. **Facts:** Boos wants to display signs in front of the embassies in Washington, D.C. There is a local statute that prohibits such displays if they are negative.

b. **Holding:** The display statute regulates speech based on its potential impact. It prohibits political speech and is clearly content-based. Protecting foreign dignitaries from insults is not a compelling governmental interest in support of a content-based regulation.

c. This regulation focuses on what a picket card would say. It discriminates between the types of speech because a picket sign regarding employment disputes would be allowed while political opinions that are negative are prohibited.

b. **Content Neutral** *(Intermediate Scrutiny)*
   
   i. Reasonable time, place, manner restrictions may be used

   ii. So long as designed to serve a substantial gov’t interest and do not unreasonably limit alt avenues of communications

      1. Look at whether other reasonable time place and manner restrictions are available

   c. **PROBLEMS IN APPLYING THE DISTINCTION BETWEEN CONTENT BASED AND CONTENT NEUTRAL LAWS**

      i. *City of Renton v. Playtime Theatres*

         1. **Facts:** A zoning ordinance prohibited adult movie theatres from being located within 1,000 feet of any residential zone, church, park or school. Playtime Theatres, Inc., claimed that the First and Fourteenth Amendments were violated by the city ordinance.

         2. **Holding:** Content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication. These restrictions are ok because they prevent theatres from being certain distances from schools, dwellings, etc.

            a. **Content Neutral Because Secondary Effects**

               i. Ordinance may be content based on its face but still content neutral if there is a
substantial government interest for the law.
ii. Further, this ordinance is not interfering with the content of the theatre.

III. Treated as content neutral because it doesn’t ban them all together but rather restricts it to certain areas
IV. They say its content neutral because of the secondary effects of the adult movie theatres in the zone

i. National Endowment for the Arts v. Finley
   1. **Facts:** Finley was denied a federal grant to fund her performance art after the National Endowment for the Arts determined that it might offend the general standards of decency.
   2. **Holding:** This law is constitutional as it does not interfere with freedom of speech rights and it is not overly vague. This law only requires the Petitioner to consider factors of decency. It does not mandate that all explicit works be denied federal grants. Therefore, it is not an unconstitutional content-based rule.

ii. Pleasant Grove v. Summum
   1. **Facts:** Summum, a religious organization, sent a letter to the mayor of Pleasant Grove, Utah asking to place a monument in one of the city’s parks. Although the park already housed a monument to the Ten Commandments, the mayor denied Summum’s request because the monument did not "directly relate to the history of Pleasant Grove." Summum filed suit against the city in federal court citing, among other things, a violation of its First Amendment free speech rights.
   2. **Holding:** The Court held that the placement of a monument in a public park is a form of government speech and therefore not subject to scrutiny under the Free Speech Clause of the First Amendment. The Court reasoned that since Pleasant Grove City had retained final authority over which monuments were displayed, the monuments represented an expression of the city’s viewpoints and thus government speech.

2. Is It Vague or Overbroad? (Allows for facial challenge)
   a. If vague or overbroad, unconstitutional per se.
      i. **Vague:** If a reasonable person cannot tell what is and is not being regulated
         1. Coates v. City of Cincinnati
            a. **Facts:** Coates was involved with several other individuals in a demonstration and picketing in a labor dispute. They were later convicted for violating a Cincinnati city ordinance prohibiting assembly on public sidewalks if the assembly annoyed other individuals. Appellant claims that such a statute violates his right to free assembly.
            b. **Holding:** The ordinance is unconstitutionally vague because it subjects the exercise of the right of
assembly to an unascertainable standard, and unconstitutionally broad because it authorize the punishment of constitutionally protected conduct. In fact conduct that annoys some people, does not annoy others. Therefore it causes guessing as to what the meaning of the standard of conduct is.

ii. **Overbroad**: If it regulates substantially more speech than the Constitution allows. Strikes it down on its face (but SC has allowed a narrowing of the understanding and are able to strike down to this particular set of facts, but uphold it as a whole.)

1. **Substantially Overbroad**: significant number of situations where it restricts protected speech as well as prohibited speech; might chill protected speech.
2. **Unconstitutional As Applied to Others**: allows 3rd party standing.

3. **Schad v. Borough of Mount Ephraim**
   a. **Facts**: Schad operated an adult bookstore in the commercial zone of the Ephraim borough, and the store contains licensed coin-operated devices that display adult films. When appellants added a coin-operated mechanism permitting a customer to watch a usually nude live dancer, complaints were filed against them charging that the exhibition of live dancing violated an ordinance that restricted uses permitted in a commercial zone.
   b. **Holding**: An entertainment program may not be prohibited solely because it displays a nude human figure, and nude dancing is not without its First Amendment protection. The First Amendment requires sufficient justification for the exclusion of a broad category of protected expression from the permitted commercial uses (nude dancing).
      - **This would prohibit plays, concerts, etc.**

4. **Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.**
   a. **Facts**: The Board of Airport Commissioners of Los Angeles adopted an ordinance, which prohibited all "First Amendment activities" in the Los Angeles International Airport (LAX). Alan Snyder, a minister with Jews for Jesus, was instructed by an airport officer to refrain from distributing free religious literature on a walkway in the central terminal of LAX.
   b. **Holding**: Using the "First Amendment overbreadth doctrine," the Court found that the ordinance violated the Constitution. The rule was vague, overly broad, and would have effectively prohibited activities such as reading, talking, or wearing expressive shirts or political buttons in the LAX terminal. Allowing such an ordinance, would have caused LAX to become a "First Amendment Free Zone."
3. Prior Restraints
   a. **Prior Restraint**: A court order or administrative order that prevents speech from occurring in advance of the time the speech occurs (like licensing or injunction.)
      i. Especially Disfavored b/c it chills people from engaging in constitutionally protected activities
   b. **Collateral Bar Rule**: If there is a court order or injunction, it prevents one from even raising the argument as a constitutional one, if they already violated the court order
      i. Rationale: necessary in respect for court order / judicial system, people would constantly raise these issues otherwise to avoid orders
   c. Licensing (permit for speech) is only allowed if:
      i. Government has important reason for it
         1. Public welfare, allocation of resources, efficiency and fairness of use of its resources
         2. National security
      ii. Clear standards leaving almost no discretion to government
      iii. Procedural safeguards
         1. Prompt decisions as to whether or not the speech will be allowed
         2. Full and fair hearing before determination/speech is prevented
         3. Prompt judicial determination in the hearing of the license.
   d. **Court Orders As a Prior Restraint**
      i. *Near v. State of Minnesota ex rel. Olson* (EXCEPTION)
         1. **Facts**: Minnesota officials obtained an injunction to prevent Near from publishing his newspaper under a state law that allowed such action against periodicals. The law provided that any person "engaged in the business" of regularly publishing or circulating an "obscene, lewd, and lascivious" or a "malicious, scandalous and defamatory" newspaper or periodical was guilty of a nuisance, and could be enjoined (stopped) from further committing or maintaining the nuisance.
         2. **Holding**: This was unconstitutional. The statutory scheme constituted a prior restraint and hence was invalid under the First Amendment. Thus the Court established as a constitutional principle the doctrine that, with some narrow exceptions, the government could not censor or otherwise prohibit a publication in advance, even though the communication might be punishable after publication in a criminal or other proceeding. LIKE the release of:
            a. Locations of troops
            b. Impending attacks
            c. Sailing dates of drafts
            d. Etc.
   e. **Court Orders to Protect National Security**
      i. *New York Times Co. v. United States*
The President argued that prior restraint was necessary to protect national security.

