The Post Civil War Amendments

1. **13th Amendment**
    a. **§ 1** – Neither slavery nor involuntary servitude, **except as a punishment** for crime whereof the party shall have been **duly convicted**, shall exist within the United States, or any place subject to their jurisdiction
        i. **Note:** people received due process protections, restrictions: couldn't hold them as property so you would have to pay?
    b. **§ 2** – Congress has power to enforce via legislation

2. **Dred Scott Impetus (14th Amendment)**
    a. Procedural History
        i. ***Winny v. Whitesides*** – when master takes slave to free state and by the length of residence indicates an intention of making that place his residence and that of his slave,' the slave is permanently freed
        ii. ***Rachel v. Walker*** - slave won her freedom because her owner, a U.S. Army officer, had taken her to Fort Snelling in free territory
        iii. ***Dred Scott (State Level)*** – note: Diversity JX was at issue because wife's brother was in NY
    b. US Supreme Court
        i. Black slaves not included in citizens of the Constitution
            1. Cannot claim rights and privileges that Constitution provides for and secures to US Citizens
            2. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it
            3. Two clauses point to blacks as separate class/not "the people"
                a. Two clauses were not intended to confer on them or their posterity the blessings of liberty, or any of the personal rights so carefully provided for the citizen

c. *Dred Scott* Superseded by **14th Amendment § 1** (birthright citizenship)

i. **§ 1** – All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. **No state** shall **make or enforce** any law which shall **abridge** the privileges **or** immunities of citizens of the United States; nor shall any state **deprive** any person of life, liberty, or property, **without due process of law**; nor deny to any person within its jurisdiction the **equal protection of the laws**

1. **Privileges & Immunities**

a. ***Slaughterhouse Cases* –** who is protected by the 14th **P/I Clause**, P/I of states vs. United (several states) → out-of-staters protection

i. **Several states -** Those which are fundamental which belong of right to citizens of all free governments and which have at all times been enjoyed by several states which compose union

b. ***Saenz v. Roe* –** Durational residency requirements **violate** the right to travel by denying a newly-arrived citizen the same privileges and immunities enjoyed by other citizens in the same state, and are therefore subject to strict scrutiny

i. **Right to travel** expressly protected by **Article IV § 2** – by virtue of citizenship, citizen of one state who travels to others intending to return home and the end is entitled to enjoy P&I of several states that he visits (See also ***Shaprio*** – fundamental)

1. Right to be treated in the same way that people who are long term residents of that given state

2. **Also part of 14th amendment** – rich or poor have the right to choose to be citizens of states wherein they reside **BUT** states do not have any right to select their citizens

Privileges/Immunities	
State 14th Amendment	**Federal Article IV**
- Fundamental rights - Right to travel - Acquire and possess property - Right to work/pursue occupation/livelihood	- Navigable waters/pirate protections - Peaceably assemble - Habeas Corpus - Treaties with foreign nations

ii. **§ 2** – Reversed 3/5 clause, birthright citizenship

iii. **§ 3** – Excludes Confederates from holding office, 2/3 Congress to remove section (never removed)

iv. **§ 5** – Enforcement (Limited by Civil Rights Cases)

3. 15th Amendment

a. **§ 1** - The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

b. **§ 2** – Congress enforcement

Threshold – State Action Doctrine

1. **State Action Doctrine** - nor shall any **state** deprive any person of life, liberty, or property without DP of law; nor deny to any person within tis JX the EPC

    a. ***Civil Rights Cases –*** refused persons accommodations: inns, public conveyance, public amusement, public amusement

        i. Invalidated Congress' regulation of private parties for purposes of preventing racial discrimination

        ii. 14th only restrains state action, not private wrongs

        iii. Law guaranteeing all persons equal entitlement to the quasi-public facilities within the country was an unconstitutional use of power by Congress under the grant provided by the 13th and 14th

2. **Public Function Test –** is there state action present in the exercise of private entity of powers traditionally exclusively reserved to state *Traditional the exclusive prerogative of the state*

3. **Techniques: find state action violate private racial restrictions**

    a. ***Shelley v. Kraemer*** – States cannot affirmatively enforce private scheme of discrimination via judicial action (willful blindness *probably* ok)

        i. Judicial enforcement of racially discriminatory covenants constituted state action (property covenant restrictions based on race)

    b. ***Burton v. Wilmington Parking Authority*** – Together, obvious fact that restaurant is operated as integral part of public building devoted to public parking service indicates that degree of state participation and involvement in discriminatory action

        i. State involvement in private discrimination sufficiently significant to find state action

    c. ***Reitman v. Mulkey*** – state action found where state repealed of fair housing laws

        i. Mere repeal did not establish unconstitutional state action

    d. ***Marsh v. Alabama*** - company town may not limit speech through restrictions that would violate 1st if imposed by municipality

    e. ***Evans v. Newtown*** – invalid under 14th EPC the operation of park for whites only

