Constitutional Law Outline
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I. Federal Judicial Power and its Limits
    A. The Authority for Judicial Review
    B. Limits on the Federal Judicial Power
        1. Interpretive Limits
        2. Congressional Limits
        3. Avoidance Principles and Justiciability Limits
II. Federal Legislative Power
    A. Congress v. the States
    B. The Commerce Power
        1. Federal Regulation of Private Conduct
        2. Federal Regulation of States
    C. Congress's Taxing and Spending Powers
    D. Congress' Power Under the Post-Civil War Amendments
    E. Congress' Power to Authorize Suits against State Governments
III. Federal Executive Power
    A. Powers Explicit in the Constitution
    B. Inherent Presidential Power
    C. The Constitutional Problems of the Administrative State
    D. Separation of Powers and Foreign Policy
    E. Presidential Power and the War on Terrorism
    F. Checks on the President
IV. Limits on the State Regulatory and Taxing Power
    A. Pre-emption of State and Local Laws
    B. Dormant Commerce Clause
V. Constitutional Protection of Individual Rights
    A. Incorporation
    B. State Action- the Application of the Constitution to Private Conduct
VI. Equal Protection and Suspect Classes
    A. Rational Basis Test
        1. Standard Approach
        2. Exceptional Cases
    B. Classifications Based on Race and National Origin—Strict Scrutiny Test Proving Discrimination
        1. Facial Classifications
        2. Facially Neutral Laws: Disparate Impact and Discriminatory Purpose
        2. Affirmative Action
    C. Classifications Based on Gender—Intermediate Scrutiny Test
        D. Other Classifications (Aliens, Non-marital children, Age, Wealth, Disability, Sexual Orientation)
VII. Fundamental Rights under Equal Protection and Due Process
    A. Economic Substantive Due Process
    B. Reproductive Autonomy
    C. Medical Care Decisions
    D. Education
    E. Family Autonomy
    F. Sexual Orientation and Sexual Activity
    G. Right to Vote

I. FEDERAL JUDICIAL POWER

IS THERE AUTHORITY FOR JUDICIAL REVIEW? DOES THE COURT HAVE JURISDICTION?

I. **Is there Authority for <u>Federal</u> Review**?
   a. Generally
      i. Marbury v. Madison:
         1. This case establishes the authority for judicial review of both federal executive and legislative acts, since there is *no* express authority written into the Constitution.
         2. This case establishes Article III as ceiling on federal court jx, instead of the floor
            a. Constitutional grants limited power, it is not aspirational
         3. The Original jx clause of Article III is read by Marshall to establish a ceiling as to what the SC can hear
         4. SC can review constitutional issues relating to both the executive and legislative branches.
         5. President is not above the law.
         6. SC has final word on Constitutional issues, whereas their interpretation of a law that is non-constitutional in nature can be overcome by the legislature's later amendment of the law.
         7. Marshall concluded that particular powers could be <u>implied</u> from the explicit grant of other powers.

   b. Is there <u>Original Jurisdiction</u>?
   -If it is a case affecting <u>public ministers/consuls/ambassadors</u>, then original jx.
   -If it is a case in which the <u>state is a party</u>, then original jx.
   -Note, parties cannot just agree to be in federal court first.

   c. Is there <u>Appellate Jurisdiction</u>?
   -If it is a case concerning <u>admiralty and maritime</u>, then there is appellate jx.
   -If it is a case where <u>the US is a party</u>, then there is appellate jx.

-If it is a case between citizens of different states, then there is appellate jx.
-If it is a case between citizens of same states claiming lands by grants of different states, then there is appellate jx.
-If it is a case between a state (or its citizens) and foreign states, citizens or subjects, then there is appellate jx.

d. Does Jx stripping apply?

i. Can Congress limit the cases that the SC can hear? This is a huge unresolved issue before the SC for the last 200 years.

II. Is there Authority for State Court Review?

a. Does the Supreme Court have the Authority to Review this State Court Judgment?

i. Rule: The Supreme Court has the authority to review state court judgments if their decisions generate federal constitutional issues

1. Martin v. Hunter's Lessee
   a. Facts: Dealt with 2 competing claims to a plot of land. Court recognized state's authority to have taken and disposed of the land.
   b. The constitution is based on the recognition that "State attachments, state prejudices, state jealousies, and state interests might sometimes obstruct, or control the regular administration of justice."
   c. SC review is essential to ensuring uniformity in the interpretation of federal law.

b. Is there a Criminal Defendant who seeks Supreme Court Review?

i. Rule: Criminal Defendants can seek SC review if they believe their conviction violates the US Constitution.

1. Cohens v. Virginia
   a. Facts: Brothers convicted of selling fake lottery tickets in violation of state law appealed to SC.
   b. Ct said that state courts cant be trusted to adequately protect federal law→ reaffirmed constitutionality of SC review of state ct judgments.

III. Is there Authority for Executive Branch Review?

a. Rule: The Supreme Court cannot intervene on matters that involve executive discretion
   i. I.e. If the president vetoes a bill, the decision is *not* reviewable.

b. Rule: The Supreme Court can intervene when questions arise with respect to which the law imposes a duty to act upon a high official of the executive branch
   i. So SC only has jx for executive branch review where an affirmative duty/prohibition is violated.
   ii. I.e. If the president (or his agent) has a duty to carry out an act, and he fails to do that, then the aggrieved party arguably has a legal right and remedy (perhaps a writ of mandamus.

IV. Is there Authority for Other Review? (Such as executive actions of the state)?

a. Rule: SC has the sole power to interpret what the Constitution means—so extension of SC's power even more to the states.

b. Rule: All judges sign an oath to support the constitution and its up to the SC to dictate what the law actually is, therefore, the SC can exercise review over the President, Congress, State Court judges **and** also executive actions of state governors.
   i. Cooper v. Aaron:
      1. Facts: Court orders Little Rock High School to desegregate because 14th amendment doesn't allow discrimination on the basis of race.
      2. School argues that it is doing what the Constitution requires—separate but equal.

ARE THERE ANY LIMITS ON THIS COURT'S FEDERAL JUDICIAL POWER?

INTERPRETIVE LIMITS:

I. Are there any Interpretive Limits on the SC's Federal Judicial Power?

a. Under the Originalist approach, what is the scope of the Court's Power?

i. Rule: The Court is justified in protecting constitutional rights only if they are stated in the text or intended by the Framers of the constitution.

ii. Rule: If the Constitution is silent, it is for the legislature, unconstrained by the Courts to decide that law.

1. Constitution evolves by amendment only—narrow judicial power
2. Problem: Intent of the Framers is not always clear.

b. Under the Non-Originalist approach, what is the scope of the Court's Power?

i. Rule: SC should go beyond that set of references of references and enforce norms that cannot be discovered within the four corners of the document (Constitution)

ii. Rule: Constitution should be read to evolve to meet the needs of a society that is advancing technologically and morally.

1. I.e. racial discrimination favored under the Constitution, equal protection not originally meant to apply to women.

c. What other interpretative tools does the Court use for constitutional interpretation?

(1) Constitutional Text (Originalist v. Non-originalist)
(2) Intent of the Framers
1. Originalists look only at the intent at the time of the Constitution (Scalia)
2. Non-Originalists consider what Framers would do Today
(3) Tradition/Historical Analysis (Non-originalists)
1. Look at what the states have been doing
2. Contemporary morals and values
(4) Precedent (Non-Originalists and Originalists)
(5) Policy/Social Costs/Democratic Process (Non-Originalists only)
1. Often interested in improving processes of government (efficiency)
(6) Foreign Opinions
(7) Values that are fundamental to liberty

CONGRESSIONAL LIMITS:

II. Are there any Congressional Limits on the SC's Federal Judicial Power?

a. Does Congress have the ability to restrict federal court jurisdiction?

i. Rule: Under Article III, §2: "Supreme court shall have appellate jx, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

1. About 10 years ago, Senators tried to pass a law that said SC cannot look at any case that looked at whether school prayer was constitutional.
   a. If you deny someone the right to settle a constitutional claim in federal court—that is not ok.

b. If not, then what falls under Congress's power to make "exceptions and regulations"?

-View 1: Congress has broad authority to remove matters from the SC's purview, and Constitution intended Congress to be able to check the judiciary.
-View 2: Congress is limited in its ability to control the SC.
-View 3: Even though Congress is given the authority to limit SC jx in the text of Article III, removing particular topics from review is an unconstitutional abuse of that authority.

c. Can Congress use jx stripping power top violate the Constitution?

i. Rule: However interpreted, Congress cannot use jx stripping power to violate the constitution (i.e. DP)

JUSTICIABILITY LIMITS:

III. Are there any Justiciability Limits on the SC's Federal Judicial Power?

a. Generally:
   i. Some Justiciability limits are "constitutional" so that Congress cannot override them.
   ii. Some Justiciability limits are "prudential" meaning hat they are based on prudent judicial administration and can be overridden by Congress
      1. These are usually inspired by public policy

b. Is the SC prohibited from issuing Advisory Opinions?

   i. Rule: Yes, the issuance of Advisory Opinions is a violation of "case or controversy" as required by Article III, §2 of the Constitution
      1. The point of the judicial process is to have some change or effect—wont happen in this case.
   ii. Rule: There must be an actual dispute between adverse litigants.
      1. In order for a case to be justiciable and not an advisory opinion, there must be a substantial likelihood that a federal court decision in favor of a claimant will bring about some change or have some effect.
   iii. Rule: Declaratory judgments are okay, as long as there is an actual dispute

c. Is the SC prohibited from hearing this case based on Standing grounds?

i. Does the standing meet the Constitutional Limits?

1. Is there an injury that π has suffered or will suffer imminently? (Actual injury)

a. Rule: There must be an injury that the P has suffered or will imminently suffer future injury
   i. City of Los Angeles v. Lyons—π lacked standing to seek future injunction for future use of chokehold in non-violent cases

2. Is the injury distinct from an injury suffered in general?

a. Rule: The injury must be an injury to a specific party, not to all citizens in general
   i. Taxpayers cannot challenge federal spending if they disagree UNLESS:
      1. (1) Taxpayer can establish **logical link** between taxpayer status and the type of legislative enactment attacked, +
      2. (2) Establish a **nexus** between that taxpayer and the precise nature of the constitutional infringement alleged on one of the taxpayer's rights.

b. Rule: Article III does not grant the SC an unconditioned authority to determine the constitutionality of executive or legislative acts. Federal courts can only decide rights of individuals, not of citizens in general.

3. Has the π alleged and proven that ∆ has caused the harm? (causation)

a. Rule: π must allege and prove that D caused the harm
   i. Lujan v. Defenders of Wildlife:
      1. Facts: US provided only 10% of funding for the project so injunction would not necessarily assist wildlife protection

4. Has the plaintiff shown redressiblity?

a. Rule: Plaintiff must prove that it is likely that a favorable court decision will remedy the injury (extension of causation requirement)
   i. Lujan
      1. Since the agencies funding the projects abroad were not parties to the case, relief could be accorded only against the Secretary, which would not redress the citizens' specific concerns—and so no redressiblity.

ii. **Does the standing meet the Prudential Limits?**
    1. **Is there third party standing?**
        a. Rule: P must assert his own legal rights and interests
            i. **EXCEPTION**:
                (1) Where 3rd party is unlikely to be able to sue, SUBSTANTIAL OBSTACLE to the 3rd party asserting his or her rights and reason to believe that the advocate will effectively represent the interests of the 3rd party
                (2) Close Relationship between P/3rd party

    2. **Does the statute address the "category" of person/injury being alleged?**
        a. Rule: Plaintiff is outside the "zone of protection" when they might have an actual injury that falls under a specific statute, but the court may find that the statute was not created to address that type of injury.
            i. I.e. cattle ranchers wont get relief under Endangered Species Act if the death of their cows is the unintended result of protecting an endangered species.

    3. **Is this a violation of an individual right?**
        a. Rule: There is a prohibition of generalized grievances and so there must be a violation of an individual right.

d. Is the SC prohibited from hearing the case because of Ripeness?
- i. Rule: If someone has suffered actual or threatened harm as a result of government action, then the case is ripe for the SC to hear it.
- ii. Rule: If the injury is speculative, then it is too early to hear the case.
    1. **EXCEPTION**:
        a. When a party is seeking pre-enforcement review of a statute? Declaratory Judgment Act:
            i. You do not have to wait to break a law to get to court. Clarification is ok in some instances.
            ii. Court will balance plaintiff's rights against prohibition on advisory opinion.

e. Is the SC prohibited from hearing this case because of Mootness?
- i. Rule: Plaintiff must present a live controversy at all stages of the litigation. If anything occurs while a lawsuit is pending to end the plaintiff's injury, the case will be dismissed as moot (i.e. resolved, party dies, law changes, case settles).

f. Is the SC prohibited from hearing this case because it falls under the Political Question Doctrine?
- i. Rule: Courts cannot decide "political" questions, since that subject matter is committed to Congress by the Constitution (raises separation of powers issues)
- ii. Rule: However, the mere fact that a suit seeks protection of a political right does not mean that it presents a political question.
    1. Baker v. Carr
- iii. Examples:
    1. Congressional Self-governance, foreign policy issues, impeachment (federal judges), gerrymandering, reapportionment if brought under the guaranty clause (but not EP—no judicially discoverable or manageable standards to determine when Constitutional violation results).

II. FEDERAL LEGISLATIVE POWER

ARE THERE ANY LIMITS ON THIS CONGRESS'S FEDERAL LEGISLATIVE POWER?

CONGRESS V. THE STATES

I. **ATTACK PLAN** for the constitutionality of ANY act of Congress:
   (1) Does Congress have authority under the Constitution to legislate?
      -If yes then go to next question
      -If no then go to last question.
   (2) Does the Federal statute target state or state actors?
      -Only states actors are a valid category?
   (3) Is the right, which Congress is enforcing, already recognized by the SC?
      -(If yes, then move on to next question re: some level of scrutiny).
      -Can only be an existing right defined by the SC.
      -Congress can't expand rights
   (4) Level of scrutiny
      -Is there a record of discrimination/animus?
      -Is the remedy appropriate or is it excessive?
   (5) Does the law violate another constitutional provision or doctrine, such as by infringing separation of powers or interfering with individual liberties?

II. **Article I Congressional Powers**:
   a. Congress has limited constitutionally enumerated powers
      i. Limited to: Immigration, bankruptcy, copyright, high seas, laws of the nation, declaration of war, raise armies and navies, commerce clause, 14the amendment, tax/spend.
   b. Congress can act only with express or implied authority
      i. MuCulloch v. Maryland:
         1. Court found authority in the Necessary and Proper Clause
            a. N+P Clause: Article I§8—gives congress the power to make all laws that are necessary and proper to carry into execution its powers vested in the Constitution.
      ii. Supremacy Clause: Allows the removal of all obstacles to Congress's actions within its own sphere
         1. MuCulloch v Maryland: States have no power by taxation or otherwise to retard, impede, burden or in any manner control the operations of constitutional laws enacted by Congress to carry into execution the powers vested in the general government.
         2. Supremacy Clause—Artcile VI, §1 Clause 2—says that federal laws made in pursuance of the Constitution are the Supreme Law of the Land.

III. **10th amendment**: States' rights
   a. States have inherent police power to protect the health, safety and general welfare of state residents
      i. 10the amendment acknowledges that "leftovers go to the States"—so it gives state sovereignty over any powers not explicitly given to Congress in the Constitution
      ii. NOTE: State laws are valid UNLESS they violate a constitutional provision.

IV. **Arguments for Federalism**—smaller federal government
   a. National govt shouldn't be too broad and powerful over the states
      i. States should be experimental and try out new laws

V. **Arguments against Federalism**—bigger federal government
   a. Afraid of tyranny on individual rights by the state

b. Afraid that state govts, in the political process, will infringe on individual rights by majority rule.