2. **Holding**: The Court held that the government did not overcome the "heavy presumption against" prior restraint of the press in this case. Justices Black and Douglas argued that the vague word "security" should not be used "to abrogate the fundamental law embodied in the First Amendment." Justice Brennan reasoned that since publication would not cause an inevitable, direct, and immediate event imperiling the safety of American forces, prior restraint was unjustified.

f. **Court Orders to Protect Fair Trials**
   i. *Nebraska Press Association v. Stuart*
      1. **Facts**: A Nebraska state trial judge, presiding over a widely publicized murder trial, entered an order restraining members of the press from publishing or broadcasting accounts of confessions made by the accused to the police. The judge felt that this measure was necessary to guarantee a fair trial to the accused.
      2. **Holding**: Yes. The Court agreed with the trial judge that the murder case would generate "intense and pervasive pretrial publicity."
         a. However, the unanimous court held that the practical problems associated with implementing a prior restraint on the press in this case would not have served the accused's rights. Chief Justice Burger reasoned, "a whole community cannot be restrained from discussing a subject intimately affecting life within it."

g. **Court Orders Seizing the Assets of Businesses Convicted of Obscenity Violations**
   i. *Alexander v. United States*
      1. **Facts**: Alexander owned adult bookstores throughout the state. He was convicted of selling obscene pornographic tapes and racketeering. The United States, ordered him to forfeit all of his businesses.
      2. **Holding**: The majority emphasizes the definition of a prior restraint to distinguish it from a subsequent judgment. The stores were shut down because they were related to past wrongdoings. The Petitioner is free to start another adult bookstore chain once he serves his sentence. So, this action is not a content-based restraint.

h. **Licensing As a Prior Restraint**
   i. *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*
      1. **Facts**: The Village of Stratton promulgated an ordinance that prohibits canvassers from entering private residential property to promote any cause without first obtaining a permit from the mayor’s office. The Watchtower Bible and Tract Society of New York filed a suit seeking an injunction against the ordinance.
      2. **Holding**: The Court held that the ordinance’s provisions making it a misdemeanor to engage in door-to-door advocacy without first registering with the mayor and
receiving a permit violate the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills. The Court reasoned that the village’s interest in preventing fraud could not support the ordinance’s application to the religious organizations, to political campaigns, or to enlisting support for unpopular causes.

ii. To require a license prior to speech, the Court found that there must be:

1. **An important reason for licensing**
   a. A parade or demonstration that can only be denied if the area is already in use.
   i. Important Reason: to allow the city enough time to get proper police amounts together to protect them

2. **Clear Standards Leaving Almost No Discretion to the Government**
   a. Court concerned about content-based censorship, and denying permits with unfavorable speech.

3. **Procedural Safeguard**
   a. Any system of prior restraints must have:
      i. Prompt decision as to whether the speech will be allowed
      ii. Full and fair hearing before the speech is prevented
      iii. A prompt judicial determination of the validity of the preclusion of any speech.

4. **What Is an Infringement of Freedom of Speech?**
   a. Laws that significantly burden speech are ones that:
      i. Allow civil liability for expression
      ii. Prevent compensation for speech
      iii. That compel expression
      iv. That condition a benefit on a person’s foregoing speech
      v. That pressure individuals not to speak

b. **CIVIL LIABILITY AND DENIAL OF COMPENSATION FOR SPEECH**

   **PROHIBITIONS ON COMPENSATION**
   i. *United Stated v. National Treasury Employees Union*
      1. **Facts:** The Ethics in Government Act of 1978, amended by the Ethics Reform Act of 1989, prohibits members of Congress, federal officers, and other government employees from accepting an honorarium for making an appearance, speech, or writing an article. The prohibition applies even when neither the subject of the speech or article nor the person or group paying for it has any connection with the employee’s official duties. The National Treasury Employees Union filed suit challenging the honorarium ban as an unconstitutional abridgement of its freedom of speech
      2. **Holding:** The Court declared that a flat ban violated free-speech rights. Concerns about impropriety do not apply if there is no link between a government employee’s job and
"the subject matter of the expression or the character of the payor."

c. COMPELLED SPEECH
      1. **Facts:** The West Virginia Board of Education required that the flag salute be part of the program of activities in all public schools. All teachers and pupils were required to honor the Flag; refusal to salute was treated as "insubordination" and was punishable by expulsion and charges of delinquency.
      2. **Holding:** The Court held that it was unconstitutional for public schools to compel students to salute the flag. The Court found that such a salute was a form of utterance and was a means of communicating ideas. "Compulsory unification of opinion," the Court held, was doomed to failure, and was antithetical to First Amendment values.

   ii. *McIntyre v. Ohio Elections Commission*
      1. **Facts:** Margaret McIntyre distributed leaflets to persons attending a public meeting in Ohio expressing her opposition to a proposed school tax levy. Though they were independently produced, she signed them as the views of "Concerned Parents and Tax Payers." Mrs. McIntyre was subsequently fined $100 for violating Section 3599.09(A) of the Ohio Elections Commission Code prohibiting the distribution of campaign literature that does not contain the name and address of the person or campaign official issuing the literature.
      2. **Holding:** Yes. The freedom to publish anonymously is protected by the First Amendment and "extends beyond the literary realm to the advocacy of political causes." When a law burdens such anonymous speech, the Court applies "exacting scrutiny," upholding the restriction only if it is narrowly tailored to serve an overriding state interest.

d. GOVERNMENT PRESSURES
   i. What happens when the government pressures individuals from refraining from using speech, without actually prohibiting or penalizing speech? Cases mixed on this issue

b. TYPES OF UNPROTECTED AND LESS PROTECTED SPEECH
   i. INCITEMENT OF ILLEGAL ACTIVITY
      1. The Clear and Present Danger Test
         a. *Schenck v. United States*
            1. **Facts:** During World War I, Schenck mailed circulars to draftees. The circulars suggested that the draft was a monstrous wrong motivated by the capitalist system. The circulars urged "Do not submit to intimidation" but advised only peaceful action such as petitioning to repeal the Conscript Act. Schenck was charged with conspiracy to violate the Espionage Act by attempting to cause insubordination in the military and to obstruct recruitment.
ii. **Holding**: Schenck is not protected in this situation. The character of every act depends on the circumstances. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." During wartime, utterances tolerable in peacetime can be punished.

b. **Frohwerk v. United States**

i. **Facts**: The Missouri Staats Zetung, a newspaper published in Kansas City, Missouri, issued a series of twelve editorials written by Jacob Frohwerk denouncing involvement by the United States in World War I. Frohwerk was charged with violating the Espionage Act of 1917, which made it a crime to "willfully cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States.

ii. **Holding**: The Court reasserted its conclusion in Schenck v. United States that the First Amendment does not "give immunity for every possible use of language." After noting that the federal government has a valid interest in protecting the recruitment of members of the armed forces, and that in publishing the articles, Frohwerk engaged in such a conspiracy, the Court concluded that Frohwerk's conviction was legal. The Court dismissed the argument that Frohwerk's intention was never to obstruct recruitment, noting "conspiracy to obstruct recruiting would be criminal even if no means were agreed upon specifically by which to accomplish the intent."

c. **Debs v. United States**

i. **Facts**: The Espionage Act of 1917 made it a crime to "convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies." This had the effect of constraining sedition and political speech. On June 16, 1918, Eugene V. Debs, a leader of the Socialist Party of America, gave a speech in Canton, Ohio protesting involvement in World War I. During the speech, he discussed the rise of socialism and specifically praised individuals who had refused to serve in the military and obstructed military recruiting. For his speech, Debs was arrested and charged with violating the Espionage Act. At trial, Debs argued the Espionage Act violated his right to free speech under the First Amendment. A federal district court rejected his claim and sentenced Debs to ten years in prison.

ii. **Holding**: The Court found Debs' sympathy for individuals convicted of opposing the draft and obstructing recruitment analogous to the situation in Schenck. Thus, Debs' conviction was upheld.

d. **Abrams v. United States**

i. **Facts**: The defendants were convicted on the basis of two leaflets they printed and threw from windows of a building. One leaflet signed "revolutionists" denounced the sending of American troops to Russia. The second leaflet, written in Yiddish, denounced the war and US efforts to impede the Russian Revolution. The defendants were charged and convicted for inciting resistance to the war effort
and for urging curtailment of production of essential war material. They were sentenced to 20 years in prison.

ii. **Holding**: The act’s amendments are constitutional and the defendants’ convictions are affirmed. In Clarke’s majority opinion, the leaflets are an appeal to violent revolution, a call for a general strike, and an attempt to curtail production of munitions. The leaflets had a tendency to encourage war resistance and to curtail war production.

e. **Gitlow v. New York**

i. **Facts**: Gitlow, a socialist, was arrested for distributing copies of a "left-wing manifesto" that called for the establishment of socialism through strikes and class action of any form. Gitlow was convicted under a state criminal anarchy law, which punished advocating the overthrow of the government by force. At his trial, Gitlow argued that since there was no resulting action flowing from the manifesto’s publication, the statute penalized utterances without propensity to incitement of concrete action. The New York courts had decided that anyone who advocated the doctrine of violent revolution violated the law.

ii. **Holding**: On the merits, a state may forbid both speech and publication if they have a tendency to result in action dangerous to public security, even though such utterances create no clear and present danger. The rationale of the majority has sometimes been called the "dangerous tendency" test. The legislature may decide that an entire class of speech is so dangerous that it should be prohibited. Those legislative decisions will be upheld if not unreasonable, and the defendant will be punished even if her speech created no danger at all.

f. **Whitney v. California**

i. **Facts**: Charlotte Anita Whitney, a member of the Communist Labor Party of California, was prosecuted under that state’s Criminal Syndicalism Act. The Act prohibited advocating, teaching, or aiding the commission of a crime, including "terrorism as a means of accomplishing a change in industrial ownership...or effecting any political change."

ii. **Holding**: In a unanimous decision, the Court sustained Whitney's conviction and held that the Act did not violate the Constitution. The Court found that the Act violated neither the Due Process Clause nor the Equal Protection Clause, and that freedom of speech guaranteed by the First Amendment was not an absolute right. The Court argued "that a State...may punish those who abuse this freedom by utterances...tending to...endanger the foundations of organized government and threaten its overthrow by unlawful means" and was not open to question. The decision is most notable for the concurring opinion written by Justice Brandeis, in which he argued that only clear, present, and imminent threats of "serious evils" could justify suppression of speech.

2. The Risk Approach Formula
a. **Dennis v. United States**

i. **Facts**: Raymond Dennis and others were members of the Communist Party; they were also officers and members of the International
Union of Mine, Mill, and Smelter Workers. They filed false affidavits between 1949 and 1955 to satisfy the stipulations of 9(h) of the National Labor Relations Act as amended by the Taft-Hartley Act, which required all union officers to submit non-Communist affidavits. The union officials retained their Communist Party affiliations, filed the affidavits, and enabled the union to use the services of the National Labor Relations Board. The union officers were indicted by the United States District Court for conspiracy to fraudulently obtain the services of the National Labor Relations Board.

i. **Holding:** Yes, not addressed, and yes. In a 7-2 decision, the Supreme Court held that the indictment properly charged a conspiracy to defraud the United States Government under 18 U.S.C. 371. The majority opinion, authored by Justice Abe Fortas, argued that the conspiracy of filing the false affidavits was intentional and that the events of filing the affidavits and using the NLRB facilities together were a "concert of action" with the purpose of defrauding the Government.

3. The *Brandenburg* Test
   a. *Brandenburg v. Ohio*
      i. **Facts:** Brandenburg, a leader in the Ku Klux Klan, made a speech at a Klan rally and was later convicted under an Ohio criminal syndicalism law. The law made illegal advocating "crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform," as well as assembling "with any society, group, or assemblage of persons formed to teach or advocate the doctrines of criminal syndicalism."
      ii. **Holding:** The Ohio law violated Brandenburg's right to free speech. The Court used a two-pronged test to evaluate speech acts:
         1. Speech can be prohibited if it is "directed at inciting or producing imminent lawless action" and
         2. It is "likely to incite or produce such action." The criminal syndicalism act made illegal the advocacy and teaching of doctrines while ignoring whether or not that advocacy and teaching would actually incite imminent lawless action. The failure to make this distinction rendered the law overly broad and in violation of the Constitution.

**CLEAR AND PRESENT DANGER TEST:**
1. Likelihood (with intent) of causing
2. Imminent
3. Seriously harmful, lawless action

ii. **FIGHTING WORDS, THE HOSTILE AUDIENCE, AND THE PROBLEM OF RACIST SPEECH**
   1. **Fighting Words**
      a. *Chaplinsky v. New Hampshire*
         i. **Facts:** Chaplinsky, a Jehovah's Witness, called a city marshal a "God-damned racketeer" and "a damned fascist" in a public place. He was arrested and convicted under a state law for violating a breach of the peace.
         ii. **Holding:** Some forms of expression--among them obscenity and fighting words (words that inflict injury or tend to excite an immediate breach of the peace)--do not convey ideas and thus are
**not subject to** First Amendment protection. In this case, Chaplinsky uttered fighting words, i.e., words that "inflict injury or tend to incite an immediate breach of the peace."

b. Narrowing the Fighting Words Doctrine
   - **Is there an intent to intimidate?**
   - **1 Directed at a specific person**
   - **AND**
   - **2 Likely to provoke a violent response**

   - Fighting words - those which by their very utterance inflict injury to tend to incite an immediate breach of the peace

   i. There is a small class of fighting words, which are likely to provoke the average person to retaliation and thereby cause a breach of the peace.
   ii. Unprotected fighting words occur **only if** the speech is directed to a specific person and likely to provoke a violent response.

   1. "Fuck the Draft" on the back of a jacket is not aimed at a specific person, even if it could be reasonably thought to provoke a violent response.
   2. Flag burning is symbolic protected speech, though it might provoke violence, because it is not aimed at a particular person.

c. Fighting Words Laws Invalidated as Vague and Overbroad
   i. **Gooding v. Wilson**
      1. **Facts:** A Georgia state court convicted Johnny Wilson of violating a state statute. The statute provided "[a]ny person who shall, without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor."
      2. **Holding:** The Supreme Court because the statute was unconstitutionally vague and overbroad. Quoting Speiser v. Randall, the Court noted "the separation of legitimate from illegitimate speech calls for more sensitive tools than (Georgia) has supplied."

d. Narrowing Fighting Words Laws as Content Based Restrictions
   i. **R.A.V. v. City of St. Paul**
      1. **Facts:** Several teenagers allegedly burned a crudely fashioned cross on a black family's lawn. The police charged one of the teens under a local bias-motivated criminal ordinance, which prohibits the display of a symbol, which "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.
      2. **Holding:** The ordinance was invalid on its face because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." The First Amendment prevents government from punishing speech and expressive conduct because it disapproves of the ideas expressed. Under the ordinance, for example, one could hold up a sign declaring all anti-Semite are bastards but not that all Jews
are bastards. Government has no authority "to license one side of a debate to fight freestyle, while requiring the other to follow the Marquis of Queensbury Rules."

- The Ordinance is prohibited because it applies only to those fighting words that insult or provoke violence against persons based on "race, color, creed, religion or gender." Therefore, if the Ordinance were upheld, those who wished to use fighting words in connection with other ideas, such as on the basis of political affiliation, union membership or homosexuality, would not be covered.

e. Even though the fighting words doctrine exists, the court hasn't held anything as fighting words in over 40 years

2. The Hostile Audience Cases
i. **Facts**: On March 8, 1949, Irving Feiner, a white student at Syracuse University, made an inflammatory speech on a street corner in Syracuse, New York. During the speech, which was intended to encourage listeners to attend a leftist rally, Feiner made several disparaging remarks about local politicians, organizations, and President Truman. A crowd gathered, and several listeners began "muttering" and "shoving." One listener threatened Feiner. Two officers on the scene, fearing violence, asked Feiner twice to end his speech. After he refused, the officers arrested Feiner for inciting a breach of the peace.

ii. **Holding**: The Court applied the "clear and present danger" principle it originally articulated in Schenck v. United States (1919). According to the Court, Feiner's arrest was a valid exercise of "the interest of the community in maintaining peace and order on its streets." The Chief Justice dismissed the notion that the arrest amounted to the suppression of free communication. "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace."

b. Virginia v. Black
i. **Facts**: Barry Black, Richard Elliott, and Jonathan O'Mara were convicted separately of violating a Virginia statute that makes it a felony "for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place," and specifies that "any such burning...shall be prima facie evidence of intent to intimidate a person or group."

ii. **Holding**: the Court held that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, the provision in the Virginia statute treating *any cross burning as prima facie evidence of intent to intimidate* renders the statute unconstitutional in its current form.