THE COMMERCE POWER:

I. Generally:
   a. Article I, §6:
      i. "The Congress shall have the power… to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."
         1. Serves as the authority for a broad array of federal statutes, from criminal to securities to civil rights and environmental laws.
   b. Four distinct eras of interpretation:
      i. Early American history—1890s:
         1. Commerce power broadly defined, but minimally used.
      ii. 1890s-1937:
         1. Court narrowly defined the scope of Congress's commerce power and used the Tenth Amendment as a limit.
      iii. 1937-1990s:
         1. Court expansively defined the scope of the Commerce clause and refused to apply the Tenth Amendment.
      iv. 1990s-Today (Rehnquist Court)
         1. Court has again narrowed the scope of the commerce power and revived the 10th amendment as an independent, judicially enforceable limit on federal actions.

   c. **Status of the Commerce Clause <u>Pre</u>-Lopez**:
      i. Congress can regulate commerce in 3 ways:
         (1) When the activity "**substantially affects interstate commerce**"
         (2) **Instrumentalities of interstate commerce** (infrastructure, trains)—plus people/things that move across state lines
            a. Court can regulate the "instrumentalities" of interstate commerce even though the threat may come only from intrastate activities. This category refers to people, machines and other "things" used in carrying out commerce.
         (3) Use of **channels of interstate commerce** (i.e. telephone lines, highways, rivers—Congress can regulate channels even if activity at issue is completely intrastate)

   d. Status of Commerce Clause <u>Post</u>-Lopez:
      i. Congress can regulate commerce in 4 ways:
         (1) When the **activity "affects interstate** commerce"
            a. Reno v. Condon (2000)
         (2) **Instrumentalities** of interstate commerce
         (3) Use of **channels** of Interstate commerce
         (4) AND **substantially affects:** where this is a non-economic activity, which if unregulated, would punch a hole in a federal scheme that regulates commerce
            b. If the activity itself is arguably <u>commercial</u>, then it doesn't seem to matter whether the <u>particular instance</u> of the activity directly affects interstate commerce, as long as the instance is part of a general class of activities, that collectively, substantially affect interstate commerce
            c. But if the activity <u>is not commercial</u>, then there will apparently have to be a <u>pretty obvious connection</u> between the activity and interstate commerce
      ii. Cases:
         1. <u>Lopez</u>: Local activity must be commercial or economic in nature.
         2. <u>US v. Morrison</u>: Local Activity must be commercial in nature AND have a substantial effect on interstate commerce, regulation of non-commercial/economic activity should be left to the states

3. Gonzales v. Raich: Congress may regulate non-economic intrastate activities where the failure to do so undercuts its legitimate regulation of interstates commerce (NP clause).

II. Does this fall within Congress' Commerce Powers to regulate private conduct?

a. Rule: Congress's Commerce authority extends to all activities having a substantial effect on interstate commerce, including those that do not have a substantial effect individually, but do when judged by their national aggregate effect (*Wickard*)
b. Rule: Congress can use the Commerce Clause to fight racial discrimination by individuals
    i. Even when it might be possible for Congress to pursue other methods for abolishing racial discrimination (i.e. 5th and 14th amendments), using its Commerce Clause powers is perfectly valid when interstate commerce is clearly affect (*Heart of Atlanta Motel*)
c. Rule: Congress can forbid racial discrimination in restaurants that serve only local business under the commerce clause when it is a burden to interstate commerce (i.e. meat comes form another state) (*Katzenbach v. McClung*).
d. Rule: Congress can regulate local activity that is commercial/economic in nature and if it **substantially affects** interstate commerce. (*Lopez*-gun case)
    i. Rule: Local activity must be commercial or economic for it to fall under Congress's Commerce Clause powers to regulate. (*Lopez*—1995)
        1. The core must be financial or else there is no jurisdictional hook in the statute.
e. Rule: Congress can regulate homegrown cannibis even where states approve its use for medicinal purposes. The commerce clause allows Congress to establish a regulatory scheme and N+P clause allows Congress to do whatever they must to enforce these regulations and whatever they must doesn't need to fall under or meet criteria of commerce clause. (*Gonzales v. Raich*—2005)
f. Rule: Congress can institute prisons and therefore has the right to do whatever is necessary and proper to regulate them and protect the people (*US v. Comstock*).

III. Does this fall within Congress's Commerce Powers to regulate the states?

a. What does the state statute attempt to regulate?
    i. Rule: If STATE implicates state sovereignty we must determine whether State is acting in its governmental role or as a private actor
        1. Is the state acting within its governmental role OR as a private actor?
            a. Rule: If **state is functioning in its governmental role**, federal government may only prohibit State action, but may not impose affirmative duties on the States.
                i. Printz case:
                    1. Per the 10th amendment, Congress cannot constitutionally compel state executive branch officials to administer a federal regulatory program any more than it can compel the states themselves to enact, enforce or administer a federal regulatory program, even if the act is only temporary or administrative and requires limited discretion.
                        a. Factors to consider: Role of state government acting in traditional governmental role or as a private actor? Affirmative requirement or prohibition? Whose resources are being used federal or state?
                    2. Printz implies that the 10th amendment is an independent limitation on the commerce power.
            b. Rule: If **state is acting as commercial actor**, federal government may regulate (makes government look more like Sears rather than a sovereign state)
                i. Reno v. Condon (DMV case sending out info)
                    1. While the 10th amendment prohibits the fed. Government from forcing the states to enact policies or regulations that

would impact the state's citizens, Congress can regulate activities of the states themselves.

ii. Rule: If PRIVATE PARTY, federal government may regulate as long as the statute falls within constitutional power (i.e. Lopez, Morrison, and Raich).

IV. Does this fall within Congress's Taxing and Spending Powers?

a. Generally:
   i. Article I, §8:
      1. "Congress shall have the power to law and collect taxes, Duties, Imposts, and Excises, to pay the debts and provide for the common defense and general welfare of the US; but all Duties, Imposts and Excises shall be uniform throughout the US."
   ii. Congress has broad authority under this provision.

b. Is the exercise of the spending power by Congress in pursuit of the "general welfare"?
   i. Rule: In considering whether this test is met, the SC has held that there should be "substantial deference" to the judgment of Congress and that the exercise of the spending power by Congress must be in pursuit of the "general welfare."
      1. It is derived from the text of the Constitution

c. Does the exercise of the spending power by Congress violate another Constitutional provision?
   i. Rule: The exercise of the spending power cannot violate another constitutional provision such as the 10th Amendment or individual rights.
      1. The exercise of the spending power by Congress cannot violate another Constitutional provision.

d. Is Congress exercising its spending power by imposing conditions on the states' receipt of funds?
   i. (1) Is Congress conditioning the States' receipt of federal funds unambiguously?
      1. Rule: If Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the states to exercise their choice knowingly, cognizant of the consequences of their participation.

   ii. (2) Is Congress's condition related to the "federal interest in particular national programs or projects?"
      1. Rule: Conditions on grants must be illegitimate if they are unrelated to federal interest in particular national programs or projects
         a. South Dakota v Dole—drinking limit-- federal highway funds

V. Congress's Power under the Post Civil-War Amendments

a. 13th Amendment
   i. Thirteenth Amendment (1865)—Prohibits Slavery and involuntary servitude
b. 14th Amendment
   i. Fourteenth Amendment: All persons born or naturalized in the US are citizens and no state can abridge the privileges of such citizens, due process and equal protections
c. 14th Amendment, §5:

(1) **Applies only to STATE Actors**

-Must be aimed at proscribing discrimination by officials which 13amendment itself might not proscribe

-Means must **congruent** and **proportional** to the injury to be prevented or remedies.

   a. US v. Morrison—Rehnquist majority holds that civil damages provision of federal gender violence law is not constitutional as a use of the 14th amendment power. That amendment clear applies only to state action and the statute in question fails to specify only state actors
      i. Breyer Dissent: Yes the 14th amendment only applies to state action, but this doesn't preclude its use here. The federal

government is being called upon to fix an inadequacy on the part of the state to provide a remedy for a crime that is already outlawed by state law. Thus the 14th amendment should be used here to control state action.

(2) **Two views of which rights can be remedied**

-(a) **Narrower** view: Only those rights the Court recognizes

-(b) **Broader** view: Congress has ability to create new rights from 14th, but cant dilute current rights

d. Scope of Congress's Power: **May Congress regulate under the post-Civil war amendments?**

i. **Requirements for statute to be constitutional under 14th amendment §5:**

(1) Remedial

a. Must be remedial and not substantive

b. Congress only has authority to prevent or provide remedies for violations of rights recognized by the SC.

i. So Congress cannot expand the scope of rights and provide additional rights.

(2) Congruent and Proportional

c. Congruence: Congress must come up with a record that this is a significant problem in the states (not an isolated event)

d. Proportional: Does this fit? Is this too severe on the states given the nature of the problem?

(3) Cannot be directed at an individual

e. Must be state action.

ii. (*Boerne v. Flores*)

e. 15th Amendment

i. Fifteenth Amendment: Right to vote not to be abridged on account of race, color, or prior servitude.

f. RATIONAL BASIS TEST APPLIES (Brennan)

EXAM TIPS: THE FEDERAL COMMERCE POWER

- Whenever you've got to decide whether a congressional statute falls within an enumerated power, check the Commerce Clause first. It encompasses a broader variety of congressional action than any other congressional power.
- Remember that the Court takes a fairly deferential view on the issue of whether a particular action falls within the commerce power. So long as a regulated activity "substantially affects" interstate commerce, the regulation will be found to fall within the commerce clause.
  - Even if a particular activity being regulated seems to take place solely intrastate, the Court will usually find that when all similar activities are considered a class, they have a cumulative effect on interstate commerce.
  - Congress may ban or regulate interstate transport as a way of dealing with *local* problems.
  - However, look out for congressional regulation of activities that are not really commercial. Here, there's a much better chance that the Court will find that the activity does not substantially affect interstate commerce
    - Examples of attempts to regulate activities that probably don't substantially affect interstate commerce, so the regulation is probably invalid:
      - Congress prescribes the curriculum public schools must use.
      - Congress makes it a federal crime to commit a gender-based violent crime against a woman (Morrison)
      - Congress bans marriage under 18 years
      - But if there's a "jxal hook"—like a ban only on those machine guns passed in interstate commerce—the regulation is probably ok
- Be alert for facts where Congress is regulating the states. Such regulation raises a 10th Amendment issue
  - So long as Congress has merely passed a generally applicable law, this law can apply to states just as it does to private individuals, and there is no 10th amendment violation

- But Congress may not directly compel to states to enact or enforce a federal regulatory program. When Congress does this, it violates the 10th Amendment. But Congress may single out the states for regulation when the states are acting as market participants.

EXAM TIPS: OTHER NATIONAL POWERS

- Professors sometimes test on the blurry line bw taxing and regulation. Your fact pattern might give you a **tax** that is principally for **regulatory purposes**. If so, you can rely on the taxation power as an independent source of congressional power (distinct from the Commerce Clause)- so long as the tax produces at least a non-trivial amount of revenue and its regulatory scheme seems **rationally related** to the collection of the tax itself, it's a valid exercise of the tax power.

III. FEDERAL EXECUTIVE POWER

FEDERAL EXECUTIVE'S EXPLICIT POWERS

I. Does the President have an explicit Constitutional Power?
   a. Executive Powers Explicit in the Constitution
      i. Article I §7, par 2: Veto Power
      ii. Article II, §1, par 1: Tenure and Oath of Office
      iii. Article II, §2, part 1, 2 , 3: Commander in chief, appointment of officers, treaties
      iv. Article II, §3: State of the union, take care laws are faithfully executed
      v. Article II, §4: Impeachment, removal from office.

II. Is the President acting within the <u>scope</u> of his explicit constitutional power?
   a. Rule: If President has an express constitutional power, then the sole issue is whether the President is acting within the **scope** of that power.

III. Has Congress given the President statutory power?
   a. Rule: Congress can give the President statutory power as long as it is constitutional?

FEDERAL EXECUTIVE'S INHERENT POWERS

I. General argument:
   a. Because Article II doesn't limit the President to powers "herein granted" (like with Congress), the President has authority that is not specifically delineated within the Constitution.
   b. Plurality in Youngstown:
      i. President has NO inherent power in this case—he cannot order the involuntary surrender of private property to the Government (steel mills)

II. Does the Executive's inherent power fall under Justice Black's <u>textualist</u> argument from Youngstown?
   a. <u>Rule</u>: There is no inherent executive power; presidential powers must be in the constitutional text or an explicit act of Congress.

III. Does the Executive's inherent power fall under Justice Douglas's <u>separation of powers</u> argument from Youngstown?
   a. <u>Rule</u>: There may be inherent power if Congress and the Constitution are both silent on the issue. However, the power CANNOT interfere with another branch's power and authority (separation of powers)
      i. Here, the Constitution says this is a taking—and this is congress's role so President overstepped.

IV. Does the Executive's inherent power fall under Justice Jackson's spectrum of inherent power argument from Youngstown?

Rule (1): President's actions have maximum force and authority when he acts pursuant to an express or implied authorization by Congress

-I.e. Seizure executed by the President pursuant to an Act of Congress supported by the strongest of presumptions and the widest latitude of judicial interpretation

Rule (2): **Zone of Twilight**: When Congress is silent (or is not clear), authority is uncertain and President may act independently or concurrently.

-Congressional indifference may, as a practical matter, enable/invite independent presidential responsibility.

Rule (3): Where the president acts in contradiction to the express or implied will of Congress, his power is at its lowest ebb, and the president may only rely on his own constitutional powers, minus any congressional power.

-Jackson thinks that Youngstown falls under this category.

Rule (4): (Unstated rule): President may get more deference and have more inherent authority with regard to foreign policy

-This is true even if Congress opposes president's actions

-BUT→ must still be constitutional

V. Does the Executive's inherent power fall under the Dissenter's argument of express constitutional prohibition from Youngstown?

a. Rule: Only when the President violates an express provision of Congress does he act outside his power.

FEDERAL EXECUTIVE'S EXECUTIVE PRIVILEGE POWER

I. Generally
   a. Executive privilege: is the ability of the President to keep secret conversations with or memoranda to or from advisers.
      i. Not mentioned in the Constitution, but Presidents have claimed it throughout American History

II. Does the Federal Executive's executive privilege power apply in this criminal suit?

a. Rule: Court has justiciability in criminal cases because the Court has the responsibility to protect the rights of the accused to have all adversarial evidence provided. (*US v. Nixon*).
   i. Court denies reading an absolute executive privilege—citing Marbury.
   ii. Court also says this was impinging on the role of the Attorney General acting as Special Prosecutor—his powers must be respected and enforced by the 3 branches of government.
b. Rule: Court says maybe executive privilege would prevail if it was a claim of military, diplomatic, or sensitive national security interest
   i. So balance these factors to see if court would step in during a criminal case

III. Does the Federal Executive's executive privilege power apply in this civil suit?

a. Rule: The Supreme Court doesn't see the same "constitutional dimensions" at issue in civil suits as in criminal suits. (*Cheney v. US*).
   i. SC is careful not to usurp executive branch and power in civil suits involving executive privilege
b. Rule: There is Absolute Immunity for President's Acts done in his official capacity as president (not for UNOFFICIAL acts PRIOR to becoming President—think Clinton case)

FEDERAL EXECUTIVE'S SEPARATION OF POWERS/FOREIGN POLICY POWERS

I. Generally
   a. The Constitution says very little about foreign policy decision making.
   b. There is a broad deference to the president in foreign policy matters—only limited by the Constitution

II. Does the President have more inherent foreign policy powers than domestic affairs powers?

a. Rule: Congress can delegate lawmaking power to the president in the realm of foreign affairs—President also has the authority to had pursuant to his inherent foreign policy powers not stated in the Constitution. (*US v. Curtiss-Wright*)
   i. This is because President is the only organ that deals with other nations, holds secrets, and represents US to the world—therefore, he is in a better position to know what is going on in the world and make the call.

b. Rule: The only limit on the President's foreign policy powers: Constitution

III. Has the President entered into a signing statement?

a. President says that he reserves the right to not abide by the legislation and that he has the obligation to torture when he thinks its necessary to the national interest
   i. (Bush with the no cruel or inhumane punishment statute)

FEDERAL EXECUTIVE'S WAR POWERS

I. General

a. Lack of detail in the Constitution on this issue raises the difficult question of "What is the relationship between Congress's power to declare war and the President's authority as Commander in Chief?"

b. The constitutionality of the War Powers Act is unknown, and it wont go before the SC because of the political question doctrine—so instead its up to Congress to try to enforce it or not—(i.e. by cutting funds)

II. Questions to be mindful of:

a. When may the Executive detain American Enemy Combatants?
   i. The constitutionally guaranteed right of habeas corpus review applies to persons held in Guantanamo and to persons designated as enemy combatants on that territory.
   ii. If Congress intends to suspend the right, an adequate substitute must offer the prisoner a meaningful opportunity to demonstrate he is held pursuant to an erooneous application or interpretation of relevant law, and the reviewing decision maker must have some ability to correct errors, to assess the sufficiency of the government's evidence and to consider relevant exculpating evidence. (*Boumediene*)

b. When, if at all, are military tribunals constitutional?
   i. President did not have the authority to set up military tribunals without congressional authorization, because they did not comply with the Uniform Code of Military Justice and the Geneva Convention. (*Hamdan*)

III. Was the American citizen who is an enemy combatant given a meaningful opportunity to contest the factual basis for his detention?

a. Rule: Due Process requires that neutral decision maker give a citizen a **meaningful** opportunity to contest the factual basis for that detention. (*Hamdi*).

At a minimum:

(a) Habeas petition heard in fed court

(b) Meaningful factual hearing

(1) Notice of the charges

(2) Right to respond

(3) Right to be represented by an attorney

(c) Less protection than normal court

(1) Hearsay might be admissible

(2) Court might shift Burden of Proof to the defendant.