1. Does it regulate less protected or unprotected speech?
   A. **Unprotected**: 
      i. Fighting words; hostile audience; true threat (hate speech)
c. Hate speech statutes are often struck down because they are content based.

iii. SEXUALLY ORIENTED SPEECH
1. Obscenity
   a. Supreme Court Decisions Finding Obscenity Unprotected
      i. Roth v. United States
         1. Facts: Roth operated a book-selling business in New York and was convicted of mailing obscene circulars and an obscene book in violation of a federal obscenity statute. Roth's case was combined with Alberts v. California, in which a California obscenity law was challenged by Alberts after his similar conviction for selling lewd and obscene books in addition to composing and publishing obscene advertisements for his products.
         2. Holding: The Court held that obscenity was not "within the area of constitutionally protected speech or press." The Court noted that the First Amendment was not intended to protect every utterance or form of expression, such as materials that were "utterly without redeeming social importance." The Court held that the test to determine obscenity was "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court held that such a definition of obscenity gave sufficient fair warning and satisfied the demands of Due Process.

      ii. Paris Adult Theatre I v. Slaton
         1. Facts: State officials in Georgia sought to enjoin the showing of allegedly obscene films at the Paris Adult Theatre. The Theatre clearly warned potential viewers of the sexual nature of the films and required that patrons be at least 21 years of age. The Georgia Supreme Court held that the films were "hard core" pornography unprotected by the Constitution.
         2. Holding: The Court held that obscene films did not acquire constitutional protection simply because they were exhibited for consenting adults only. Conduct involving consenting adults, the Court argued, was not always beyond the scope of governmental regulation. The Court found that there were "legitimate state interests at stake in stemming the tide of commercialized obscenity," including the community's quality of life and public safety. The Court also noted that conclusive proof of a connection between antisocial behavior and obscene materials was not necessary to justify the Georgia law.

      iii. Miller v. California (Obscenity Test)
         1. Facts: Miller, after conducting a mass mailing campaign to advertise the sale of "adult" material, was convicted of violating a California statute prohibiting the distribution of
obscene material. Some unwilling recipients of Miller's brochures complained to the police, initiating the legal proceedings.

2. **Holding:** The Court held that obscene materials did not enjoy First Amendment protection. The Court modified the test for obscenity established in Roth v. United States and Memoirs v. Massachusetts, holding that "[t]he basic guidelines for the trier of fact must be:

   - Whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .
   - Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
   - Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

(national standard)

### iv. REPUTATION, PRIVACY, PUBLICITY, AND THE FIRST AMENDMENT: TORTS AND THE FIRST AMENDMENT

1. **Defamation**
   a. Public Officials as Defamation Plaintiffs
      - P must be a public official or running for public office
      - 1. P must show **clear and convincing evidence** of
      - 2. Falsity of D's statement (must show false)
      - 3. P proves d had "actual malice"
         - aka knew statement was false or acted w. reckless disregard of the truth
         - to get compens and pun damages
      - who is public official?
         - Apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it
      - Clear and convincing evidence
         - De novo review standard
      - False statements?
         - False statement of opinion is not punishment, only statement of facts. This gives the high standard breathing room for criticism to be heard. Necessary for full expression to apply
         - Fabrication of quotes is not enough
   
   **REMEDIES**
   - Public official (pub matter):
     - Compens: actual malice
     - Punitive: actual malice
   - Private figure (public concern):
     - Compens: actual malice NOT required
     - Punitive: actual malice
   - Private figure (private matter):
     - Compens: actual malice NOT req
     - Punitive: actual malice NOT req

i. *New York Times Co. v. Sullivan*
1. **Facts:** There was a full-page ad in the New York Times which alleged that the arrest of the Rev. Martin Luther King, Jr. for perjury in Alabama was part of a campaign to destroy King’s efforts to integrate public facilities and encourage blacks to vote. L. B. Sullivan, the Montgomery city commissioner, filed a libel action against the newspaper and four black ministers who were listed as endorsers of the ad, claiming that the allegations against the Montgomery police defamed him personally. Under Alabama law, Sullivan did not have to prove that he had been harmed; and a defense claiming that the ad was truthful was unavailable since the ad contained factual errors. Sullivan won a $500,000 judgment.

2. **Holding:** The Court held that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials except when statements are made with actual malice (with knowledge that they are false or in reckless disregard of their truth or falsity). Under this new standard, Sullivan's case collapsed.

**EXAM TIP:** look to see if this is commercial speech bc it was an ad in a newspaper

- This isn’t commercial speech according to bolger factors

2. **Intentional Infliction of Emotional Distress**
   a. **Hustler Magazine v. Falwell**
      i. **Facts:** A lead story in the November 1983 issue of Hustler Magazine featured a "parody" of an advertisement, modeled after an actual ad campaign, claiming that Falwell, a Fundamentalist minister and political leader, had a drunken incestuous relationship with his mother in an outhouse. Falwell sued to recover damages for libel, invasion of privacy, and intentional infliction of emotional distress. Falwell won a jury verdict on the emotional distress claim and was awarded a total of $150,000 in damages. Hustler Magazine appealed.
      ii. **Holding:** The Court held that public figures, such as Jerry Falwell, may not recover for the intentional infliction of emotional distress without showing that the offending publication contained a false statement of fact which was made with "actual malice." The Court added that the interest of protecting free speech, under the First Amendment, surpassed the state's interest in protecting public figures from patently offensive speech, so long as such speech could not reasonably be construed to state actual facts about its subject.

b. **Snyder v. Phelps**
   i. **Facts:** The family of deceased Marine Lance Cpl. Matthew Snyder filed a lawsuit against members of the Westboro Baptist Church who picketed at his funeral. The family accused the church and its founders of defamation, invasion of privacy and the intentional infliction of emotional distress for displaying signs that said, "Thank God for dead soldiers" and "Fag troops" at Snyder's funeral.
   ii. **Holding:** The Court held that the First Amendment shields those who stage a protest at the funeral of a military service member from liability
• **Public concern:** when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is subject of a legit news interest, that is a subject of general interest and of value and concern to the public.

3. Protected But Low Value Sexual Speech - more def to gov’t and they apply RB
   a. Zoning Ordinances
      i. **Young v. American Mini Theatres**
         1. **Facts:** American Mini Theaters opened two theaters that showed adult movies in the city of Detroit. Two city ordinances enacted in 1972 prohibited the opening of adult theaters within 1,000 feet of other buildings with "regulated uses" or within 500 feet of any residential district.
         2. **Holding:** Detroit’s ordinances were reasonable, and although erotic material could not be completely suppressed, Detroit had adequate reasons to restrict the distribution of such material.
   b. Nude Dancing
      i. **City of Erie v. Pap’s A.M.**
         1. **Facts:** "Kandyland," operated by Pap’s A. M. in Erie PA, featured totally nude female erotic dancing. The city council enacted an ordinance making it an offense to knowingly or intentionally appear in public in a "state of nudity." To comply with the ordinance, dancers had to wear, at a minimum, "pasties" and a "G-string." Pap's filed suit against Erie, seeking a permanent injunction against the ordinance's enforcement.
         2. **Holding:** The Court held that Erie’s public indecency ordinance did not violate any cognizable First Amendment protections of expressive conduct. Even if Erie’s public nudity ban has some minimal effect on the erotic message by muting that portion of the expression that occurs when the last stitch is dropped, the dancers... are free to perform wearing pasties and G-strings." “The requirement... is a minimal restriction in furtherance of the asserted government interests, and the restriction leaves ample capacity to convey the dancers’ erotic message.”
   c. Government Techniques for Controlling Obscenity and Child Pornography
      i. **Stanley v. Georgia**
         1. **Facts:** Law enforcement officers, under the authority of a warrant, searched Stanley’s home pursuant to an investigation of his alleged bookmaking activities. During the search, the officers found three reels of eight-millimeter film. The officers viewed the films, concluded they were obscene, and seized them. Stanley was then tried and convicted under a Georgia law prohibiting the possession of obscene materials.
         2. **Holding:** The Court held that the First and Fourteenth Amendments prohibited making private possession of
obscene materials a crime. In his majority opinion, Justice Marshall noted that the rights to receive information and to personal privacy were fundamental to a free society. Marshall then found that "[i]f the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." The Court distinguished between the mere private possession of obscene materials and the production and distribution of such materials. The latter, the Court held, could be regulated by the states.

ii. **Osborne v. Ohio**
1. **Facts**: After obtaining a warrant, Ohio police searched the home of Clyde Osborne and found explicit pictures of naked, sexually aroused male adolescents. Osborne was then prosecuted and found guilty of violating an Ohio law that made the possession of child pornography illegal.
2. **Holding**: The Court held that Ohio could constitutionally proscribe the possession of child pornography. The Court argued that the case at hand was distinct from Stanley v. Georgia, "because the interest underlying child pornography prohibitions far exceed the interests justifying the Georgia law at issue in Stanley." Ohio did not rely on "a paternalistic interest in regulating Osborne's mind;" rather, Ohio merely attempted to protect the victims of child pornography.