CHECKS ON THE FEDERAL EXECUTIVE

I. Are there any formal checks on the federal executive's power?

a. Can this civil lawsuit be a check on the federal executive's power?

i. Rule: The President of the US is shielded by **absolute immunity** from civil damages liability for **acts done in his official capacity as president** during his tenure.

ii. Rule: A sitting President does not enjoy immunity from civil lawsuits when the suits are based on (1) **his unofficial acts** and (2) acts taken **prior** to becoming President.

b. Can this impeachment be a check on the federal executive's power?

i. Rule: Article II, §4: "The President, VP, and all civil officers of the US shall be removed from office on impeachment for, and conviction of , treason, bribery, or high crimes and misdemeanors.

1. Article I, §2: House of Representatives has the sole power to impeach
2. Article I, §3: Trial in the Senate requires 2/3 of the members present

ii. Rule: Impeachment is a last resort

iii. Rule: SC has held that challenges to the impeachment and removal process pose non-justiciable political questions.

II. Are there any informal checks on the federal executive's power?

a. Public opinion, budget, congress

EXECUTIVE AGENCIES' POWERS

I. Generally

a. Executive Agencies are not mentioned in the Constitution

II. Non-delegation

a. Legislative Power Doctrine—Doctrine says that congress has given way too much power to these administrative agencies.

i. This attempted limit has failed—as long as Congress gives agency an intelligible principle to work with, that is enough.

b. Congressional veto—it is unconstitutional for Congress to say we want an agency to do x, y, or z or else we take away some of their powers.

i. Congress cannot delegate legislative power to executive agencies

ii. Historically, concern in the courts about this, but over time, practical pressures have led the court to allow Congress to delegate power to the agencies.

III. Benefits of delegation

a. There is no way Congress can oversee the minutia that agencies regulate

i. Congress doesn't have the expertise or resources.

b. Congress can delegate legislative power to executive agencies

i. Scalia recently wrote a unanimous opinion that says its ok for Congress to delegate legislative authority to the executive branch.

ii. As long as Congress gives the agency some "intelligible principles to operate under, we will consider the agency as executing the aw and not legislating."

IV. End result:

a. Agencies have this power and efforts to thwart that power have been unsuccessful.

IV. LIMITS ON THE STATE REGULATORY AND TAXING POWER

I. Generally

a. This is about structural limitations on government/state power.

b. Preemption:
    i. This comes up when states and the federal government are legislating in the same area
    ii. Congress's purpose is frustrated by the state law.
c. State limits if no federal statute of if federal statute is silent.
d. Applies only to government action

II. Attack plan of this issue:

a. If Congress has passed a law in the area in which the state regulates:
    i. Go through the regular approach on the federal law (justiciability, power of congress, limitations)
    ii. IF the federal law is constitution, go through the preemption issues
b. If there is no federal law in the same area or the federal law is invalid:
    i. Look to see if the dormant commerce clause applies (since the dormant commerce clause applies only if there is no obvious federal law in conflict).

III. Has Congress acted?

a. Is there a conflict between federal and state law?

i. Rule: If there is a conflict between federal and state law, the federal law controls and the state law is invalidated because federal law is supreme under preemption (Supremacy Clause)

1. **Does the federal law expressly preempt state or local law**, OR
    a. Rule: Four corners of the statute
        i. I.e. Congress requires that all cigarettes sold in the US contain a warning "You smoke you die", no state is required to include anything further.

2. **Did congress clearly and implicitly intend to preempt**?
    a. Does it fall within Field Preemption?
        i. Rule: when a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.
            Court will consider:
            -(1) Whether the law covers a matter traditionally left to federal control
            -(2) If there is a broad pattern of federal regulation already in place
            -(3) If Congress has already set up an agency with broad powers.
    b. Does it fall within Conflict Preemption?
        i. Rule: Occurs when (1) compliance with both federal and state regulations is a physical impossibility OR (2) where a state law stands as an obstacle to the accomplishment and the execution of the full purposes and objectives of the Congress

IV. Has Congress not acted?

a. General Rule: Where Congress has not acted, the judiciary decides that the state law is not preempted.
b. EXCEPTIONS:
    (1) Can the state law be challenged under the dormant commerce clause?
    Rule: The Dormant Commerce Clause only applies to states and it is the principle that states cannot prohibit a state from passing legislation that improperly burdens or discriminates against interstate commerce.
    Rule: State and Local laws are unconstitutional if they place an **undue burden** on interstate commerce.
        a. EXCEPTION:
            i. Ok if Congress authorized the state or local action

ii. "Market Participant exception": A state or local government may favor its own citizens in receiving benefits from state or local governments or in dealing with government-owned businesses.
1. Note that discriminatory laws trigger tough scrutiny.

(2) Can the state law be challenged under the privileges and immunities clause?
Rule: States cannot deny the privileges and immunities to other citizens that it gives to its own state citizens.
a. Limits the ability of states to discriminate with regard to constitutional rights or important economic activities
b. These laws can also be challenged under the EPC of the 14th Amendment.

V. CONSTITUTION'S PROTECTION OF INDIVIDUAL RIGHTS

I. Generally
a. Before the Bill of Rights
i. The Constitution did little protect individual liberties
ii. Supreme Court initially thought that the Bill of Rights only applied to the Fed. Govt
1. BUT in the 1900s, the Court applied most of the Bill of rights to the states, finding that the provisions were incorporated into the DP Clause of the 14th amendment
b. The seven Articles of the Constitution are primarily about the structure of the government and not individual rights

II. Incorporation
a. Generally
i. The Incorporation of the Bill of Rights into the DP Clause of the 14th Amendment
1. The SC Suggested finding some of the Bill of rights are part of the liberty protected from state interference by the DP Clause of the 14th Amendment.
ii. In 1897 in Chicago, Burlington, & Quincy Railroad Co. v. Chicago, the SC Ruled that the DP Clause of the 14th Amendment prevents states from taking property within just compensation.
1. Although the Court didn't speak explicitly of the 14th Amendment incorporating the Takings Clause, that was the practical effect of the decision.

b. Debate over Incorporation
i. **Total Incorporationists**:
1. Believe that all of the Bill of Rights should be deemed to be included in the DP Clause of the 14th Amendment.
ii. **Selective Incorporationists**:
1. Only some of the Bill of Rights were sufficiently fundamental to apply to state and local governments
2. Justice Cardozo: "The DP Clause included principles of justice so rooted in the tradition and conscience of our people as to be ranked fundamental and there implicit in the concept of ordered liberty.
3. Justice Frankfurter: "The DP Clause precludes those practices that offend those canons of decency and fairness which express the notions of justice of English-speaking people.
iii. 3 issues the Debate Centered on:
1. (1) History and the framers intentions with the 14th amendment
2. (2) Federalism
3. (3) Appropriate judicial role

III. State Action—The Application of the Constitution to Private Conduct
a. Generally
i. The Constitution's protections of individual liberties and its requirement for equal protection apply only to the government. Private conduct generally does have to comply with the Constitution. This is often referred to as the "state action" doctrine.

1. The constitution applies to government at all levels—federal, state, and local.

b. Exceptions to the State Action Doctrine When Private Conduct MUST Comply w/ the Constitution

(1) **Public functions Exception**

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

(2) **Entanglement Exception**

1. Private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.
2. Here, either the government must cease its involvement with the private actor or the private entity must comply with the Constitution.
3. The key question is then what degree of government involvement is sufficient to make the Constitution applicable?
4. Entanglement Exception cases arise primarily in 4 areas:
   (1) Judicial and law enforcement actions
   (2) Government licensing and regulation
   (3) Government subsidies
   (4) Voter initiatives permitting discrimination.

VI. EQUAL PROTECTION

ANALYSIS

- Is it state or federal action?
  - If **no**, then there is no violation of 5th or 14th amendment
  - If **yes**, move on to the next question
- Does the Classification exist on the face of the law and is it based on suspect criteria (Race, national origin, or, generally, for states, legal non-citizens)?
  - If **yes**, then heightened judicial review:
    - Unconstitutional unless: ends have an "actual compelling government interest" and the means are: necessary to achieve a goal (narrow tailored)
    - There's a presumption of invalidity and the burden is on the government to justify
  - If **no**, move on to the next question.
- If the law is facially neutral, does it have a discriminatory purpose and impact?
  - If **yes**, then heightened judicial review:
    - Unconstitutional unless: ends have an "actual compelling government interest" and the means are: necessary to achieve a goal (narrow tailored)
    - There's a presumption of invalidity and the burden is on the government to justify
  - If **no**, move on to the next question.
- Does the classification exist on the face of the law and is it based on "quasi suspect" criteria (Gender, legitimacy—non-married parents)?
  - If **yes**, then intermediate review:
    - Unconstitutional unless: ends are important government interest (actual purpose), and means: classification substantially related to purpose (exceedingly persuasive justification?)
    - There's a presumption of invalidity and the burden is on the government to justify.
  - If **no**, then move on to the next question.
- If the law is facially neutral, does it have a discriminatory purpose and impact?
  - If **yes**, then intermediate review:
    - Unconstitutional unless: ends are important government interest (actual purpose), and means: classification substantially related to purpose (exceedingly persuasive justification?)
    - There's a presumption of invalidity and the burden is on the government to justify
  - If **no**, then Deferential **Rational Basis Review**:
    - Constitutional if:
      - End= Any conceivable legitimate (constitutionally permissible) purpose +

- Means: rationally related to purpose—a rough fit is sufficient (but it cannot be arbitrary or irrational)
- There's a presumption of validity and the burden is on the challenger.

- Nuances:
  - Note apparent difference bw "strict" strict scrutiny and strict scrutiny "not necessarily fatal in fact" (Grutter)
  - Note apparent difference bw intermediate scrutiny in VMI ("exceedingly persuasive justification) and approach in Nguyen case
  - Note apparent difference bw traditional basis and "rational basis with a bite" (Cleburne)
    - Ginburg v. Kennedy.

I. Introduction

a. Since Brown, the SC has relied on the EP Clause as a key provision for combating invidious discrimination and for safeguarding fundamental rights
b. In Bolling, the Court held that Equal Protection applies to the federal government through the DP Clause of the 5th Amendment.
c. Main issue: Is the government's classification justified by a sufficient purpose?
   i. A sufficient justification depends entirely on the type of discrimination.
d. Issues
   i. What is the Classification?
      1. Facially Neutral laws
         a. If P's claim is that the statute/regulation doesn't make a classification on its face, but is being administered in a purposefully discriminatory way, then he is claiming that the statute/regulation is a violation of equal protection "as applied."
      2. Classification on the Face of the Law

   ii. What is the appropriate Level of Scrutiny?

Strict Scrutiny	A law is upheld if it is proven necessary to achieve a compelling government purpose and cannot achieve its objective through any less discriminatory purpose	Race, national origin, and discrimination against aliens (Immutable characteristic) -Burden is on the government
Intermediate Scrutiny	A law is upheld if it is substantially related to an important government purpose. The means used need not be necessary, but must have a "substantial relationship" to the end being sought	Gender, non-marital children (Immutable characteristic) -Burden is on the government
Rational Basis Test	A law is upheld if it is rationally related to a legitimate government purpose	Everything else -Burden is on person challenging it

   iii. Does the Government Action meet the Level of Scrutiny?
      1. Must evaluate both the law's ends and its means
         a. Strict Scrutiny
            End: "Compelling government purpose"
            Means: "necessary"
         b. **Intermediate Scrutiny**:
            End: "Important government purpose"
            Means: "substantially related"
         c. **Rational Basis**:
            End: "Legitimate purpose"
            Means: "rationally related"
e. Sliding Scale
   i. Some claim the court has already done this:
      1. Rational basis with a "bite"

2. Intermediate scrutiny is applied in a very deferential manner that is essentially rational basis, while in other cases its indistinguishable from strict scrutiny.

II. Rational Basis Test

a. Standard Approach

i. Is there a legitimate purpose? (End)

1. There doesn't have to be a need articulated by Congress
    a. The SC has never required Congress to give reasons for legislation.
2. ANY conceivable legitimate purpose is GENERALLY sufficient.

ii. Are the classifications reasonable in light of the statute's purpose? (Means)

1. Is the classification Over-inclusive?

a. Generally
    i. The government's decision to intern ALL Japanese- Americans on the West Coast was radical, bc it harmed a large number of people unnecessarily.
    ii. Over-inclusive laws risk burdening a politically powerless group, which would have been spared if it had enough clout to compel normal attention to the relevant costs and benefits.
    iii. This is not a determinative evaluation—its just helpful to the judge to see how the means achieve the ends
b. Rule: A law prohibiting advertising vehicles, unless for business owners, has a legitimate purpose of enhancing traffic safety because the City might have perceived that the prohibited advertisements could be more distracting (*Railway Express Agency v. NY*).

2. Is the classification Under-inclusive?

a. Laws are under-inclusive when they do not regulate all who are similarly situated
b. The SC has said that when rational basis review is used, even substantial under-inclusiveness is allowed, bc the government may "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.

b. Exceptional Cases

i. Does Rational Basis with a "Bite" Apply?

1. Generally
    a. Where the court sees bare animus against a group, the Court may apply a higher standard even if its not a protected classification.
        i. Here, there is no presumption of validity.
        ii. The heavier the burden, the more likely the court will find bare animus and apply rational basis with a bite.

2. Is the legal disability motivated by "animus"?

a. The court has been willing to strike down legislation that is motivated by "**animus**" or "hostility" towards a politically-unpopular group.
    (1) The desire to harm an unpopular group cannot be a "legitimate governmental objective"
    (2) To the extent some apparently legitimate state objective is cited by the statute's defenders, the means drawn are so poorly linked to the achievement of that objective that not even a "rational relation" between means and end is present

b. Is the legal disability motivated by animus a ban on protection of gays?

i. Rule: An amendment declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of EP of the laws in the most literal sense (*Romer*)

1. In Romer, the Court struck down a constitutional amendment that would have prevented the state or any of its cities from giving certain protections to gays or lesbians.

c. Does the statute attack a vulnerable group and is the legal disability whole irrelevant to the stated purpose of the act?

i. If **yes**, then rational basis with a bite.

1. Rule: In Moreno, (food stamp and hippies), the court held that if the constitutional conception of Equal Protection means anything, it must at least meant that the bare congressional desire to harm a political unpopular group (without further policy justifications) cannot constitute a legitimate governmental interest.
2. Rule: In Cleburne, there is no rational basis for believing that the home would pose any threat to the city's interests, especially not more than several other groups not included within the ordinance
    a. So VERY UNDER-inclusive.

III. Classifications Based on Race and National Origin—Strict Scrutiny Test Proving Discrimination

a. On the face of the law, does the statute discriminate based on Race or other protected class?

i. Generally:

1. Historically: Racial classifications were permitted under the Constitution—Dred Scott even reconfirmed that slaves were property.
2. Modern: In order to pass muster, racial classification has to be **necessary** to achieve **compelling state interest**.

a. (1) Remedial

i. To remedy past discrimination (i.e. in Swan case—there was legalized segregation in VA and how do you desegregate f you don't pay attention to race? Court said you can use race to remedy that situation)
ii. [Argument not used by the court]

b. (2) Diversity

i. Educational benefits that diversity was designed to produce were substantial. It promotes learning, prepares students for a diverse workforce, and classes will be enriched by this diversity
ii. [Argument used by the court]

c. There must be NO non-racial or a less racial way for the government to achieve the same goal.

i. I.e. Protective affirmative action statute, if a particular disease is exhibited by a particular racial group requiring that the group be screened may be in the national interest, or it might sometimes be wise to segregate for safety reasons (i.e. in prison).

d. Used regardless of whether the classification is designed to disadvantage or help minorities.

i. Even if using racial classifications for a benign purpose, strict scrutiny is still the test bc EPC protects "all persons" so all people are guaranteed equal protection under the laws.

e. BUT, just because the Court applies strict scrutiny it doesn't mean the law is unconstitutional

3. Race and Segregation

a. Plessy v. Ferguson: Separate but equal: Segregated trains and schools have the same services, which indicate that they are equal—as long as the services are equal it doesn't matter that they are separate

i. SC upheld laws requiring the segregation of the races (7/8 White—LA statute on trains)

b. Gaines v. Canada: Blacks not allowed into State's law school but paid for them to attend elsewhere—CT said no, must provide **substantially equal** opportunities—so MO set up a new black school
c. Sweatt v. Painter: Ct ordered U TX law school to admit black student—there was a separate black law school but it was clearly not substantially equal
d. McLaurin v. Ok State: Ct said once blacks admitted to a previously all-white school, they cannot be forced to sit in segregated areas.
e. Brown v. Board of Education: Segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of minority group equal educational opportunities.
f. De Facto Segregation: The way the law has evolved, its ok if schools are racially segregated (ny population)
    i. **Can schools voluntarily do something do something to integrate schools?**
        1. Rule: States cannot use busing as a desegregation tool since reallocation of governmental decision-making power must be done in a racially neutral manner. (*Seattle School District*).

ii. Is the law unconstitutional? (ends)

1. **Does the law expressly single out and disadvantage a particular racial group?**
    a. Rule: It is unconstitutional to expressly single out and disadvantage blacks (when not allowed in jury pool—*Strauder v. W. Virginia*).
    b. Rule: There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause (*Loving v. Virginia*)

2. **Does the law expressly discriminate against a racial group because of pressing public necessity?**
    a. Although racial antagonisms never justify legal restrictions which curtail the civil rights of a single racial group, pressing public necessity may (especially in a time of war)—*Korematsu*.
        i. ADLER: You cannot always trust the SC to stand up for constitutional rights in time of emergency. The court will be deferential to the executive branch in times of crisis.

3. **Does the law expressly discriminate in order to advance affirmative action?**
    a. Rule: A university that wants a "diverse" class may give a preference to applicants from underrepresented minorities as long as this is done as part of an individualized process (*Grutter*)
    b. Rule: However, any race-based classification will clearly face a presumption of unconstitutionality even if it is motivated by affirmative action concerns.
    c. Rule: The only governmental objectives that have so far been endorsed by the Court as possibly supporting race-conscious affirmative action are
        (1) The **redressing** of clear past discrimination and
        (2) The pursuit of **diversity** in a student body

4. **Was there quite strong and specific evidence of past discrimination?**
    a. Formal findings are probably not necessary that this discrimination took place.

5. **Was the government the one who discriminated?**
    a. A race-conscious affirmative action plan is most likely to be upheld if the past discrimination was by the particular government entity in question.

6. **Is there a racially based quota here?**
    a. Rule: A racially based quota is an inflexible number of admission slots and virtually all racially based quotas will be struck down even where the government is trying to eradicate the effects of past discrimination.
        i. The court will probably say that a quota is not "necessary" to remedy discrimination, that more flexible "goals" can do the job.

7. **Is there preferential university admissions going on here?**
    a. Rule: (1) Public universities and colleges may explicitly consider minority racial statute as a factor that increases the odds of admission, but that (2) these institutions may not award "points" for minority status, or otherwise pursue "mechanical quota like schemes" and must instead evaluate each candidate as part of a "holistic review" that treats race as merely one factor among others (*Grutter*)
        i. In application: Can a college favor children of wealthy alumni or athletes?
            1. Strict scrutiny is not triggered bc the law doesn't target race
            2. The court will apply rational basis
            3. In most cases, the court will defer to the university.

iii. Is it narrowly-tailored enough? (means) (O'Conner—*Grutter*)

1. **O'Conner's narrow tailoring criteria:**

(1) Soft core race must be one of many factors
- Admissions process should be individualized and not mechanical so that it looks at all aspects of diversity

(2) Cannot use a quota system—cannot insulate each category of applications with certain desired qualifications from competition with other applications—this is only a plus that's it.

(3) Any alternative way to achieve this goal? i.e. diversity
-State must have considered race neutral devices that don't suffice to get this diversity.

(4) Temporary? In 25 years, this wont be necessary—sunset provision is required, otherwise its broader than necessary
-One argument: after 25 years, its unconstitutional.

(5) Cannot be unduly burdensome to whites

(6) Everybody must be thrown into the same competitive pool

(7) Diverse class should be the goal

2. **Is there race-conscious pupil-assignments in public schools?**
    a. No individual student's race may be considered in making that student's school assignment. (Seattle School District)
        i. Kennedy concurrence: The plurality went too far in its insistence on complete color-blindness.
            1. When an individual child's race is something that can ultimately decide where they go to school, race is playing too big of a role.
            2. Suggests: Any school program that wants to integrate better consider a way to make that decision *not* based on race.
    b. Although diversity is a compelling interest, it must be limited to the realm of higher education. The program wasn't narrowly tailored enough to satisfy strict scrutiny

b. If the law is Facially Neutral Laws does it have a disparate impact and discriminatory Purpose?

i. Generally:

1. To have a facially neutral law treated as containing a racial classification (and subject to strict scrutiny), challenger must show not only disparate impact, but also intent to discriminate.

ii. Is there discriminatory purpose in the statute?

1. Rule: If a law is facially neutral regarding race, even if there is a discriminatory impact, there must be proof of discriminatory purpose to get strict scrutiny (Washington v. Davis—test for policemen)
    a. So its very difficult to get strict scrutiny on racial grounds unless the classification is apparent from the face of the statute.
2. Rule: There is no gender discrimination claim when if the law is facially gender-neutral, and petitioners fail to give any proof that the state's purpose in adopting the law was to disadvantage women. Rather, challenger must show that the government desired to discriminate against women. (*Personnel Administrator of MA v. Feeney*—veterans statute)
3. Rule: While it is true that discriminator purpose need only be A factor in the leg and not the only factor, petition can fail to meet the burden of proof of animus. (*Village of Arlington Heights v. Metropolitan Housing*)
    a. Were any Factors for Discriminatory Animus Present?
        (a) Circumstantial and Direct evidence of intent—Statistics?
            1. Sometimes clear pattern of discriminatory intent emerges
        (b) Historical background of the decision (History of the event)
            2. Did the law change in response to recent events?
                a. Sudden departures from normal procedures may afford evidence of improper purpose.
        (c) Sequence of events leading up to challenged decision
    ii. (d) Legislative/Administrative history.
    b. If P proves discriminatory purpose, can the defendant, who has the burden now, explain it away by showing that the legislation would have passed regardless of the discriminatory purpose? OR
        i. If D does prove this, there is no causation bw P's injury and the discriminatory purpose.
            1. Rule: Once racial discrimination is shown to be a substantial or motivating factor behind the enactment of the law, the burden shifts to the law's defenders to demonstrate that the law would have been enacted without this factor (ppl convicted of moral turpitude cant vote—*Hunter v. Underwood*)
    c. If P proves discriminatory purpose, can the defendant, who has the burden now, explain it away by showing that it wasn't a motivating factor at all?

iii. Is there a disparate impact as a result of the administration of the statute?

1. Rule: Proof of discriminatory impact in the administration of the death penalty is insufficient, without proof of discriminatory animus to show an EPC violation – need to show that in this case, the govt acted with animus and therefore you are successful. (*McKlesky v. Kemp*)
    a. ADLER: Overwhelming statistical data may show that a statute has a racial purpose when nothing but discrimination can explain the results, but it's RARE.

IV. Classifications Based on Gender—Intermediate Scrutiny Test

a. Generally
    i. There's been a long history of discrimination against women that "protect" them
    ii. With gender, we're worried about the legislature using characteristics that have nothing to do with the goals of the legislation.
    iii. Intermediate Scrutiny—a compromise for gender:

1. Class must be substantially related to an important government purpose.
2. Less deferential than rational basis
    a. *Craig v. Boren:* first case that gave gender classifications intermediate scrutiny.

iv. Affirmative Action for Women
1. Will be treated with less scrutiny by the courts and allowed more frequently, than affirmative action for race even though it is conceded that affirmative action for race is more necessary.

b. Is there a sufficiently important government purpose? OR

i. Sufficiently important government purposes:

1. Are we dealing with biological differences between men and women?
- a. If **yes**→ sufficient
- b. Rule: A Rule favoring mothers over fathers is constitutional because of the greater certainty as to the identity of the mother and the greater opportunity that mothers have in establishing a relationship with their children. (INS v. Nguyen- INS argued that a biological connection is more easily established bw mother and the child bc of records and act of giving birth)
- c. Practical application of different approaches to biology
    i. Hypo: HS bball team and girl tries to get on boy's team EP violation?
        1. Principle would say no. Worried about the girl getting hurt, locker room etiquette, boys who would refuse to play.
        2. Dissent would argue that if the girl's team will not be able to afford her a similar opportunity bc of fewer resources, then the court should apply VMI and allow her to join.

2. Is the classification remedying past discrimination or is it really just a stereotype?
- a. If remedying past discrimination—then sufficient
- b. I.e. School can create all girl magnet school, can give Affirmative Action to boys, since they tend to score lower.
- c. The court is likely to strike down a gender-based classification system that seems to be based on fault generalizations or stereotypes about the differing abilities and interests of the two sexes (*US v. Virginia*)

3. Is the object of the statute to exclude or protect members of one gender bc they are presumed to suffer from an inherent handicap or to be innately inferior?
- a. Relying on archaic stereotypes is not allowed

c. Is there an exceedingly persuasive justification for a gender-based scheme? AND

i. Rule: A state must show an "exceedingly persuasive justification" for a gender based scheme and courts must give "skeptical scrutiny to such a scheme (*US v. Virginia (VMI)—Ginsburg*)
1. So much closer to strict scrutiny than rational basis.

ii. Was the objective one that really motivated the state?
1. Rule: The objective must be one that really motivated the state. This justification must show **actual state purposes**, not rationalizations for actions in fact differently grounded.
2. Rule: The burden is on the state to demonstrate that the actual goal is significant (or exceedingly persuasive) and that the legislation is substantially related to serving that significant state goal. (*Mississippi University for Women v. Hogan*—nursing school—school is unconstitutional here)

a. It would be a different case if we were talking about medical school where women have been traditionally excluded.

d. Is the law substantially related to the important government purpose?

i. **Acceptable Government purposes**:

1. Remedial:
    a. Has there been a history of discrimination against women in nursing in MS or nationwide? (its much broader than with race and remedial compelling state interest where we asked was there intentional racial discrimination beforehand in Seattle—court said no and so that's why race wasn't a compelling state interest) – *Mississippi University for Women v. Hogan*.
2. Public safety
3. Compensation

ii. **Unacceptable Government purposes**:

1. Stereotype—overbroad generalizations about capacities bw men and women
2. Biological difference that cant really hurt women—not ok for inferiority of women in legal, economic, or social ways
3. Not ok if based on inherent inferiority.

iii. Rule: Government's purpose must be the actual purpose

1. Court will not hypothesize these objectives
2. Will only consider those objectives that are shown to have actually motivated the legislature

iv. Rule: it need not be the only possible way to achieve the goal (Diff. than Strict Scrutiny)

v. Rule: The burden rests with the government and not with the challenger.

V. Other Classifications (Aliens, Non-marital Children, Age, Wealth, Disability, Sexual Orientation)

a. **Aliens** (discrimination against non-citizens, not national origin)

i. Protected by EP since the 14th amendment says "no person" shall be discriminated against—Clause doesn't refer to citizens

1. The general rule is that strict scrutiny is used to evaluate discrimination against non-citizens.

ii. **Exception**: Alienage classifications related to (1) self government and to (2) the democratic process only need meet rational basis review.

b. Non- Marital Children

i. It is clearly established that intermediate scrutiny is applied in evaluating laws that discriminate against non-marital children.

ii. Intermediate scrutiny is justified because of the unfairness of penalizing children because their parents were not married

iii. It is *immutable* in the sense that there is nothing the individual can do to change his or her status.

c. Other types of Discrimination: Only Rational Basis Review

i. Generally:

1. Unless the discrimination was with regard to race, national origin, gender, alienage or legitimacy, the law will receive rational basis review.
    a. I.e. who can have a driver's license, who can receive welfare, who can be a police officer, etc.
2. The SC has expressly rejected heightened scrutiny for some other types of discrimination:
    a. Age, disability, wealth, and sexual orientation.
        i. **Wealth**:
            1. It appeared for awhile that the SC would use heightened scrutiny for laws discriminating against the poor.

2. However, the SC clearly held that only rational basis review should be used for wealth Classifications.
    a. In *San Antonio Independent School District*—SC expressly held that poverty is not a suspect classification and that discrimination should only receive rational basis review.
3. **Poverty** is not immutable.

VI. Fundamental Rights and Equal Protection

a. Generally
    i. There will be strict scrutiny not only when a "suspect classification is used, but also when a "fundamental right" is burdened by the classification by the government. Whenever a classification burdens a "fundamental right" the classification will be subjected to strict scrutiny even though the people who are burdened are not members of a suspect class

b. Voting

i. The right to <u>vote</u> in state and local elections is "fundamental" so any classification burdening that right will be strictly scrutinized (i.e. poll tax, or an unduly long residency requirement before voting is allowed)

c. Necessities

i. There is <u>no</u> fundamental right to material <u>necessities of life</u>. Thus, food, shelter, and medical care are <u>not</u> "fundamental" and the state may distribute these things unevenly.
ii. Similarly, one does not have a fundamental right to a <u>public school education</u>, therefore the state may impose inequalities in the distribution of that education, without having to pass strict scrutiny.

VII. FUNDAMENTAL RIGHTS UNDER EQUAL PROTECTION AND DUE PROCESS

WHAT RIGHTS THAT ARE NOT SPECIFICALLY ENUMERATED IN THE CONSTITUTION ARE GOING TO BE CONSIDERED SO FUNDAMENATL THAT WHEN THESE RIGHTS ARE AT STAKE THE COURTS SHOULD NOT DEFER TO THE STATE OR FEDERAL LEGISLATURE?

I. Introduction

a. Generally:
    i. The SC recognizes that some liberties are so important that they are deemed "fundamental rights"
    ii. Generally the government cant infringe upon these rights unless strict scrutiny is met
b. Fundamental Rights fall under either <u>Due Process</u> or <u>Equal Protection</u>
    i. **DP claims**:
        1. Whether the government interference is justified by a sufficient purpose (law denies a right to everyone)
            a. If law denies right to everyone→challenge under Due Process
    ii. **EP claims**:
        1. Whether the government discrimination as to who can exercise the right is justified by a sufficient purpose (law denies a right to some, while allowing it to others)
            a. If the law denies the right to some, while allowing to others→ challenge as offending equal protection.
    iii. The <u>Major Difference</u>—is how the constitutional argument is phrased.
c. 9th amendment:
    i. "The enumeration in the constitution of certain rights shall not be construed to disparage others retained by the people."

1. Not a source of rights itself, but used to provide textual justification for the Court to protect non-textual rights (i.e. right to privacy).

d. ADLER note re: Fundamental Rights
   i. Fundamental rights are available only to the extent that citizens can afford to pay for them. The law protects abortion rights but not for women who cant afford them, since the state has no obligation to fund it. Some argue that makes the right hollow for the population
e. Substantive v. Procedural Due Process
   i. Existence of a right triggers two distinct burdens on the government.
      1. **Substantive**:
         a. Government must justify infringement by showing that its action is sufficiently related to an adequate justification
      2. **Procedural**:
         a. Requires government to provide notice and a hearing before terminating custody.
f. Narrow Analysis:
   i. State Action?
   ii. Substantive?
      1. Has there been a deprivation?
         a. Of Life, Liberty, or Property?
            i. Fundamental Right?
               1. <u>Factors for considering whether right is fundamental</u>:
                  a. Text of the Constitution
                  b. Values
                  c. Scope of the right (in the phrasing) (i.e. Scalia says that the fundamental right in question should be framed in the most narrow manner possible)
                     i. ADLER: You have to carefully described the right you are talking about—this will especially impact the tradition argument
                  d. Tradition
                  e. Precedent
               2. Argue broad or narrow definition of a right
               3. Is the right implicit in the concept of ordered liberty or evolution of values?
               4. Does the Court need to restore the natural order upset by the legislature?
            ii. Has the right been infringed?
               1. Directness and substantiality of the interference?
            iii. Scrutiny level
   iii. Procedural
      1. Notice and form of hearing.

g. Broad Analysis:
   i. Is there a fundamental right?
      1. This is important
      2. Three general rules to find out whether a right is fundamental:
         a. How **Broadly** or **Narrowly** the issue characterized makes all the difference
            i. I.e. is there a fundamental right to private sexual behavior between consenting adults v. is there a fundamental right to homosexual sodomy?
         b. Use **text, framers' intent, history, tradition and policy**. Consider whether right encompasses value "implicit in the concept of ordered liberty" and the evolution of values.

<u>(1) Originalists</u>:

-Fundamental rights limited to those liberties explicitly stated in the text or clearly intended by the framers.

(2) Non-Originalists:

-Permissible for the Court to protect fundamental rights that are not enumerated in the Constitution or intended by its drafters

(3) Moderate Originalists:

-Judiciary should implement the framers' general intent, but not necessarily their specific views.

c. There are cases (see below) that protect **certain clusters of fundamental rights**. You have to use those cases in your analysis to analogize or distinguish. Argue to the concurrences, the justices ready to switch sides.
d. Whether the court is needed to **restore the natural order, which has been upset by the legislature**?

ii. Is the constitutional right infringed?

1. When the exercise of a right is prohibited, this is clearly infringement
2. But, when it is not a complete prohibition, when it is just a burdening of the right, when does it constitute an infringement?
    a. Consider directness and substantiality of the interference.
    b. The court has rarely discussed the issue of infringement.
        i. Look to abortion cases, post-Casey, for the most in-depth discussions of infringement

iii. **Is there sufficient justification for the government's infringement of a right? Is the means sufficiently related to the purpose?** (i.e. does the law pass strict scrutiny?)