4. **Profanity and "Indecent" Speech**
   a. **Cohen v. California**
      i. **Facts**: A 19-year-old department store worker expressed his opposition to the Vietnam War by wearing a jacket emblazoned with "FUCK THE DRAFT. STOP THE WAR" The young man, Paul Cohen, was charged under a California statute that prohibits "maliciously and willfully disturb[ing] the peace and quiet of any neighborhood or person [by] offensive conduct." Cohen was found guilty and sentenced to 30 days in jail.
      ii. **Holding**: The expletive, while provocative, was not directed toward anyone; besides, there was no evidence that people in substantial numbers would be provoked into some kind of physical action by the words on his jacket. Harlan recognized that "one man's vulgarity is another's lyric." In doing so, the Court protected two elements of speech: the emotive (the expression of emotion) and the cognitive (the expression of ideas).

   b. **INTERNET**
      i. **Reno v. American Civil Liberties Union**
         1. **Facts**: Several litigants challenged the constitutionality of two provisions in the 1996 Communications Decency Act. Intended to protect minors from unsuitable internet material, the Act criminalized the intentional transmission of "obscene or indecent" messages as well as the transmission
of information which depicts or describes "sexual or excretory activities or organs" in a manner deemed "offensive" by community standards.

2. **Holding**: The Court held that the Act violated the First Amendment because its regulations amounted to a content-based blanket restriction of free speech. The Act failed to clearly define "indecent" communications, limit its restrictions to particular times or individuals (by showing that it would not impact adults), provide supportive statements from an authority on the unique nature of internet communications, or conclusively demonstrate that the transmission of "offensive" material is devoid of any social value.

---

ii. *Brown v. Entertainment Merchants Association*

1. **Facts**: Associations of companies that create, publish, distribute, sell and/or rent video games brought a declaratory judgment action against the state of California in a California federal district court. The plaintiffs brought the claim under the First and Fourteenth Amendment s seeking to invalidate a newly-enacted law that imposed restrictions and labeling requirements on the sale or rental of "violent video games" to minors.

2. **Holding**: "Like the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world). That suffices to confer First Amendment protection."

- They used SS bc it was content-based
- Means were not narrowly tailored – overinclusive and underinclusive

---

v. **COMMERCIAL SPEECH**

1. Constitutional Protection for Commercial Speech


      i. **Facts**: Acting on behalf of prescription drug consumers, the Virginia Citizens Consumer Council challenged a Virginia statute that declared it unprofessional conduct for licensed pharmacists to advertise their prescription drug prices.

      ii. **Holding**: The Court held that the First Amendment protects willing speakers and willing listeners equally. The Court noted that in cases of commercial speech, such as price advertising, freedom of speech protections apply just as they would to noncommercial speech. Even speech that is sold for profit, or involves financial solicitations, is protected. The Court concluded that although the Virginia State Board of Pharmacy has a legitimate interest in preserving
b. Commercial Speech is generally protected

2. What Is Commercial Speech?
   a. *Bolger v. Young’s Drugs Products Co.*
      i. **Facts:** Young’s Drug Products Corp. wants to send direct mailings to the public advertising its contraceptives. A federal statute prohibits such activity.
      ii. **Holding:** Whether the printed material is commercial speech depends upon the existence of three distinct attributes:
          1. (1) It is meant to be an advertisement,
          2. (2) It references a particular product, and
          3. (3) There is an economic motivation for disseminating the material.
             a. If all of these attributes are present, then it is protected under the First Amendment of the United States Constitution

3. The Test for Evaluating Regulations of Commercial Speech
   a. *Central Hudson Gas & Electric Corp. v. Public Service Comm. of New York*
      i. **Facts:** The Public Service Commission of New York (PSC), in the interest of conserving energy, enacted a regulation that prohibited electric utilities from promoting electricity use. The PSC’s regulation distinguished promotional advertising from informational advertising, which was permitted.
      ii. **Holding:** The Court held that the New York’s ban violated the right to commercial speech. It cited the protections for “commercial speech from unwarranted governmental regulation.” *There is a four-part analysis for commercial speech cases.*

V. Commercial speech
   a. Is it commercial speech?
      i. Does it advertise?
      ii. Does it refer to a specific product?
      iii. Is there an economic motivation?
      iv. AND IF YES,
   b. Is the regulation acceptable? (CENTRAL HUDSON TEST) (INTERMEDIATE SCRUTINY)
      1. Does speech advertise illegal activity or convey false/deceptive message?
         a. If YES, speech is unprotected
         b. If NO, following intermediate scrutiny applies:
      2. Is there a substantial gov’t interest?
      3. Does law directly advance the gov’t interest?
      4. Is restriction no more extensive than necessary?
         a. Interpreted as “narrowly 'tailored” NOT “least restrictive”

ii. **CONDUCT THAT COMMUNICATES**
   **Does it regulate speech? 2 part inquiry**
   **First,** is conduct communicative? If no, 1st am doesn’t apply. If yes, go to second. (Spencer)
   **Second,** when may gov’t regulate communicative conduct? (O’brien)
   1. What Is Speech?
      a. Conduct that communicates
         i. Can be symbols: marches, protests, flag burning, arm bands, etc.
2. When is Conduct Communicative?
   a. It is possible to find communicative conduct in almost everything, but this
does not mean all communicative conduct is protected.
   i. Conduct is speech if it intends to convey a message
      1. An armband for peace in a time of war is clearly
         communicative.
   ii. Likelihood is great that the message is understood by those who
       viewed it (this is read broadly)

3. When May a Government Regulate Conduct That Communicates?
   a. The O'Brien Test
      i. *United States v. O'Brien*
         1. **Facts**: David O'Brien burned his draft card at a Boston
courthouse. He said he was expressing his opposition to war.
He was convicted under a federal law that made the
destruction or mutilation of drafts card a crime.
         2. **Holding**: It cannot be accepted that there is an endless and
limitless variety of conduct that constitutes “speech”
whenever the person engaging in the conduct intends to
express an idea. However, even if the alleged communicative
element of Defendant’s conduct is sufficient to bring into play
the First Amendment of the Constitution, it does not
necessarily follow that the destruction of a draft card is
constitutionally protected activity.
   a. First, a government regulation is sufficiently justified
      if it is within the constitutional power of the
government.
   b. Second, if it furthers a substantial or important
      governmental interest.
   c. Third, if the governmental interest is unrelated to the
      suppression of free expression. [that should be the
      first question we ask] (does it deal with particular
      content or viewpoint of speech, if so O'brien doesn’t
      apply and its bumped up to strict scrutiny - this was
      established in texas v johnson)
   d. Fourth, if the incidental restriction on alleged First
      Amendment constitutional freedoms is no greater
      than is essential to the furtherance of that interest.
      (Doesn't need to be the least restrictive - )
The 1965 Amendment meets all these requirements.
Therefore, the 1965 Amendment is constitutional as
applied to Defendant.

b. Flag Desecration
   i. *Texas v. Johnson*
      1. **Facts**: In 1984, in front of the Dallas City Hall, Gregory Lee
Johnson burned an American flag as a means of protest
against Reagan administration policies. Johnson was tried
and convicted under a Texas law outlawing flag desecration.
He was sentenced to one year in jail and assessed a $2,000
fine.
      2. **Holding**: The Court held that Johnson's burning of a flag was
protected expression under the First Amendment. The Court
found that Johnson's actions fell into the category of
expressive conduct and had a distinctively political nature. The fact that an audience takes offense to certain ideas or expression, the Court found, does not justify prohibitions of speech. The Court also held that state officials did not have the authority to designate symbols to be used to communicate only limited sets of messages, noting that "[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."

c. Spending Money As Political Speech
   i. Buckley v. Valeo
      1. **Facts:** In the wake of the Watergate affair, Congress attempted to ferret out corruption in political campaigns by restricting financial contributions to candidates. Among other things, the law set limits on the amount of money an individual could contribute to a single campaign and it required reporting of contributions above a certain threshold amount. The Federal Election Commission was created to enforce the statute.
      2. **Holding:** The Court arrived at **two** important conclusions.
         a. First, it held that restrictions on individual contributions to political campaigns and candidates **did not violate** the First Amendment since the limitations of the FECA enhance the "integrity of our system of representative democracy" by guarding against unscrupulous practices.

         VI. Gov't interest of reducing corruption
         VII. The act intends to limit presence or appearance of corruption
         VIII. "I will give you money if you do x for me" - quid pro quo
            a. They want to reduce this because it undermines public faith of integrity of the system

            a. Second, the Court found that governmental restriction of independent expenditures in campaigns, the limitation on expenditures by candidates from their own personal or family resources, and the limitation on total campaign expenditures did violate the First Amendment.

            2. Since these practices do not necessarily enhance the potential for corruption that individual contributions to candidates do, the Court found that restricting them did not serve a government interest great enough to warrant a curtailment on free speech and association.

         3. **Citizens United v. FEC**
            a. **Facts:** Citizens United sought an injunction against the Federal Election Commission in the United States District Court for the District of Columbia to prevent the application of the Bipartisan Campaign Reform Act (BCRA) to its film Hillary. In an attempt to regulate "big money" campaign contributions, the BCRA applies a variety of restrictions to
"electioneering communications." Section 203 of the BCRA prevents corporations or labor unions from funding such communication from their general treasuries. Sections 201 and 311 require the disclosure of donors to such communication and a disclaimer when the communication is not authorized by the candidate it intends to support.

b. **Holding:** The Court held that under the First Amendment corporate funding of independent political broadcasts in candidate elections cannot be limited. *Political speech is indispensable to a democracy, which is no less true because the speech comes from a corporation.* The majority also held that the BCRA’s disclosure requirements as applied to The Movie were constitutional, reasoning that disclosure is justified by a "governmental interest" in providing the "electorate with information" about election-related spending resources. The Court also upheld the disclosure requirements for political advertising sponsors and it upheld the ban on direct contributions to candidates from corporations and unions.

- The only compelling interest is that quid pro quo corruption rationale which is very narrow - not even the appearance of corruption, it has to be actual corruption
- Corporations as seen as people and they are allowed to donate as much as they want, however, there is a limit on how much they can donate to one person.
- Leveling the playing field(anti-distortion) is NOT an adequate interest

4. **McCutcheon v. FEC**
   a. **Facts:** In 2002, Congress passed the Bipartisan Campaign Reform Act (BCRA), which established two sets of limits to campaign contributions. The base limit placed restrictions on how much money a contributor—defined broadly as individuals, partnerships, and other organizations—may give to specified categories of recipients. The aggregate limit restricted how much money an individual may donate in a two-year election cycle. The limits were periodically recalibrated to factor in inflation.

Shaun McCutcheon is an Alabama resident who is eligible to vote. In the 2011-2012 election cycle, he donated to the Republican National Committee, other Republican committees, as well as individual candidates. He wished to donate more in amounts that would be permissible under the base limit but
would violate the aggregate limit. McCutcheon and the other plaintiffs sued the Federal Election Commission, arguing that the aggregate limit violated the First Amendment by failing to serve a "cognizable government interest" and being prohibitively low.

b. **Holding**: The plurality held that the aggregate limit did little to address the concerns that the Bipartisan Campaign Reform Act was meant to address and at the same time limited participation in the democratic process. Because the aggregate limit fails to meet the stated objective of preventing corruption, it does not survive the "rigorous" standard of review laid out by previous precedent dealing with campaign contributions from a First Amendment perspective and is therefore unconstitutional. The aggregate limit also prevents a donor from contributing beyond a specific amount to more than a certain number of candidates, which may force him to choose which interests he can seek to advance in a given election. The plurality held that the collective interest in combating corruption can only be pursued as long as it does not unnecessarily curtail an individual's freedom of speech, and in this case the aggregate limit is not sufficiently closely tailored to accomplish this goal. The plurality also noted that there are many other means by which the government may fight election corruption without setting an aggregate limit on campaign contributions.

- Single candidate limits, upheld but agg limits are struck down
- SS in analysis

b. **WHAT PLACES ARE AVAILABLE FOR SPEECH?**

i. **GOVERNMENT PROPERTIES AND SPEECH**

1. **Government Properties and Speech**

   a. Initial Rejection and Subsequent Recognition of a Right to Use Government Property for Speech

   i. **Hague v. Committee for Industrial Organization**

   1. **Facts**: On November 29, 1937, several individuals gathered at the headquarters of the Committee for Industrial Organization (CIO) in Jersey City, New Jersey to initiate a recruitment drive and discuss the National Labor Relations Act. Acting on the orders of Mayor Frank Hague, police seized the group's recruitment materials and refused to allow the meeting to take place. Hague argued that he was enforcing a 1930 city ordinance that forbade gatherings of groups that advocated obstruction of the government by unlawful means. Hague referred to CIO members as "communists." Arguing that the ordinance violated the First Amendment protection of freedom of assembly, the group filed suit against several city officials, including Hague.
IX. Parks, sidewalks, streets - but that doesn’t mean that they are unlimited
   a. It can be regulated, but not prohibited
      i. By reasonable time place and manner - when content neutral
      ii. Regulation for the good of all but cannot be an abridgment or denial
      iii. If content based - reasonable time place and manner restrictions cannot be used, it is struck down, per se

   i. *Schneider v. New Jersey*
      1. **Facts:** Municipal codes in four cities across the United States - Milwaukee, WI, Los Angeles, CA, Worcester, MA, and Irvington, NJ - banned hand-to-hand distribution of pamphlets in public places and private residences. Defendants convicted of violating these ordinances in each city argued that the ordinances were invalidated by the fundamental constitutional protection of free speech. The cities argued that the bans upheld their municipal prerogative to keep streets clean and reduce littering.
      2. **Holding:** The First Amendment right to free speech was fundamental and substantially impaired by the bans against distributing pamphlets. The burden on cities of upholding First Amendment free speech outweighed the burdens of cleaning up litter caused by hand-to-hand pamphleteering. The cities could regulate dishonest pamphleteering and legislate in order to keep streets freely accessible, but could not outlaw one citizen's attempt to impart information to another citizen through the means of passing out written documents.
         • That right is not absolute; public speech cannot disturb the general comfort, convenience, peace, and order. The government may regulate speech in public places, but only to preserve convenience and order. Further, the government cannot deny use of public places altogether

2. What Government Property and Under What Circumstances?
   a. *Perry Education Association v. Perry Local Educators Association*
      i. **Facts:** The Perry Education Association (PEA) won an election against the Perry Local Educators’ Association (PLEA) to serve as the sole union representing teachers in Perry Township, Indiana. As part of the collective-bargaining agreement reached between PEA and the Board of Education of Perry Township, PEA obtained exclusive rights to use the internal school mail system and PLEA was denied access. PLEA contended that denying their members use of the mail system violated the First Amendment and the Equal Protection Clauses of the Fourteenth Amendment.
      ii. **Holding:** The school board chose to grant exclusive access to the official teachers union in order to facilitate a collective-bargaining
agreement. It did not act to suppress the speech of rival teachers unions. The school board entrusted PEA with obligations as the sole representative of teachers that would require the use of the mail system. PLEA did not have these obligations and could communicate effectively though many other channels. Since the mail system was not a "public forum," PLEA had no unassailable right to access it.