1. Fundamental right triggers strict scrutiny
2. Therefore, compelling interest is necessary:
    a. Government has the burden of persuading court that a truly vital interest is served by the law in question.
        i. Heavy burden on the state
        ii. Compelling interests: Public health, safety, and morals
        iii. Narrowly tailored: spandex fit.
3. Non-Fundamental rights trigger only rational basis.
    a. The Ct. may think the rule is dumb, but it will stay in effect of it as long as the State provides some sort of rational basis
        i. Rationale: if the right is not fundamental, it should be left to the changing morals of society/the political process to regulate.

II. Economic Substantive Due Process

a. Substantive Due Process

i. Protection of economic liberties refers to protection of constitutional rights concerning the ability to enter into and enforce contracts to pursue trade or professions, and to acquire, possess, and convey property.
    1. Today: FREEDOM TO K IS NOT A FUNDAMENTAL RIGHT.
ii. If you can make the argument that _____ is a fundamental constitutional right, you can argue that strict scrutiny should be applied instead of rational basis
    1. I.e. retarded people should be sterilized to make more perfect genetic pool
iii. The reverse is true; you can trigger strict scrutiny (i.e. with traditional categories like race) without triggering fundamental rights.
iv. Basis in the Constitution—3 ways to approach economic rights
    1. Article 1, §10: Contracts Clause
        a. "No state shall pass any law impairing the obligation of Ks.
    2. Takings Clause
        a. Applies to property (along with 5th amendment(
    3. Economic Substantive Due Process
        a. The Lochner Court used the DP Clause of the 14th Amendment to invalidate government economic regulations that interfered with freedom to contract, since contracts clause (although applicable to the states)

applied only to existing contracts (**Lochner** was about future contracts or the right to contract generally).

b. Historical Background of Economic Substantive Due Process:

i. Predominately used from late 1800s to 1937.
ii. Used to limit the government's ability to both impair existing Ks and regulate the content of future Ks.
    1. Used during **Lochner** era to declare many state laws (i.e. those addressing minimum wage)—as violating the 14th amendment by impermissibly interfering with the freedom of K.

c. Lochner v. New York (1905)

i. Facts:
    1. Lochner filed for violating state labor law, which prohibited employment in bakeries for more than 60 hours per week.
ii. Held:
    1. The general right to make a K is an economic liberty interest protected by the 14th amendment.
iii. Reasoning:
    1. Court used early strict scrutiny test: asked (1) is infringement based on a valid exercise of police power? (morals, health, safety, and welfare of the public—compelling state interest) (2) is the statute narrowly tailored to accomplish the stated goal of the sovereign? (it cannot be over-inclusive)
    2. Court rejected the argument that the statute was for the health and safety of the bakers because the means to accomplish the safety goal were not direct enough.
    3. The right to K is not absolute bc the state retains its police power and there are times when the state interest could outweigh freedom of K.
iv. Holmes Dissent:
    1. Argues that the court decided of its own accord that the freedom to K was part of the "liberty" protected by Due Process
v. Adler:
    1. The decision has shaped the SC ever since bc its been careful and afraid of subjective beliefs dictating decisions regarding fundamental rights under due process.

d. Lochner Dead or Alive:

i. Post 1937, the court no longer protected freedom of K under the liberty provision of the DP clause, nor did it impose limits on Congress's ability to regulate the economy based on federalism or narrow definitions of federal powers.
ii. The Depression created a widespread perception that governmental economic regulations were essential—wages were low and employees lacked bargaining power.
    1. **West Coast Hotel v. Parrish** (1937)
        a. Washington state enacted a law that set the minimum wage law for women. West Coast Hotel challenged the statute as violating the DP clause of the 14th amendment. Court rejected **Lochner** and reasoned that the Constitution does NOT include the right to K within its protection of "liberty."
            i. Instead court reasoned that the liberty in the Constitution means social orgnization and protects **health, safety, morals and welfare**.
            ii. Court applied rational basis
        b. Held: Minimum wage laws are a reasonable and rational way (not arbitrary or capricious) for the legislature to respond to this public welfare problem.
    2. **US v. Carolene Products (**1938)
        a. Congress passed the "Filled Milk Act" which prohibited the shipment in interstate commerce of skimmed milk with any fat or oil other than milk.

Carolene Products were indicted for violated the act and challenged it as unconstitutional.

i. Court radically departed from **Lochner** and established that with legislation affecting commercial or economic transactions only, there is a **presumption** that the law **is constitutional**.
ii. Court accorded wide deference to the legislature

b. Held: Congress held hearings prior to the passage of the act and so had a **rational basis** for believing that the act was necessary for the protection of the public.
c. **FOOTNOTE 4**: Justice Stone—VERY IMPORTANT—explains when and why rational basis test can be applied rather than a higher level of scrutiny.
d. This is a complete reversal of Lochner.

Rational Basis	Strict Scrutiny
-Run of the mill commercial transactions	-Although this case doesn't deal with anything that triggers strict scrutiny—footnote 4 embraces 1st 10 amendments and especially fundamental rights and suspect classifications. Fundamental Rights - EP clause - DP clause Suspect Classifications (discreet and insular groups/minorities of people. - EP clause

e. Extreme Deference to the legislature and lobbyists—Commercial Transactions

i. **Williamson v. Lee Optical of Oklahoma** (1955):
1. State law prohibited any person prom fitting or duplicating lenses without a prescription from an optometrist. Court reasoned that the reasons for the state law's passages do NOT have to be a tight fit with the state's goals. It does not matter if the law is wasteful or exacts some needless requirements.
2. Held: As long as the legislature might have concluded that in some instances it accomplishes the goal, hypothetical rational basis is enough in **commercial or economic regulation**.
3. ADLER:
a. If you can think of ANY way this works, then its probably ok, so long as its **economic**.

ii. CURRENT LAW

1. Economic regulations (laws regulating business and employment practices) will be upheld when challenged under the DP Clause so long as they are **rationally related to a legitimate government purpose**.
a. Government purpose can be any goal not prohibited by the Constitution.
b. Asserted purpose need not be legislature's actual objective
c. Law only needs to be a reasonable way of attaining the end—need not be narrowly tailored to achieving this goal (rational basis).

III. Reproductive Autonomy

a. Right to Procreate

i. Buck v. Bell (1927):
1. Government mandated sterilization of "feeble minded" women—and the court held that the right to procreate is NOT a constitutional right, and therefore, the restriction is okay.
a. Holding was **implicitly overruled in Skinner**.

ii. Skinner v. Oklahoma (1942):

1. OK statute that required sterilization for anyone convicted of 2 or more felonies involving "moral turpitude." Δ objected and the Court agreed that the interest in preventing the "passing of the criminal gene" did not outweigh the constitutional right to procreate.
2. Held: The right to procreate is a fundamental right that deserves special protection (Strict Scrutiny) under the Constitution
    a. Majority finds the fundamental right to procreate under the EPC (<u>not</u> DPC)
        i. NOTE: Same Analysis for EP claims AND DP claims as they relate to fundamental rights.
    b. Majority is not making criminals a suspect class, but two groups are being treated differently and have different protection of a fundamental right→ therefore, Strict Scrutiny.

b. Right to Purchase and Use Contraceptives

i. <u>Griswold v. Connecticut</u> (1965)
1. CT statute made giving advice on contraception of the purposes of preventing pregnancy a criminal offense. Court is concerned about **Lochner**-izing, but reasons that the Bill of Rights radiates penumbras (shadows of shadows) or implicit guarantees that shadow explicit rights and give them substance.
    a. Based on 1, 3, 4, 5th Amendments, CT finds a **penumbral right to privacy**.
2. <u>Held</u>: the right to privacy in marital relations is fundamental and older than the bill of rights; it is sacred and we do not want police in the bedroom looking for signs of contraceptives. Therefore, we apply Strict Scrutiny, and the state law is unconstitutional.
3. **Harlan Concurrence**:
    a. "DP is what is connected to Fundamental right.
    b. Looking at the "liberty" language in the 14th amendment says that it must be "**implicit in the concept of ordered liberty**."
    c. Restraints:
        i. Must adhere to federalism (State powers)
        ii. Must honor separation of powers
        iii. Should pay lots of attention to precedent
        iv. Shouldn't move too fast.
4. **Douglas Majority**<u>:</u>
    a. "Shadow of a Shadow"
    b. Spatial privacy in the bedroom
5. **Goldberg/ Harlan/ White**:
    a. Look to collective conscience of American people.
6. **Black Dissent**
    a. Textualist—there's no constitutional right to privacy—and says if we wanted there to be one, there could an amendment to the constitution.
    b. Doesn't want the court to be the one having to determine fundamental rights—people should lobby the legislature to have it changed.

ii. <u>Einsenstadt v. Baird</u> (1972)
1. Δ convicted of a state statute that says that contraceptives can be distributed to single people for preventing disease but not for preventing contraception. Brennan wrote majority and set the case up for Roe. Court rejected the state interest in discouraging pre-marital sex through unwanted pregnancy.
2. <u>Held</u>: If the right of privacy means anything it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamental affecting a person as the decision whether to bear or beget a child."
    a. So:
        i. <u>Griswold</u>: Right to privacy: spatial privacy
        ii. <u>Eisenstadt</u>: Right to privacy: about making reproductive decisions.

1. Privacy is beyond married or single – so any person has the right to consider whether they want to bear children.
2. Even as to **teenagers→** must <u>strictly scrutinize</u> their ability to purchase contraceptives.
    a. Re: fundamental right to consensual sex.
        i. Strict scrutiny:
        ii. Compelling state interests: health standards, morality of society (iffy)
        iii. And if it doesn't stand well, we do a rational basis test
3. ADLER: If ban of contraceptives to married persons unlawful under Griswold, ban on distribution to unmarried persons is also unlawful.

c. Right to an Abortion

<u>Varying Viewpoints on Abortion</u>

Lowest Scrutiny (Rational Basis) — Highest Scrutiny (Strict Scrutiny)

i. Introduction
    1. Possible Political Positions
        a. Life begins at conception (no possibility of abortion, even w/ rape, incest)
        b. The state may not interfere with the woman's right to choose
        c. Battle is in the middle.
            i. Problem with a woman who is about to go into labor with a healthy unborn child and decides she wants to terminate the pregnancy—need to cut it off somewhere.
    2. ALL in the phrasing:
        a. Effect of going to the narrowest wording of the scope? What if you have to use the narrowest language in the abortion cases? No longer framing it "autonomy"

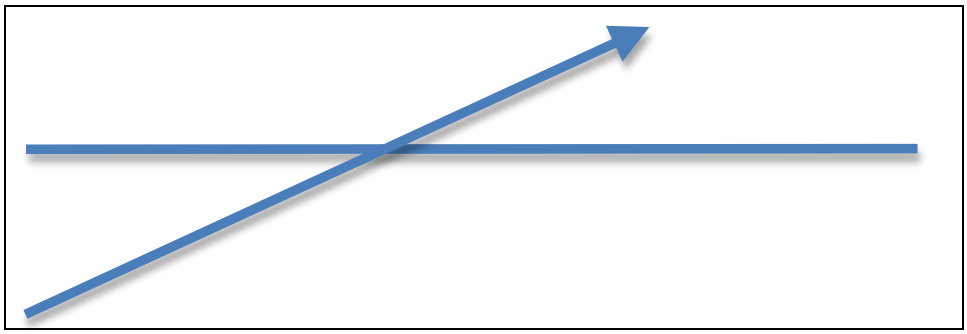
ii. <u>Roe v. Wade (1973):</u>
    1. Roe, a single woman wanted to get an abortion but TX law made it illegal unless necessary to save the mother's life. Court acknowledged that a right of personal privacy, or a guarantee of certain areas or zones of privacy exists under the Constitution. Court says that the right to an abortion is <u>fundamental</u> even if it is <u>not absolute</u>.
    2. <u>Held:</u> The state's interest in potential life (the fetus) only becomes compelling at viability, when the baby is able to survive outside the womb (24-28 weeks). In the first two trimesters, however, the state has NO overriding interest that displaces the woman's right to choose.
        a. In the **first trimester**: essentially unregulated
            i. Decision must be left to the woman and the medical judgment of her attending physician

ii. The state has an interest in maintaining medical standards, thus it can regulate that an abortion can only be performed by a physician in a certain facility, etc.

b. In the **second trimester**:
   i. The state's interest in maternal health is sufficiently compelling to allow it to regulate abortion procedure in ways that are narrowly tailored and reasonably related to this interest.

c. In the **third trimester**:
   i. After viability, the state's compelling interest in potential life allows it to prohibit abortion.
   ii. However, must include an exception for abortions to save the mother's life or health.
      1. Whether there needs to be an explicit "health" exception is still debated.

3. Rehnquist Dissent:
   a. There is no fundamental right to privacy involved here. In fact, since a majority of the states have legislated restrictions on abortions—it's a strong indication that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental"



iii. Planned Parenthood v. Casey (1992)
   1. Planned Parenthood facially challenged Pennsylvania's abortion law. The statute required (1) 24 hour waiting period by the woman seeking an abortion, (2) parental notification, (3) husband notification, unless she is abusive, not the father, or raped her, and (4) public report on all procedures to ensure compliance with the act.
      a. Court deviated from, but did not overrule **Roe**, and articulated a new test for abortion.
      b. Privacy is not mentioned in the opinion at all (first departure from Roe), but the opinion confirms that the constitutional protection of the woman's decision to terminate her pregnancy derives form the DP clause, which promises a realm of personal liberty that the government dos not enter.
         i. Here, not talking about privacy interest, only liberty interest, and since Roe, now in case, shift in importance of state interest.
            1. Liberty interest comes from the 14th amendment DPC
      c. Opinion states that neither the Bill of Rights nor the specific practices of the States at the time of the adoption of the 14th amendment marks the outer limits of the substantive sphere of DP. Thus the CT relies on the rights derived from other cases (i.e. Griswold, Eisenstadt, Loving, etc.).
         i. The right of a woman to choose is based on the right to personal dignity and autonomy
         ii. They seem to say there are certain rights that are so important that they should be left out of the political realm and this is one of them (secret meeting by O'Conner, Kennedy and Souter)—A state

can regulate and place restriction on abortion so long as those regulations don't impose an undue burden on the woman's ability to make the abortion decision→ when an undue burden results, the regulations are unconstitutional.

1. It's a form of **intermediate scrutiny**.
    a. An undue burden exists, and therefore a provision of the law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.

d. Dissent:
    i. Looked at tradition—so it's not that useful of an analytic tool when analyzing abortions.

2. **Changes from Roe**:
    a. The state has a profound interest in potential human life throughout the pregnancy. Therefore, the State can take measures to ensure that the woman's choice is informed and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion and do not create an undue burden on the right.
        i. Viability is STILL the dividing line as to when the state's compelling interest in potential life trumps the woman's right to choose (like in Roe).
        ii. Before viability, state's interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to the procedure.
            1. But interest in the fetal life exists pre-viability and state can make mother consider it even though this interest has diminished to a degree.

3. **Undue Burden Test Applied** (New Standard)

(1) **Requiring a 24 hour waiting period after the state gives information is NOT an undue burden**

-Criticism: What about women who live in rural areas and have to travel far to receive an abortion?

-Response: Still within the woman's control, encourages the woman to be more thoughtful about the decision.

-ADLER: SO when does the burden become undue? When 5 justices think it's going to be too much.

(2) **Parental consent provision NOT an undue burden**

-State may require than an un-emancipated woman under 18 obtain parental consent, subject to a judicial bypass.

(3) **Spousal consent, IS an undue burden**

-Unlike above, no longer in woman's hands, the state may not assign veto power to someone else.

(4) **States MAY refuse to give public funding (i.e. Medicaid) for abortions even though they give such funding for other types of operations**.

-May also prohibit public hospitals from performing abortions.

iv. Stenberg v. Carhart (2000)
1. Case about "partial birth" abortions. Court found that banning partial birth abortions imposes an undue burden upon a woman's right to a D&E abortion (not D&X) and thereby unduly burdens the right to abortion itself.
    a. Court said that D&E procedures are the most common method for performing pre-viability second trimester abortions and thus the law and its subsequent chilling effect result is an undue burden on the woman's right to make an abortion decision.

b. Statute is also unconstitutional bc it lacks any exception for the preservation of the health of the mother, it only has an exception for the safety/life of the mother.