3. Public Forums

PUBLIC FORUM - GOV'T REGULATION
1. Must be content neutral
   1. Or if content based, overcome SS
2. Must be reasonable time, place, and manner restriction that serves
   1. Important gov't interest
   2. Leaves open adequate alternatives for speech
3. If licensing permit, must meet requirements of licensing
4. Must be narrowly-tailored
   1. But need not be least-restrictive alt - rather, must not burden "substantially more speech than is necessary to further the gov't legitimate interest"

OVERVIEW
A. FIRST CATEGORY - PUBLIC FORUM - full 1st am restriction - public parks and sidewalks
   • For the stat to enforce a content based exclusion - strict scrutiny must be met
B. Second category - DESIGNATED PUBLIC FORUM - FULL 1A PROTECTION
   • Public property that hasn't traditionally been open for speech, but which gov't voluntarily opens for speech
   • Once open for expressive activity, the gov't can withdraw that permission
   • As long as it does open it for activity, same standard as public forum
     • School auditorium or school class rooms
       A. They are open to public after hours.
       • Full 1st amendment protection
   •
C. Third category - Limited/non-public forum - limited 1A protection
   • (public property not traditionally open for speech, and which gov't either does not open for speech or opens only to certain groups or dedicated solely to certain subjects)
   • Things can sometimes fall into the second or third category
   • RULE: time, place, and manner restrictions are okay
     • Gov't may BAN speech, so long as ban is:
       • So long as reasonable
       • Not viewpoint based (but can be content-based aka the whole matter like the whole subject - banning speech about abortion)

Public forum - Gov't property that the gov't is constitutionally obligated to make available for speech (sidewalks and parks)

a. Content Neutrality
   i. Police Department of the City of Chicago v. Mosley
      1. Facts: Chicago adopted an ordinance prohibiting picketing within 150 feet of a school during school hours; the law made an exception for peaceful labor picketing. Mosley had been picketing near a public high school; he was protesting "black discrimination." Mosley sought a declaration that the ordinance was unconstitutional.
      2. Holding: The exemption for labor picketing violated the equal protection clause. Government regulation of message
content is presumed unconstitutional unless there are compelling justifications. And regulations that selectively exclude speakers from a public forum must undergo careful judicial examination to ensure the minimal degree of furthering an important government interest. Mosley fashions an important principle from the values of freedom and equality: equal freedom of expression.

b. Time, Place and Manner Restrictions
   i. *McCullen v. Oakland*
      1. **Facts:** Massachusetts' Reproductive Health Care Facilities Act, originally passed in 2000, was amended in 2007 to create a 35-foot buffer zone around reproductive health care facilities. The Act was challenged by protesters at the Planned Parenthood in Worcester, Massachusetts under the First and Fourteenth Amendments.
      2. **Holding:** "The buffer zones burden substantially more speech than necessary to achieve [Massachusetts'] asserted interests."[1] He stated that Massachusetts failed to show that it tried less intrusive alternatives first: "Although respondents claim that Massachusetts 'tried other laws already on the books', they identify not a single prosecution brought under those laws within at least the last 17 years. And while they also claim that the Commonwealth 'tried injunctions', the last injunctions they cite date to the 1990s. In short, the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective."

   ii. *Hill v. Colorado*
      1. **Facts:** A Colorado statute makes it unlawful for any person within 100 feet of a health care facility's entrance to "knowingly approach" within 8 feet of another person, without that person's consent, in order to pass "a leaflet or handbill to, display a sign to, or engage in oral protest, education, or counseling with [that] person...." Leila Hill and others, sidewalk counselors who offer abortion alternatives to women entering abortion clinics, sought to enjoin the statute's enforcement in state court, claiming violations of their First Amendment free speech rights and right to a free press. In dismissing the complaint, the trial court held that the statute imposed content-neutral time, place, and manner restrictions narrowly tailored to serve a significant government interest and left open ample alternative channels of communication.
      2. **Holding:** the Court held that the Colorado statute's restrictions on speech-related conduct are constitutional. The Court concluded that the statute "is not a regulation of
iv. SPEECH IN AUTHORITARIAN ENVIRONMENTS

1. Tinker v. Des Moines Independent Community School District
   a. Facts: In December 1965, a group of students in Des Moines held a meeting in the home of 16-year-old Christopher Eckhardt to plan a public showing of their support for a truce in the Vietnam war. They decided to wear black armbands throughout the holiday season and to fast on December 16 and New Year's Eve. The principals of the Des Moines school learned of the plan and met on December 14 to create a policy that stated that any student wearing an armband would be asked to remove it, with refusal to do so resulting in suspension. On December 16, Mary Beth Tinker and Christopher Eckhardt wore their armbands to school and were sent home. The following day, John Tinker did the same with the same result. The students did not return to school until after New Year's Day, the planned end of the protest.

   b. Holding: The Supreme Court held that the armbands represented pure speech that is entirely separate from the actions or conduct of those participating in it. The Court also held that the students did not lose their First Amendment rights to freedom of speech when they stepped onto school property. In order to justify the suppression of speech, the school officials must be able to prove that the conduct in question would "materially and substantially interfere" with the operation of the school. In this case, the school district's actions evidently stemmed from a fear of possible disruption rather than any actual interference. The wearing of the armband was singled out of all other symbolic speech engaged in by the student body. Clearly, this was designed to erase all opposition to the war speech in the schools and was not related to any legitimate purpose. There was no evidence that the wearing of the armbands caused any disruption of any class or school function.

2. Bethel School District No. 403 v. Fraser
   a. Facts: At a school assembly of approximately 600 high school students, Matthew Fraser made a speech nominating a fellow student for elective office. In his speech, Fraser used what some observers believed was a graphic sexual metaphor to promote the candidacy of his friend. As part of its disciplinary code, Bethel High School enforced a rule prohibiting conduct which "substantially interferes with the educational process... including the use of obscene, profane language or gestures." Fraser was suspended from school for two days.

   b. Holding: The Court found that it was appropriate for the school to prohibit the use of vulgar and offensive language. Chief Justice Burger distinguished between political speech which the Court previously had protected in Tinker v. Des Moines Independent Community School District (1969) and the
supposed sexual content of Fraser's message at the assembly. Burger concluded that the First Amendment did not prohibit schools from prohibiting vulgar and lewd speech since such discourse was inconsistent with the "fundamental values of public school education."

3. **Hazelwood School District v. Kuhlmeier**
   
a. **Facts:** The Spectrum, the school-sponsored newspaper of Hazelwood East High School, was written and edited by students. In May 1983, Robert E. Reynolds, the school principal, received the pages proofs for the May 13 issue. Reynolds found two of the articles in the issue to be inappropriate, and ordered that the pages on which the articles appeared be withheld from publication. Cathy Kuhlmeier and two other former Hazelwood East students brought the case to court.

   b. **Holding:** The Court held that the First Amendment did not require schools to affirmatively promote particular types of student speech. The Court held that schools must be able to set high standards for student speech disseminated under their auspices, and that schools retained the right to refuse to sponsor speech that was "inconsistent with 'the shared values of a civilized social order.'" Educators did not offend the First Amendment by exercising editorial control over the content of student speech so long as their actions were "reasonably related to legitimate pedagogical concerns." The actions of principal Reynolds, the Court held, met this test.