2. Held: Partial-birth abortion statutes that have the effect of placing a substantial obstacle in the path of a woman seeking an abortion are unconstitutional.
3. O'Conner concurrence:
    a. The Statute is unconstitutional bc it doesn't have a health exception and bc the language sweeps too broadly.
4. Scalia dissent:
    a. Casey should be overruled—focus on the brutality of the method. State abortion should be left to the legislature.
5. Kennedy/Rehnquist Dissent:
    a. Kennedy co-wrote Casey and here disagrees that the OK statute imposed an undue burden on a woman's right to choose. Says Casey permits States to enact laws to promote the life of the unborn and to ensure respect for all human life and its potential.
6. ADLER: This is the 1st time that a majority of the court has accepted the undue burden test—now consensus on **INTERMEDIATE SCRUTINY APPROACH**.

v. Gonzales v. Carhart (2007)
1. Law similar to issue in Stenberg. Except for court did not follow O'Conner's roadmap in her Stenberg concurrence, and instead approved the constitutionality of the statute without a health exception for the mother. Kennedy (MAJORITY) says that we don't need a health exception since there are always other procedures that are safe, even if not AS safe.
    a. Held: Kennedy isn't a doctor, but he thinks he is. Basically, women are fucked.
2. ADLER: Gonzales didn't overrule Stenberg, it just applied the same undue burden test, and came to the opposite result. Less and less protection for women, more and more protection for societal interests and fetal rights.
3. Conclusion:
    a. Statute upheld, as opposed to Stenberg because:
        i. Definition of the procedure being banned more specific and includes a scienter requirement
            1. Scienter: Meaning intent or knowledge of wrongdoing.
        ii. BUT, still no health exception
    b. Interests recognized by Kennedy's majority:
        i. (1) Fetal life post-viability
        ii. (2) Prohibiting a gruesome procedure
        iii. (3) Protecting women from bad choices
        iv. (4) Medical ethics.
        v. (5) Societal interest in the sanctity of life.

IV. Medical Care Decisions

a. The Right to Refuse Treatment

Termination of treatment	Painkillers	Assisted Suicide	Euthanasia

i. Introduction
1. Competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment (including live-saving hydration and nutrition).
2. **No level of scrutiny has been articulated**
3. State has strong countervailing interest in preserving life
    a. Therefore, evolution of **clear and convincing evidence** standard.

b. In the case of a now-incompetent patient, the state's interest in preserving life entitles it to say that it wont allow the plug to be pulled unless there is clear and convincing evidence that the patient would have voluntarily declined the life-sustaining measure.
    i. Living wills and health care proxies, probably fulfill this requirement and states must honor
    ii. Competent people:
        1. Have a constitutionally protected liberty interest in refusing unwanted medical treatment
        2. INCLUDING life-saving hydration and nutrition
    iii. Incompetent people:
        1. Must be clear and convincing evidence that the patient would have voluntarily declined the life sustaining measure
        2. NOT ABSOLUTE
            a. State can regulate
            b. Government has compelling interest in the preservation of life.
c. BUT this is not absolute and can be regulated by the state
    i. I.e. Ct upheld a MA law that required vaccinations (i.e. cant refuse them) bc of the government's compelling interest in stopping the spread of communicable (and preventable) disease.

4. Three big issues here:
    (1) Termination of treatment (Cruzan)
    (2) Assisted Suicide (Expressly Rejected in Glucksberg)
    (3) Medication to deal with pain, knowing side effect is death
        i. SC has carved out this narrow exception—its OK

ii. Cruzan v. Director, Missouri Department of Health

1. Cruzan was comatose after car accident and remained so w/o any reasonable chance of recovery. Her parents requested that life support be terminated. Medical Personnel declined bc of state law. Court conceded that a competent person has a constitutionally protected right to refuse unwanted medical treatment
    a. Held: An incompetent person is not able to make a voluntary and informed choice to exercise a hypothetical right to refuse treatment; therefore, in certain circumstances, a surrogate will be allowed to make the call. HOWEVER, state can require the safeguard of **clear and convincing** evidence that this is what the individual would have wanted, therefore, statute is doing just that and so its constitutional.
2. O'Conner concurrence:
    a. There is a right to refuse treatment, since forced wood and water is substantial interference with one's bodily integrity. This decision doesn't preclude a future determination that the Constitution requires the States to implement the decisions of a patient's duly appointed surrogate.
3. Scalia concurrence:
    a. He sees this not as a right to refuse medical treatment, but as a right to die case. He says there is no fundamental right to suicide. Questions regarding how to regulate this should be left up to the state legislature (which is why he concurs)
4. Brennan, Marshall, Blackmun dissent:
    a. A clear and convincing evidence standard amounts to a presumption against the termination of treatment. Since the right to refuse treatment is recognized as fundamental, the presumption should be in favor of the right.
5. ADLER:
    a. The clear and convincing evidence standard is very high and particular. If you tell someone you do not want to be on a ventilator, but you are on a

feeding machine, this is likely NOT clear and convincing evidence. Has to be very, very, very, close to the situation you end up being in.

6. Open Questions After Cruzan:
    a. The majority opinion states that there is a right to refuse treatment, and O'Conner and the four dissenters expressly recognize this right. But, no one over mentioned the correct standard to be applied—is it strict scrutiny?

b. Whether there is a right to Physician-Assisted Suicide

i. <u>There is no fundamental right for assisted suicide</u>

1. <u>Washington v. Glucksberg</u>:
    a. Washington physicians filed suit declaring that the state's assisted suicide **ban** was facially unconstitutional. Court rejected their arguments. Court reasoned that the right to commit suicide has NEVER been afforded legal protection (i.e. under Cruzan).
        i. Therefore the court applied rational basis and found the ban constitutional
    b. <u>Held</u>: The right to assisted suicide is not a fundamental right protected under the DP clause, not does it prohibit states from making it a crime to assist another person in committing suicide
    c. O'Conner Concurrence:
        i. While the majority is right that there is no right to commit suicide, the decision should not preclude the question of whether a mentally competent person experiencing great suffering has a constitutional right to control the circumstances of his or her imminent death (i.e. Person should have a right to medication to ease pain even if that medicine may hasten death).
    d. NOTE:
        i. Although all agreed that the statute is constitutional, the concurrences left open the question of whether there is a <u>right to die with dignity/without pain</u>. Also implied that state does not have an interest in prolonging suffering.

ii. <u>There is no Equal Protection claim for assisted suicide</u>:

1. <u>Vacco v. Quail</u>
    a. NY Statute forbade physician assisted suicide challenged under equal protection grounds. Court said there's no suspect class here so we apply equal protection. Equal protection does not grant substantive rights, it only ensures that all people get the same protection and application of the laws.
    b. Here, Rehnquist is closing the door for all assisted suicide claims.

V. <u>Education</u>

a. <u>San Antonio Independent School District v. Rodriguez</u>

i. Rodriguez looked at Edgewood school that his kids went to and couldn't stand it anymore and organized a group of parents to challenge funding process of schools in Texas. In Texas, money is distributed based on property taxes. He raised two arguments: (1) there is a fundamental right to an education and these kids are being denied it and (2) Equal protection applies because of discrimination against the poor.

1. Court concludes two rules:
    a. (1) Fundamental right is no good so national basis applies (**no fundamental right to an education**), and
    b. (2) EPC argument is no good because **poverty is not a suspect class** and so rational basis applies.

VI. <u>Family Autonomy</u>

a. The Right to Marry

i. Generally
    1. Its recognized as a fundamental right protected under the liberty part of DP
    2. Strict Scrutiny Applies
    3. First recognized in Loving v. Virginia (1967)
ii. Loving v. Virginia (1967)
    1. A black and white couple was married in DC and when they returned to VA they were indicted for violating the state's ban on interracial marriage. Court reasoned that **the right to marry is a fundamental right** necessary for our very existence and survival.
    2. Held: Statute that prevents marriages between persons based solely on the basis of racial classifications violates the EP and DP clauses of the 14th amendment.
iii. Zablocki v. Redhail
    1. WI law said that any resident with minor children not in his custody and which he has an obligation to support cannot marry unless he's been meeting his obligations.
        a. Here a fundamental right is being denied to one class of citizens and not to another, thus it violated EP.
    2. Held: **The right to marry is a fundamental right**, so the statutory provision that restricts it cannot be upheld unless it is supported by a compelling state interest and is closely tailored (tight fit=necessity) to effectuate those interests. Here, even assuming the state's interest in the welfare of the child is compelling, preventing dead beat dads from getting married does not guarantee that the state will collect child support from him. Therefore, the statute isn't narrowly tailored enough.

b. The Right to Have Custody Over Your Children
i. You have a right to retain custody over your children.
ii. Not absolute, of course
iii. State has the right to regulate, make sure that the parents are not neglectful.

c. The Right to Keep Your Extended Family Together
i. There is a **fundamental right under DP** to keep a family together, including extended family. Related by married, blood, or adoption
    1. Cannot be separated by zoning ordinance

d. The Right to Raise Your Family as You See Fit
i. There is a liberty interest to giving children education and controlling their upbringing.

VII. Sexual Orientation and Activity

a. ADLER Note:
    i. If you cannot get a fundamental right (such as sexual activity) try to phrase it as an EP violation – see dissent in Lawrence.
b. Lawrence v. Texas (2002)
    i. Police in TX received an anonymous tip of a disturbance at Δs apartment and when they entered they say him having sex with another man. He was convicted under a statute that prohibited "deviate sexual intercourse." Court found the statute unconstitutional
    ii. Held 4 things:
        (1) Laws prohibiting private consensual homosexual sex are unconstitutional
        (2) Reaffirmed a constitutional right to privacy
        (3) Recognized that sexual activity is a fundamental aspect of personhood and that it is entitled to constitutional protection and
        (4) Recognized the right of gays and lesbians to equal dignity and equal treatment under the Constitution. (opinion begins with liberty, ends with freedom)
    iii. Court did not articulate any special level of scrutiny for laws affect gays/lesbians.
    iv. O'Conner Concurrence:
        1. This should be decided under EP not DP. That way, decision will have no impact on gay marriage, since the same rules will apply to both sexes—men cant marry men and women cant marry women. (Kennedy decides under FR)

2. She would like rational basis with a bite

v. Scalia Dissent:
   1. Defines tradition narrowly, and finds there is a long tradition of states prohibiting homosexual sex. Scalia also finds that morality is a sufficient state interest to withstand Rational Basis. If not, then what about bestiality, bigamy. For him—how do we distinguish gay marriage?

vi. ADLER:
   1. Court didn't use EP bc the majority feared that would just make states go write neutral statutes that apply equally to both gay and straight people. These statutes would still affect the liberty interest used by the majority

vii. EXAM TIP:
   1. Here is how the issue was traditionally looked at, but after **Lawrence**, we might be looking at an elevated level of scrutiny.

VIII. Right to Vote

a. ADLER Note:
   i. Most voting challenges come up through equal protection analysis.

b. Generally:
   i. Today the right to vote is a fundamental right
      1. Regarded as fundamental because its essential to a democratic society
      2. It is through voting that the people choose their government and hold it accountable
      3. Voting is itself a form of expression, but it also is the way in which people choose a government that will safeguard all of their liberties and interests.
      4. Thus, it is clearly established that **laws infringing the right to vote must meet <u>strict scrutiny</u>**.
   ii. As defined today, the right to vote constitutes more than what is expressed in the Constitution
      1. I.e. nothing in constitution says people have fundamental right to vote for state legislators, BUT, if a state sets up the right to vote for state legislature, under the 14th everyone must be given the same right.

c. Restrictions on the ability to vote

i. <u>Poll Taxes</u>
   1. <u>Poll taxes are unconstitutional in any election</u>
      a. <u>Harper v. Virginia State Board of Elections</u> (1966)
         i. Challenge to VA law requiring $1.50 poll tax for voting. Court reasoned that the state has an interest in setting qualifications for voters, but that wealth (like race) has no bearing on fitness to vote.
            1. Even under RB, this would fail, since money has nothing to do with the ability to cast a vote.
            2. The SC held that poll taxes are unconstitutional as a denial of equal protection for all other elections.
               a. A state violates the Equal Protection Clause of the 14th Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.
               b. Wealth, like race, creed, or color, is <u>not</u> germane to one's ability to participate intelligently in the electoral process
            3. Strict standard being used here—**invidiously discriminate**- to describe conduct the strict standard being applied.
            4. Under the standard applied in <u>Harper</u>, even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications.

ii. Requirement for Photo Identification for Voting
1. A law requiring voters to provide picture identification does not violate the Constitution.
a. Crawford v. Marion County Elections Board (2008)
i. Under Indiana law, voters without a photo ID may only cast a provisional ballot. To have their votes counted, they must visit a designated government office within 10 days and either bring a photo ID or sign a statement saying they cant afford one.
ii. Plaintiff says that voter ID laws demand the strictest of scrutiny but all 9 justices disagreed (even dissent)
iii. State interests brought up by Plaintiff: Deterring and detecting voter fraud, election modernization
1. Justice Stevens (Majority): said these burdens are limited to a small percentage of the population and are offset by the burden of reducing fraud.
a. Conclusion: "the statute does not impose an excessively burdensome requirement on any class of voters."
2. Justice Scalia (Concurrence): said that the SC should defer to the state and local legislators and that the SC shouldn't get involved in local election laws, which would only encourage more litigation.
3. Justices Souter and Ginsburg (Dissent): said the voter ID laws are unconstitutional because the state interests fail to justify the practical limitations placed on the right to vote, and the law imposes an unreasonable and irrelevant burden on voters who are poor and old.

d. Dilution of the Right to Vote
i. Dilution: Giving someone's in a district less weight than someone in another district
1. 1-person, 1-vote for any legislative body all districts must be about equal in population size.
a. Baker v. Carr
i. Held: The Court concluded that equal protection challenges to malapportionment were justiciable.

2. Legislature diluting a person's right to vote is infringement on a fundamental right under EP and is subject to strict scrutiny.
a. Reynolds v. Sims
i. Population shifts in Alabama didn't reapportion legislative representation for 60 years, which created a dilution problem. Only 25% of people resided in districts represented b a majority of the members of the Senate and House. People brought an EP challenge.
1. Held: Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, wherever their occupation, whatever their income, and whatever their home may be in that geographic unit.
2. State legislature districts must be roughly = in protection.
3. There's a dilution unless you have 1 person 1 vote.
4. The EP Clause of the 14th Amendment requires it.
ii. Harlan's Dissent:
1. Federalism Argument: Federal government shouldn't get into this, its up to the state and local governments.

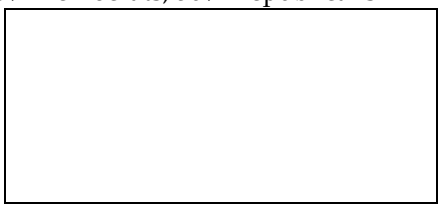
2. The 14th amendment doesn't impose this political tenet on the states, or authorize the court to do so, we had it right before Baker v. Carr. These complaints should be dismissed for failure to state a COA since no constitutional right.

3. When some votes count more than other votes, that's an EP problem, and cannot withstand constitutional scrutiny.

a. Bush v. Gore
   i. Voting as a fundamental right.
   ii. Katherine Harris didn't allow re-count to continue past first deadline. Fl. Sup. Court found Harris abused discretion and ordered the recounting. SC issued stay blocking continuing recount, then decided no Constitutionally acceptable recount could be completed in time.
   iii. Made this a case about vote dilution and EP. If you are going to recount some votes, you have to recount all the votes: under-votes, over-votes, but we're out of time so the democrats lost
   iv. **ADLER**: SC decoded the election. It's a political process, better to let representative bodies and state procedures govern
      1. Court relied on Reynolds.
         a. Once granted, right to vote must apply equally to EVERYONE.
         b. State may not later, through arbitrary and disparate treatment, value one person's vote over another.
         c. SC found that this was a case of arbitrary treatment
         d. States may create their own systems for implementing elections, but recounts must have MINIMAL PROCEDURAL SAFEGUARDS TO PROTECT EQUAL TREATMENT SO THAT FUNDAMENTAL FAIRNESS OF VOTES IS ASSURED.

4. Gerrymandering and Dilution

a. Area: 50% Democrats, 50% Republicans→ Dividing it into 2 districts:



   i. Argument: My vote has been diluted
   ii. Court has stayed out of these case→ saying it is a political question

IX. The Right to Bear Arms for Self-Defense

a. The Supreme Court protects a right to have guns apart from militia service.
   i. District of Columbia v. Heller
      1. Scalia (Majority):
         a. Tools Scalia uses:
            i. Commentary
            ii. Civil war (Argument in certain discussion—not case law)
            iii. There was an effort to disarm Black men

b. DC police officer is authorized to carry handgun while on duty and applied for a registration certificate of a gun he wanted to keep at home, but the District refused.
    i. Held: There is no establishing of a level of scrutiny here for evaluating the 2nd amendment.
        1. The District's ban on handgun possession in the home violates the 2nd Amendment, as does its prohibition against rendering any lawful firearm in the home operable for the purpose of immediate self-defense.
        2. The 2nd amendment protects an individual's right to possess a firearm for private use within the home in federal enclaves.

2. Stevens (Dissent):
    a. Tools Stevens uses:
        i. Intent of Framers.
            1. So Stevens like Scalia is looking at original meaning and the two of them disagree about the history of times and cannot agree about what original meant.
        ii. Precedence:
            1. Miller case: says it was clear—2nd limited to arms for militia Scalia says no one was there to argue the case
        iii. Traditions
            1. States have regulated guns forever
    b. The Court's conclusion that the 2nd amendment protects an individual right doesn't tell us anything about the scope of that right.
    c. The founders would have made the individual right aspect of the 2nd amendment express if that was what was intended
    d. The militia preamble and exact phrase to "keep and bear arms" demands the conclusion that the 2nd amd touches on state militia service only
    e. The court would have us believe that over 200 years ago, the Framers made a choice to limit the tools available to elected officials wishing to regulate civil uses of weapons.
3. Breyer (Dissent):
    a. Suggests some sort of balancing: "interest balancing inquiry"
    b. Intermediate standard of scrutiny
        i. Is the state's legislation very burdensome?
        ii. Sounds like an undue burden standard
        iii. So scope is not that clear

X. Procedural Due Process

a. Generally:
    i. Procedural DP refers to the procedures that the government must follow before it deprives a person of life, liberty, or property.
    ii. Substantive DP asks whether the government has an adequate reason for taking away a person's life, liberty or property.
b. Analysis
    (1) Has there been a deprivation?
    (2) Is it of life, liberty, or property?
    (3) Is it without "Due Process of Law"?

VIII. FIRST AMENDMENT: FREEDOM OF EXPRESSION

FREEDOM OF EXPRESSION

I. Analysis:
   a. Threshold Con Law Question
      (1) Is this case justiciable?
      (2) Is there state action?
      (3) Does the government have the power to enact the law?
   b. First Amendment Analysis:
      (4) Is this speech?
      (5) Is the first amendment "infringed" or "abridged"? (See particularly Role of Government)
      (6) Are there procedural issues that apply ?(irrespective of content or whether speech is protected?)
         1. Vagueness
         2. Substantial over-breadth
         3. Prior Restraint
      (7) If the government is acting as a sovereign (i.e. passes ban on certain speech) does the regulated speech fall outside protected "freedom of speech"?
         1. If **yes**→ then that type of speech is not protected→ Rational Basis Applies
         2. If **no**→ Its content based (move on to 8(b))
      (8) Protected Speech
         (a) Is the regulation a "content-neutral" restriction?
            a. If **yes**→ intermediate scrutiny
            b. If **no**→ its content based (move on to 8(b))
         (b) Is it a "content based" restriction?
            c. Threshold Q:
               i. Determine if it's content-based: If it regulates by **subject matter or view**—then its content based.

               Is it being applied to "intermediate value speech" or to "high value" speech?
               ii. If **intermediate value** speech→ Intermediate Scrutiny
                  1. **Ends**: Significant goal
                  2. **Means**: Should not limit substantially more speech than necessary
               iii. If **high value** speech→ Strict Scrutiny
                  1. **Ends**: Compelling state interest
                  2. **Means**: No less intrusion possible (i.e. limitation on speech is least restrictive means and is necessary to achieve goal)
      (9) If the government itself is acting as a speaker, sponsor, proprietor, administrator (rather than a sovereign regulator), look for a reduced level of scrutiny.

II. Justifications
   a. Self-Governance
      i. Our society based on free expression that provides a check on the government.
         1. Public officials are held accountable through criticisms that can pave the way for their replacement
         2. Through speech voters retain a "veto power to be employed when the decisions of officials can pass certain bounds"
      ii. Open discussion of candidates is essential for voter to make informed selections when voting.
      iii. Through speech people can influence government choice of policies
      iv. Although recognizing that political speech is at the core of the 1st amendment, SC has never held it as the only form of protected speech.

b. Discovering Truth

i. Free speech protects the marketplace of ideas—we get all the ideas out there, the truth will prevail.

1. Criticism: its wrong to assume that all ideas will enter the marketplace of ideas.
2. Criticism: truth may not trump over falsehood

c. Promotion of Tolerance:

i. Protecting unpopular or distasteful speech is itself an act of tolerance.

ii. Such tolerance serves as a model for all tolerance throughout society.

1. Criticism: why should tolerance be seems as a basic value

d. Advances Autonomy

i. Freedom of speech promotes self-expression, it is an essential aspect of person-hood

ii. Why we shout at protests even though we know our words will not REALLY change the outcome (say, a war)

iii. Instead, speech allows us to publicly defined ourselves

1. Criticism: this theory sucks bc it cant distinguish speech from any other human activity, so why is speech a fundamental right?

III. Free Speech Methodology: Government Infringements on Speech: Content Based v. Content- Neutral

a. Content Based Law

i. Government cannot regulate speech based on content

1. Cannot regulate the ideas or information contained in the speech—this goes for view-point OR subject matter
   a. I.e. unconstitutional for the government to say that pro-choice demonstrations are allowed in the park, but anti abortion demonstrations are not.

ii. Such laws are **presumptively invalid** and are subject to **Strict Scrutiny**, I.e.:

a. No billboards in certain neighborhood= content-neutral→ IS
b. No political billboards=content-based, since entire category of billboards prohibited→ SS
c. No republican billboards= content-based (viewpoint)→ SS

b. Content Neutral Law

i. Generally

1. Subject to **Intermediate Scrutiny**.

a. Regulates TIME, PLACE, MANNER: Doesn't single out any particular subject-matter or viewpoint
   i. Does not pre-empt certain topics
   ii. Does not allow praise but forbid dissent
b. **Ends**: State's ends must be "significant government interest unrelated to the suppression of free speech
c. **Means**: The legislation must not burden substantially more speech than necessary (alternate means of communication remain available, need not be the least restrictive means)
   i. NOTE: use of the term "narrow tailoring" in this context does not mean the same thing as it does under strict scrutiny. For a TPM restriction, it considers where there is a "fit" between the ends and means, NOT whether it's the least intrusive means possible (see O'Brien).

2. May address **SECONDARY EFFECTS** or BY-PRODUCTS of the speech

a. A facially content-based restriction will be deemed content-neutral if it is motivated by a permissible content-neutral purpose
   i. In Turner Broadcasting v. FCC, the SC held that the mere assertion of a content-neutral purpose is not enough to save a law, which, on its face, discriminates, based on content. Yet in Renton v. Playtime Theatres, the SC indicated that a facial content-based restriction would be deemed content-neutral if it is motivated by a permissible content-neutral purpose.

ii. Distinctions between Content-Based and Content-Neutral determines the level of scrutiny
    1. **Content-Neutral "must carry" rules, on their face impose burdens and bans without reference to the content of speech**
        a. Turner Broadcasting v. FCC (1954):
            i. Cable TV Consumer Protection and Competition Act requires cable systems to devote a portion of their channels to the transmission of local broadcast TV stations. This regulates speech by making it more difficult for cable programmers to compete for carriage on limited channels remaining.
                1. Held: Court said that it will apply the most exacting scrutiny (SS) to regulations that suppress, disadvantage, or impose differential burdens upon speech because of content.
                2. Court said it will apply intermediate scrutiny for regulations that are unrelated to the content of speech because they pose *less substantial risk of excising certain ideas or viewpoints from the public dialogue*.
                3. In order to decide which is which, the principal inquiry is "whether the government has adopted a regulation of speech because of agreement or disagreement with the message it conveys. (not the case here=IS).

iii. Content-Neutral Time Place Manner Restrictions
    1. Generally:
        a. The ability of the government to regulate speech in a public forum in a manner that minimizes disruption of a public place while still protecting freedom of speech
            i. NOTE: Content-neutral regulations will be upheld if it advances important governmental interests UNRELATED To the suppression of speech and does not burden substantially more speech than necessary to further those interests
                1. Must be justified without regard to the content of the regulated speech
                2. Must serve a significant government interest
                3. Must leave open ample alternative channels for communication of information
                4. Must be narrowly tailored

    2. **Time Place Manner (TPM) Restrictions are Entirely Contextual**
        a. Hill v. Colorado (2000)
            i. Colorado regulation made it unlawful to pass within 8 feet of someone at a medical center to protest. Court says government interest is regulating health and safety and that is within its police powers. Because narrowly-tailored to meet IS, court held its constitutional. It's a valid TPM regulation in a public forum because the statute wasn't adopted out of "disagreement with the message it conveys", so IS is applied and the regulation survives)
                1. Held: Court said its content- neutral since it doesn't regulate speech itself, only restricts the TPM where it can occur and it applies universally to all protesters regardless of their message.
            ii. SCALIA Dissent:
                1. The law is clearly content based bc it was adopted with the general goal of stopping a particular message and had the effect of discriminating against pro-life protestors.

2. Dissent says that when a law is adopted with the goal of restricting a specific message, the law should be deemed content-based, even if there are other justifications for the statute.

iii. Chemerinsky:

1. The majority says that its irrelevant if message has a general goal of stopping a message, so long as the law can be justified with other permissible, content-neutral purposes.
2. ADLER:
    a. The legislation is not viewpoint based simply because it was enacted in response to issues being raised by a certain viewpoint.
    b. But Scalia is right for once, this isn't really content neutral and the majority's justifications are insufficient.

3. Government need not use LEAST restrictive alternative, although regulation must be narrowly tailored for Content-Neutral TPM Restrictions

a. Ward v. Rock Against Racism (1989):

i. NYC required park performers to stfu by using sound amplifying equipment. Government argued: noise regulation. Court accepted the argument. Performers argued there was a least restrictive manner.

1. Held: TPM restrictions are deemed sufficiently "narrowly tailored" as long as they are more effective than no regulation at all, even if they are not the least restrictive/intrusive method. (one argument)
2. BUT must not burden **substantially** more speech than necessary to achieve interests (counter-argument)
    a. In other words: a limitation on manner is that the government may not regulate expression in such a manner that a substantial portion of the burden on speech doesn't advance its goals.

ii. Marshall/Brennan/Stevens Dissent:

1. Majority abandons the "narrowly tailored" requirement—amounts to government control of speech in advance of its dissemination (prior restraint)

iii. ADLER: This is a good example of a TPM restriction.

IV. First Amendment Procedural Issues

a. Generally:

i. EXAM TIP:

1. These rules can be your starting point or your end point in challenging an ENTIRE statute

ii. Issue:

1. Facial challenge to statute as whole or just portions that have procedural issues?

iii. Vagueness and Overbreadth:

1. Facial challenges to laws that regulate speech and based on form, not substance

b. Vagueness (how clear is the statute):

i. Definition:

1. A statute is unconstitutionally vague where, from the face of it, it is unclear what its objectives are.
2. Vagueness to all constitutional areas: Equal Protection (to avoid arbitrary prosecutions under vague statutes), etc.

ii. Test for Vagueness:
    1. Would a reasonable person know what behavior is barred, not allowed, illegal, or not condoned?
iii. Vagueness argument in the context of SPEECH
    1. **Chilling Effect**: If citizens cannot tell which speech is and is not punishable, people generally will risk speaking less
        a. If vague→ facial challenge can be brought (i.e. anyone has standing to challenge that a statute is unconstitutional generally as applied as opposed to plaintiff personally).
iv. Annoying conduct is too vague
    1. Coates v. Cincinnati:
        a. City ordinance prohibited gathering of 3 or more people on street corners and acting in a way that would be "annoying to a passerby"
            i. Held: Court held ordinance governed by the term "annoying" was overbroad because it would likely apply to many unintended parties (i.e. someone might find an anti-war protestor annoying)

c. Substantial Overbreadth (What is the scope/sweep of the statute)

i. Generally:
    1. A law is unconstitutionally overbroad if it regulates substantially more speech than the Constitution allows to be regulated and a person to whom the law constitution can be applied can argue that it would be unconstitutional as applied to others.
    2. In other words, in an area where the government can regulate speech, such as obscenity, a law that regulates much more expression than the Constitution allows to be restricted will be declared unconstitutional on overbreadth grounds.
ii. 2 major aspects of the overbreadth doctrine

(1) **A law must be substantially overbroad**:

a. Statute must be **substantially** overbroad, and must restrict **significantly** more speech than the Constitution allows to be controlled.
    i. If it applies to prohibit a significant number of situations, it may be deemed unconstitutional (Houston v. Hill→ made it unlawful to interrupt police while officers were performing their duties→ criminalizes a substantial amount of constitutionally protected speech)
    ii. If it applies to a few scenarios, may not be unconstitutional—NY v. Ferber (Child porn law upheld bc effects tiny fraction of materials and could be dealt with on a case by case basis).

(2) **As applied to others argument (standing)**:

a. There must be a **realistic danger** that the statute will **significantly compromise** recognized 1st amendment protections of parties not before the court.
    iii. Must show that there are a number of situations in which the law could be applied to prohibit protected speech.
    iv. Overbreadth is an exception to the rule that requires people to assert their own rights
    v. State v. JH Munson Co (law requiring disclosure by professional fundraisers unless 75% of proceeds went back to charity—fundraiser had standing to make a facial claim)

iii. **Overbreadth**: Doesn't apply to challenges regulating **commercial speech** (advertising)
    1. Not concerned about the chilling effect

d. Relationship between Vagueness and Overbreadth:

i. Overlapping, but not identical doctrines
ii. A law might be overbroad, but not vague

1. (*Jews for Jesus*: ban on all 1st amendment activity in the "first amendment zone" at LAX—not vague about activity it was banning, but was found to be overly broad since it prohibited even normal talking or symbolic communication

iii. Likewise, a law can be vague but not overbroad
1. In *Jews for Jesus* case, if ordinance had prohibited a form of speech not covered by 1st amendment in "Free speech zone" it would no longer be overbroad, but would be vague since a Reasonable Prson would not know what the law included.

e. Prior Restraint

i. Definition:
1. An administrative system or judicial order that prevents speech from occurring.

ii. Standard: **Strict Scrutiny**
1. Heavy presumption against constitutional validity
2. Even if content-neutral!

iii. An example of Prior Restraint with content-neutral restriction
1. **Licensing requirements**:
1. Important reason/justification
-I.e. Parade permits have sufficiently important purposes for a city wanting to regulate activity and know what's going on any given day.
2. Clear standards, leaving almost no government discretion
-Court is concerned that any discretion could be used for content-based censorship.
-(Prior restraint would also exist if the government seized every copy of a newspaper)

iv. Most serious and less tolerable infringement on 1st Amendment Rights
1. Dangerous because it prevents the speech from ever taking place rather than punishing the speech after the fact.

v. Standard:
1. An government action prohibiting speech or expression from occurring is presumed unconstitutional and subject to Strict Scrutiny.
a. Suppose that prez decides we're guna nuke Canada but it's a surprise. If Canada finds out, it will cost us many lifes. Phil decides to break the story to the NY times. Prez goes to Court to enjoin the publishing of the story. If successful, it qualifies as a prior restraint. This type of restriction triggers strict scrutiny.
b. Even if the restriction is content-neutral, it is still going to be strictly scrutinized (i.e. licensing for a parade)

V. The Government in Non-Typical Roles

a. Different forums

i. Generally:
1. Raises question of which publicly owned property must be made available for speech and under what circumstances.
2. Constitutionality of a regulation depends on **place** and **nature** of the government's action.

ii. Public Forums
1. Government owned properties that the government is constitutionally obligated to make available to speech
a. Places traditionally devoted to assembly and debate
b. I.e. sidewalks and parks
c. (SS is default, and TPM restrictions are subject to IS)

iii. Limited Public Forums
1. "Limited or designated forum"—a place that the government voluntarily, affirmatively opens to speech.
2. As long as the place is open to speech, all the rules for *public forums* apply.
3. I.e. Government sponsored community theatre.

iv. Non-public forums

1. Government properties that the government can close to all speech activities
    a. Not open traditionally
    b. Not open through tolerance
    c. Not open by consent
2. The government may <u>prohibit</u> or restrict speech in non-public forums so long as the regulation is <u>reasonable</u> and <u>viewpoint neutral</u>.
    a. If intended to suppress any viewpoint, subject to SS
        i. I.e. Military can preclude all demonstrations, but cant be viewpoint-based.
3. Private property: No RULES—no state action, no Freedom of Speech
    a. UNLESS state passes a law that states –have same rules apply on private property as on public property (like CA)
    b. Also, BY STATUTE private schools must give same 1st amendment rights as public schools.

b. <u>Unconstitutional Conditions</u>

i. Generally:
    1. Here the government is acting in an "alternative" role. If the government is acting as speaker, sponsor of a speaker, proprietor, administrator of a prison, school, etc (rather than a sovereign regulator) look for a reduced level of First Amendment Scrutiny.

ii. Government may not deny a benefit to a person because he exercises a constitutional right.