4. **Morse v. Frederick**
   
a. **Facts:** At a school-supervised event, Joseph Frederick held up a banner with the message "Bong Hits 4 Jesus," a slang reference to marijuana smoking. Principal Deborah Morse took away the banner and suspended Frederick for ten days. She justified her actions by citing the school's policy against the display of material that promotes the use of illegal drugs. Frederick sued under 42 U.S.C. 1983, the federal civil rights statute, alleging a violation of his First Amendment right to freedom of speech.

   b. **Holding:** School officials can prohibit students from displaying messages that promote illegal drug use. Chief Justice John Roberts's majority opinion held that although students do have some right to political speech even while in school, this right does not extend to pro-drug messages that may undermine the school's important mission to discourage drug use. The majority held that Frederick's message, though "cryptic," was reasonably interpreted as promoting marijuana use - equivalent to "[Take] bong hits" or "bong hits [are a good thing]." In ruling for Morse, the Court affirmed that the speech rights of public school students are not as extensive as those adults normally enjoy, and that the highly protective standard set by Tinker would not always be applied. In concurring opinions, Justice Thomas expressed his view that the right to free speech does not apply to students and his wish to see Tinker overturned altogether, while Justice Alito stressed that the decision applied only to pro-drug messages and not to broader political speech.

b. **FREEDOM OF ASSOCIATION**

X. Public Accommodation/human rights laws generally ARE held to be constitutional
  
a. i.e., even though they do infringing association rights, they DO satisfy strict scrutiny

XI. Some Associations can avoid complying w/ public accommodations law
a. I.e., they CAN discriminate when:
   i. Intimate Association—small, selective, secluded; OR
   ii. Expressive “integral to the message” Association—the very purpose of the association
       would be compromised if it couldn’t discriminate (e.g., Ku Klux Klan)

XII. Government may punish membership only if it proves: A.K.S.
    a. That a person actively affiliated with a group;
    b. Person knows of its illegal objectives; AND
    c. Has specific intent to further those objectives

i. LAWS PROHIBITING AND PUNISHING MEMBERSHIP
   1. The government may only punish membership only if it proves that a person actively
      affiliated with the group, knowing its illegal objectives, and with the specific intent
      to further those objectives.

ii. LAWS REQUIRING DISCLOSURE OF MEMBERSHIP
   1. NAACP v. State of Alabama, ex. rel. Patterson
      a. Facts: As part of its strategy to enjoin the NAACP from operating, Alabama
         required it to reveal to the State’s Attorney General the names and
         addresses of all the NAACP’s members and agents in the state.
      b. Holding: he unanimous Court held that a compelled disclosure of the
         NAACP’s membership lists would have the effect of suppressing legal
         association among the group’s members. Nothing short of an “overriding
         valid interest of the State,” something not present in this case, was needed to
         justify Alabama’s actions.

   2. Campaign Finance Disclosure
      a. Campaign contributions require politicians to disclose their contributors
         i. Because of the government’s compelling interest in stopping
            corruption

iii. COMPELLED ASSOCIATION
    1. Nobody can be forced to join a public union; BUT, non-members can be forced to pay
       for their share of collective bargaining activities of the union because they benefit
       from them.
       a. This is not so when personal homecare providers/medical homecare
          assistants do not want to join a union; they do not have to join.
          i. Still under strict scrutiny

iv. LAWS PROHIBITING DISCRIMINATION
    1. Roberts v. United States Jaycees
       a. Facts: According to its bylaws, membership in the United States Jaycees was
          limited to males between the ages of eighteen and thirty-five. Females and
          older males were limited to associate membership in which they were
          prevented from voting or holding local or national office. Two chapters of
          the Jaycees in Minnesota, contrary to the bylaws, admitted women as full
          members. When the national organization revoked the chapters’ licenses,
          they filed a discrimination claim under a Minnesota anti-discrimination law.
          The national organization brought a lawsuit against Kathryn Roberts of the
          Minnesota Department of Human Rights, who was responsible for the
          enforcement of the anti-discrimination law.
       b. Holding: the Court held that the Jaycees chapters lacked "the distinctive
          characteristics that might afford constitutional protection to the decision of
          its members to exclude women." The Court reasoned that making women
          full members would not impose any serious burdens on the male members’
freedom of expressive association. The Court thus held that Minnesota's compelling interest in eradicating discrimination against women justified enforcement of the state anti-discrimination law. The Court found that the Minnesota law was not aimed at the suppression of speech and did not discriminate on the basis of viewpoint.

2. **Boy Scouts of America v. Dale**
   
a. **Facts**: The Boy Scouts of America revoked former Eagle Scout and assistant scoutmaster James Dale's adult membership when the organization discovered that Dale was a homosexual and a gay rights activist. In 1992, Dale filed suit against the Boy Scouts, alleging that the Boy Scouts had violated the New Jersey statute prohibiting discrimination on the basis of sexual orientation in places of public accommodation. The Boy Scouts, a private, not-for-profit organization, asserted that homosexual conduct was inconsistent with the values it was attempting to instill in young people.

b. **Holding**: The Court held that "applying New Jersey's public accommodations law to require the Boy Scouts to admit Dale violates the Boy Scouts' First Amendment right of expressive association." In effect, the ruling gives the Boy Scouts of America a constitutional right to bar homosexuals from serving as troop leaders. Chief Justice Rehnquist wrote for the Court that, "[t]he Boy Scouts asserts that homosexual conduct is inconsistent with the values it seeks to instill," and that a gay troop leader's presence "would, at the very least, force the organization to send a message, both to the young members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."
CHAPTER 9: FIRST AMENDMENT: FREEDOM OF EXPRESSION

I. INTRODUCTION
   a. No single definition of what “religion” is
   b. Court “defines “religion three ways:
      i. For purposes of conscientious objector exemptions
      ii. The court can inquire as to if a belief is sincerely held in deciding whether it is protected under the Constitution
   c. An individual’s sincerely held belief is protected even if it is not the dogma or dominant view within his religion
   d. What Is Religion?
      i. ATTEMPT TO DEFINE RELIGION UNDER THE SELECTIVE SERVICE ACT
         1. United States v. Seeger
            a. Facts: The Universal Military Training and Service Act established a draft for all men in the US. However there was an exemption (§6(j)), for 'conscientious objectors'. ‘Conscientious objectors’ were defined in §6(j) as persons who by reason of their religious training and belief are conscientiously opposed to participation in war in any form. 'Religious training and belief' is defined as "an individual’s belief in a relation to a Supreme Being involved in duties superior to those arising from any human relation, but not including essentially political sociological, or philosophical views or merely a personal moral code." Seeger was drafted and refused to go, claiming that he was a conscientious objector. He was arrested. Instead of professing a belief in a Supreme Being, Seeger claimed that he had a "belief in goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." The Trial Court convicted Seeger of draft-dodging.
            b. Holding: The US Supreme Court found that a person can meet the requirements of being a conscientious objector even if they have unorthodox spiritual beliefs, as long as those beliefs are fundamentally equivalent to a traditional belief in God. The Court found that the proper test of religious belief should be "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox beliefs in God of one who clearly qualifies for the conscientious objector exemption." The Court noted that §6(j) can still require that a person seeking exemption prove both that his beliefs prohibit him from participating in war, and that these beliefs are strong and sincere.

      ii. REQUIREMENT FOR SINCERELY HELD BELIEFS
         1. United States v. Ballard
            a. Facts: Ballard was charged with defrauding the public by practicing a religion that he knew was false. He claimed that he had supernatural powers to heal the sick and diseased.
            b. Holding: Although Respondent’s religion seems incredible to most, it is not the role of a jury to determine its veracity. If this religion were subject to such a trial, then all organized religions would need to be treated similarly.

II. THE FREE EXERCISE CLAUSE
   a. Court has said that the Free Exercise Clause embraces two concepts:
      i. Freedom to believe
      ii. Freedom to act
         1. Belief is an absolute right
         2. Acting is not absolute
b. THE CURRENT TEST
   i. Employment Division, Department of Human Resources of Oregon v. Smith
   1. Facts: Two Native Americans who worked as counselors for a private drug rehabilitation organization, ingested peyote -- a powerful hallucinogen -- as part of their religious ceremonies as members of the Native American Church. As a result of this conduct, the rehabilitation organization fired the counselors. The counselors filed a claim for unemployment compensation. The government denied them benefits because the reason for their dismissal was considered work-related "misconduct."
   2. Holding: The Court has never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that government is free to regulate. Allowing exceptions to every state law or regulation affecting religion "would open the prospect of constitutionally required exemptions from civic obligations of almost every conceivable kind." Scalia cited as examples compulsory military service, payment of taxes, vaccination requirements, and child-neglect laws.