1. <u>Speiser v. Randall (1958)</u>
    a. WWII Veterans refused to take loyalty oath and lost out on veterans' property tax exemption. Court held that to deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the state were to fine them for the speech. Here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech.
        1. Here, the funding follows the person.

iii. Other cases have allowed the government to condition a benefit on foregoing 1st amendment rights

1. <u>Rust v. Sullivan (1991)</u>
    a. Federal law forbade recipients of federal funds for family planning services from providing "counseling concerning the use of abortion as a method of family planning." Federal money recipients couldn't refer a woman to get an abortion.
        i. <u>Held:</u> The government can selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternate program that seeks to deal wit the problem in another way. Rust v. Sullivan Denial of a tax exemption for engaging in certain speech will necessarily have the effect of coercing the claimants to refrain from the proscribed speech, in effect, penalizing them. (It is therefore unconstitutional)
    b. <u>Blackmun dissent</u>: Majority upholds viewpoint-based suppression of speech solely bc it is imposed on those dependent on the government for economic support. Counselling and referral provisions constitute content-based regulation of speech.
    c. Majority's reasoning goes back to the notion that a legislature's decision not to subsidize the exercise of a fundamental right doesn't infringe that right.
    d. ADLER: Basically the court says the government can make a value judgment favoring childbirth over abortion, and implement judgment by the allocation of public funds.

i. Here the funding follows the clinic.

2. Basically:
    a. When the government wants to regulate government speech, it can be content-based.
        i. Viewpoint based is ok
    b. Its politically accountable for itself
    c. When the government is speaking for itself, it can be content-based
    d. But when the government is speaking for a private entity, it must be content-neutral.
        i. Viewpoint neutral

c. A municipality can accept the acquisition of a privately funding permanent monument erected in a public park while refusing to accept other privately funded permanent memorials bc that is government speech.

i. Pleasant Grove City, Utah v. Summum
    1. The court considered whether the municipality, which allows privately donated monumwnts (including one of the 10 commandments) to be displayed on public property, must also let the Summum church put up its own statute, similar in size to the one of the 10 commandments. The SC ruled against Summum. Alito (majority) said that a municipality's acceptance and acquisition of a privately funded permanent monument erected in a public park while refusing to accept other privately funded permanent memorials was a valid expression of governmental speech, which is permissible and not an unconstitutional interference with the 1st amendment's guarantee of free speech.
        a. Held: This is because the "display of a permanent monument in a public park" is perceived by an ordinary and reasonable observer to be an expression of values and ideas of the government, the owner of the park and the monument. Note the distinctions between forms of private speech in public parks (i.e. holiday displays Xmas trees and menorahs) and the government speech represented by permanent monuments.

VI. "Unprotected" and "Less Protected" Speech

a. Generally
    i. The court has identified some categories of speech that are so worthless that the government can prohibit and punish them:
        1. Incitement of illegal activity
        2. Fighting Words
        3. Obscenity
    ii. Other categories of less protected speech where the government has more latitude to regulate than usual under the 1st amendment.
        1. I.e. Commercial speech – intermediate scrutiny only
        2. I.e. Sexually oriented speech—("low value"—more susceptible to government regulation)
    iii. These are defined based on the subject matter of the speech
        1. And therefore represent an exception to the usual rule that the content-based regulation must meet strict scrutiny.
    iv. Recently, the SC has indicated that generally content-based distinctions w/in categories of unprotected speech must meet **strict scrutiny** (RAV)
        1. Conventional view was Rational Basis
        2. I.e. government can prohibit fighting words, but cannot prohibit fighting words expressing hate of race, while not prohibiting words of hate of political affiliation.
    v. Political speech/argument is the **MOST** protected speech.
        1. Indecent speech is a little less protected since it is of lesser value
        2. Incitement, Fighting Words, Obscenity, etc. are the least protected speech (which you can actually ban if you want).
    vi. Rule:

1. Content-based distinctions within categories of unprotected speech must meet **strict scrutiny**.
    a. I.e. Incitement of illegal activity, fighting words, obscenity
2. Less protected:
    a. Commercial speech=IS
    b. Sexually oriented speech

b. Incitement to illegal activity

i. Generally:
1. Speech that advocates criminal activity or overthrow of the government.
    a. Once it is determined that the words are incitement, they are not protected by the first amendment and may be regulated
2. However, the strong presumption in favor of protecting speech is viewed as justifying safeguarding even advocacy of illegality unless there is a substantial likelihood of imminent harm.

ii. Old test:
1. "Clear and Present Danger test"
    a. Schenck v. US (1919)
        i. People convicted for leaflet saying the draft violated 13th amd.
        ii. Held: Court held that the question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent.

iii. Current Test:
1. Advocacy can be punished only if there is a likelihood of imminent illegal conduct and the speech is directed at causing imminent illegality.
    a. (Court is narrowly defining incitement to protect speech)
2. Brandenburg v. Ohio
    a. KKK member called a reporter and invited him to come to a KKK rally and he was convicted for calling for vengeance against the government for abandoning white supremacy. Court said that the statute only punished mere advocacy and this is unconstitutional.
        i. NEW TEST:
            (1) **Imminent harm**
            (2) **A likelihood of producing illegal action**
            (3) **Intent to cause imminent illegality**.
                a. First test to require intent

iv. Material-Support and Incitement of Illegal Activity
1. Holder v. Humanitarian Law Project
    a. Plaintiffs claim that the statute forbidding material support to terrorists is invalid to the extent it prohibits them from engaging in certain specified activities, including training some PKK members to use international law peacefully.
        i. Held: Court said that the statute that prohibited knowingly providing material support to foreign terrorist organizations was justified because it doesn't ban pure political speech—it only prohibits "material support"—which most often doesn't take the form of speech
        ii. Court said Intermediate scrutiny –content-neutral—didn't apply here since the statute was regulated on the basis of its content.

c. Fighting Words and the Problem of Racist Speech

i. Generally

1. Words that lead to an immediate breach of the peace or words that will inflict injury→ When speech can be punished because it advocates illegal acts or the overthrow of the government
    a. Speech that is directed at another and likely to provoke a violent response is unprotected because the words do not spur the debate or the exchange of ideas—there is no value to this speech.
2. Two doctrines that deal with Fighting Words:
    (1) Fighting words (speech that is directed at another and likely to provoke a violent response)—are unprotected by the 1st amendment
    (2) When a speaker may be punished because of the reaction of the audience
3. A very narrow fighting words law will likely be declared unconstitutional as impermissibly drawing content-based distinctions as to what speech is prohibited and what is allowed.
4. Modern Trends is to invalidate these statutes/convictions

ii. 3 Techniques Court Uses to Deal with Fighting Words:

1. **Narrow the scope** of the doctrine by ruling that it applies only to speech directed at another person that is likely to produce a violent response
    a. FLAG BURNING
        i. Texas v. Johnson (1989)
            1. Justice Brennan (Majority): Flag burning is okay in general since its not directed at any one person.
2. **Vagueness/overbreadth**
    a. Laws prohibiting fighting words vague or overbroad and therefore unconstitutional
        i. Gooding v. Wilson: statute prohibiting all "opprobrious" language is broader than fighting words and sweeps up protected speech (Defensive words)
            1. Held: Statute must be carefully drawn or be authoritatively construed to punish only unprotected speech and not be susceptible of application to protected expression.
3. **Arguing statute is content-based restriction**
    a. Laws prohibiting some fighting words (i.e. hate speech) permissible content-based restrictions
    b. CROSS BURNING
        i. RAV v. City of St. Paul (1992)
            1. Teen charged w/ burning a cross in a black neighbor's yard. Challenged constitutionality of a statute banning cross/symbol burning. Court reasoned that even low-value speech, like fighting words cant be made vehicle for content discrimination that is unrelated to the proscribed harm (i.e. violence). So while fighting words may be proscribed on the basis of their violent effects, they cannot be proscribed based on the government's hostility or favoritism towards their message.
                a. Held: The statute is unconstitutionally content-based bc it punishes fighting words that insult or provoke violence on the basis of **race**, creed, color, but allows fighting words based on other reasons.
                    i. Permissible to ban "fighting words" as a class based on their **effect** bc it doesn't risk viewpoint discrimination.
                    ii. OK to restrict speech when the basis for content discrimination consists entirely of

the very reason the entire class of speech is proscribable.

iii. OK to consider this when punishing conduct (i.e. we want to increase the penalty against hate crimes as opposed to other kinds of crimes—that's ok bc we are punishing the assault and using the words as evidence of that assault).

c. Chemerinsky:
   i. Says that the cumulative impact of these decisions makes it unlikely that a fighting words law could survive. If the law is narrow, then it will be impermissible probably as content based bc it outlaws some fighting words but not others, based on content.
      1. Might still be able to get around this by focusing on secondary grounds.

d. Hostile Audience Speech

i. Saying something to an audience that causes grumbling agitation, police step in and tell the speaker to stop bc of hostile reaction
ii. Used to be ok to arrest that person
   1. During civil rights—change in thinking
   2. Post 1960 shift: police should first make every possible effort to protect the speaker (and protect speech)
iii. Otherwise, hecklers would have a veto and could silence protest, and that's a dangerous thing in a free society.

e. Intimidating Speech

i. Generally
   1. Action (i.e. cross burning) done with intent to threaten or intimidate not protected by the First Amendment.
ii. (We didn't cover this)

f. Obscenity/Porn/Child Porn

i. Generally:
   1. Obscenity and child pornography are unprotected by the 1st amendment
   2. It is utterly without redeeming social importance
   3. Child pornography is banned for all use (Even in home)
   4. Other obscene materials can be regulated in their sale, exhibition, and distribution, but not possession for viewing in the home.
ii. Arguments for allowing total prohibition:
   1. Community should be allowed to determine its moral environment
   2. Generally causes antisocial behavior, including violence against women
   3. Should be regarded as sex aid, not speech, therefore doesn't implicate 1st amendment
iii. Arguments against allowing total prohibition
   1. Government should not be able to decide what is moral
   2. Question that porn causes anti-social behavior
   3. Just because speech inspires a reaction doesn't mean it is conduct that is unprotected by the 1st amendment.
iv. Court has struggled to define what qualifies as "obscene"
   1. Definition/Test for Obscenity (Miller v. California Test)
      a. Standard:
         i. Average Person
         ii. Applying Contemporary community standards
         iii. Finds work as a whole (is there some redeeming value?)
         iv. Appeals to the prurient interest (disgraceful lusting)
            1. Community standard

b. Content
    i. Work at issue depicts or describes
    ii. In a patently offensive way
        1. PE: Hardcore sexual conduct—more than just nudity
    iii. Sexual conduct specifically defined by applicable state law
        1. Law doesn't have to have an exhaustive list
c. Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value

g. Indecent Speech

i. Generally
    1. Profanity and Indecent speech are generally protected under the 1st amendment
ii. Cant limit speech because others find it offensive
    1. Cohen v. California (1971)
        a. Defendant was convicted of "disturbing the peace for wearing a jacked that said "Fuck the Draft" to a courtroom. Court reasoned you cannot forbid certain words without forbidding certain ideas in the process. Its not obscene, no fighting words, not incitement bc not intended to incite violence.
            i. The government may not prohibit or punish speech simply because others might find it offensive.
            ii. When people go out into the public they assume the risk of hearing unwanted and possible offensive speech.
iii. Subject to exceptions where limits are allowed—broadcast media and schools
    1. FCC v. Pacifica Foundation (1978)
        a. George Carlin skit was indecent but not obscene. The FCC—challenged as unconstitutional—fined the station. Court recognized that the government couldn't possibly prohibit ALL use of the 7 worst words, but said it can ban then from being aired over broadcast media. Warnings wont cut it, especially since we're concerned about protecting kids.
        b. ADLER: This was a combination of the law value of speech and the nature of the medium and the intrusiveness into the home. Seems dumb in light of cable and the Internet but that's not what the court held.

VII. Conduct that Communicates

a. Intermediate scrutiny.
    i. I.e. Marches, picketing, armbands
b. What is conduct Expressive or symbolic?
    i. Intent to convey a message
    ii. Substantial likelihood that the message would be understood by those receiving it
    iii. STANDARD
        1. If not expressive/surrogate, then Rational Basis
c. When can the government regulate expressive speech?
    i. US v. O'Brien
        1. O'Brien burned his draft card on the courthouse steps. Violated an ordinance that made knowingly defacing or altering draft card illegal.
            a. Held: When "Speech" and "Non-speech" elements are combined in the same course of conduct, a sufficiently important government interest in regulating the non-speech element can justify incidental limits on the 1st amendment freedoms.
                i. How do we know if we have a sufficiently important goal?
                    1. Must be within the Constitutional power of the government
                    2. Must further an **important/substantial interest**
                    3. Government interest must be unrelated to the suppression of free speech (i.e. content neutral)

4. Incidental restrictions on the 1st amendment must be **no greater than necessary** to further the government interest.

2. ADLER: Government argued its purpose was administrative, tells people how to find the local draft office, tells the government who is available to be drafted.

d. What test applies of O'Brien concludes that it is a NON-speech related restraint?
   i. Some kind of **intermediate scrutiny**.
e. If the test reveals that restriction was an attempt to restrict speech, what then?
   i. Court applies **strict scrutiny** since it would then be protected speech
f. FLAG BURNING
   i. Protected speech→ So Strict Scrutiny.

VIII. Protected Communications: Corporations and Unions under the 1st amendment

a. Highly protected speech:
   i. Political speech
b. Corporate funding of independent political broadcasts in candidate elections cannot be limited under the 1st amendment.
   i. Citizens United
      1. A non-profit that made an indie about Hillary Clinton.
      2. Court on its own asked for constitutionality of a provision in the McCain Feingold Act.
      3. Before this decision corporations couldn't contribute directly to a campaign→ had to do it through a Political Action Committee (PAC)
      4. Corporation cannot use general funds to attack
      5. Can set up a PAC to spend the funds
      6. Still cannot directly contribute to a campaign.

FIRST AMENDMENT: FREEDOM OF RELIGION

I. Free exercise Clause

a. Generally:
   i. The government may <u>not</u> compel or punish religious beliefs; people may think and believe what they want.
   ii. Invoked when government requires conduct that a person's religion prohibits
   iii. Invoked when people claim laws burden or make more difficult religious observances
b. Components to the Free exercise Clause:
   i. (1) Freedom to believe (absolute)
   ii. (2) Freedom to act (may be subject to governmental regulation)

c. <u>FACIALLY NEUTRAL laws that discriminate {**Rational Basis**]</u>
   i. <u>Employment Division of Oregon v. Smith (1990)</u>
      1. Native Americans challenged Oregon law prohibiting the use of peyote. Specially, challenged state's determination that their use of peyote, which resulted in firing, prohibited them from claiming unemployment insurance. Court distinguished <u>smith</u> from other Freedom of Expression cases since it did not involve a "hybrid situation" with other constitutional rights. Thus, the court **rejected Strict Scrutiny** and advised petitioners to look to the democratic process for help and not the courts.
         a. <u>Held</u>: The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of genera applicability on the grounds that the law proscribes (or prescribes) conduct that his religion proscribes or (prescribes)
            i. Court only required <u>rational basis</u>
         b. <u>Criticism</u>: Scalia says go to political process, but, what religions have enough power in the political process?

c. O'Conner Dissent: up in arms about the use of the rational basis test. Says it ought to be Strict Scrutiny. Mad that Scalia says the political process will surely screw minor religions inevitably but that's too bad.
d. ADLER: Scalia gives us little insight about what constitutes a religion. He wants to avoid people coming to court to say that their religion should allow them some sort of exemption from the law

ii. TEST that comes out of Smith:
1. **Generally applicable, religion neutral laws that have the effect of burdening religious practice NEED NOT be justified by a compelling interest**
a. 2 exceptions when strict scrutiny may apply:
i. (1) When another constitutional protection is burdened
1. Yoder: Invalidated compulsory school law as it applied to Amish parents who refused on religious grounds to send children to school; religion + right of parents to direct education of children
2. Murdock: invalidated a flat tax on solicitation as it applied to dissemination of religious ideas; religion +speech
3. Cantwell: invalidated a license system for religious and charitable solicitations under which administrator had complete discretion to deny license to any cause he deemed non-religious; religion + freedom of press.
ii. **(2) When the government has provided for individualized treatment in an unemployment compensation scheme**.

d. FACIALLY DISCRIMINATORY LAWS get **Strict Scrutiny**
i. When a law that burdens the free exercise of religion fails to satisfy the requirements of a neutrality and general applicability such that the court may infer animus in the enactment of the statute, then strict scrutiny applies.
1. Church Lukumi Babalu Aya v. City of Hialeah (1993)
a. City counsel passed ordinance that prohibited the slaughter of animals outside the slaughter houses but **made exception for everything except ritualistic killings**, which were associated with the Santeria religion. Court sayid it was under-inclusive and therefore targeted a particular religious group and said that the words "ritual and sacrifice" gave away the statute's real purpose—which was to target the Santeria religion.
i. Held: The ordinance seems to be neutral on its face, but is actually intentionally discriminatory. NOT A statute of general applicability, thus subject to Strict Scrutiny.
1. Since SS applies, statute is unconstitutional because there were plenty of alternate ways to regulate health and safety.

II. Establishment Clause
a. See Printed Notes Already.