        i. Services rendered municipal in character – public domain

    f. ***Nixon v. Henderson*** – unconstitutional under 14th to exclude blacks from Democratic primaries expressed on face of TX law

g. ***Terry v. Adams*** – 15th violation where excluded blacks from pre-party elections

h. ***Pennsylvania v. Board of Directs of Trusts*** – state action in denying admission to white students where city made trustee

i. ***Brentwood Academy v. Tennessee Secondary –*** statewide interscholastic athletics associate comprised of public and private state

i. **PUBLIC ENTWINEMENT** in its management and control notwithstanding nominally private status under state law

ii. *Overborne by pervasive entwinement of public institutions and officials in composition and workings*

iii. Note: town cases above → entanglement

j. Statutory Authorization (Parallel *Shelley* Reasoning)

i. ***Lugar v. Edmondson –*** state action where creditor pursuant to state law attached debtor's property in ex parte proceeding alleging debtor might dispose of property to defeat creditors

1. There were other means to accomplish this not pursuant to statute/utilizing state resources

ii. **Edmondson v. Leesville Concrete Co –** preemptory challenge-use by private litigant in civil proceeding to exclude jurors based on race was state action

1. <u>NO significance outside</u> court of law

4. No State Action

a. Heavily regulated industries

i. ***Moose Lodge v. Irvis*** – liquor license by state: operation did not sufficiently implicate state in discriminatory guest policies as to make it state action

ii. ***Jackson v. Metro Edison –*** termination of electricity by company approved by the state was not state action

b. Exception to *Shelley*

i. ***Evans v. Abney –*** reverter is possible through the court

14th Equal Protection – Levels of Scrutiny

1. **Standards of Scrutiny**
    a. Overview
        i. Equal protection is **not a literal** guarantee – most laws classify and create distinctions
        ii. Floor: Basic requirement that laws and government decisions affecting rights and status bear some rational relation to a legitimate government purpose
        iii. Some classifications are presumed more irrational than others: race, alienage, gender, birth out of wedlock
        iv. Laws burning fundamental rights subject to heightened scrutiny

2. **Rational Basis** – rational relation to legitimate ends
    a. Is there a legitimate government purpose and is the method chosen to achieve that purpose rational?
    b. Economic or social legislation that does not regulate a suspect or qausi suspect classification or a fundamental right
    c. Possible formulations – if any set of facts reasonably can be conceived that can sustain the classification
    d. **Don't need to exclude all evils**
    e. Minimum level of scrutiny applied to government actions challenged under equal protection → used when the type of discrimination alleged does not warrant application of intermediate or strict scrutiny. The Supreme Court generally has been extremely deferential to the government when applying the rational basis test, and it is rare for the Court to find that a law fails rational basis review
3. **Intermediate Scrutiny** - important state interest and substantially related
4. **Strict Scrutiny** - compelling state interest narrowly tailored/essential

14th Equal Protection – Rational Basis

Law upheld if it is ***rationally/conceivably related to a legitimate*** interest		
Ends	**Means**	**Burden of Proof**
There is a **legitimate government purpose**…	To which the government's action is **rationally related**	The **challenger** has the burden of proof when rational basis is applied. There is a strong presumption in favor of laws that are challenged under the rational basis test.
Difficult to fail this test, so most governmental action examined under this standard is upheld **unless** it is ***arbitrary*** or ***irrational***		

1. **ENDS –** What Constitutes a Legitimate Purpose?

    a. **Advancement of traditional "police" powers**

        i. At the least, the government has a legitimate purpose if it advances a traditional "police" purpose: protecting safety, public health or public morals.

    b. **Any goal not forbidden by the Constitution**

        i. Virtually any goal that is not forbidden by the Constitution will be deemed sufficient to meet the rational basis test.

    c. **Animus toward the class affected is not a legitimate purpose.**

        i. Only rarely has the Court found that a government purpose was not legitimate under the rational basis test. *Romer v. Evans* is the most important such decision.

2. **MEANS -** Under rational basis review, the classification drawn in a statute must be reasonable in light of its purpose.

    a. Underinclusiveness and Overinclusiveness

        i. Laws will be upheld unless the government's action is "clearly wrong, a display of arbitrary power, not an exercise of judgment."

            1. As a result, the Court will allow laws that are both significantly underinclusive and overinclusive

ii. Underinclusiveness

1. Laws are underinclusive when they do not regulate all who are similarly situated.

2. Underinclusive laws raise the concern that the government has enacted a law that targets a particular politically powerless group or that exempts those with more political clout.

3. Even substantial underinclusiveness is allowed, because 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."

3. Analysis

- What is unequal?
- What distinction does it make?
- What is purpose of regulation?
- Doesn't actually have to solve a problem
- What is means chosen for achieving this purpose?
- What arguments does π make that distinction made by Δ irrational?
- What class is harmed by legislation?
    - Has it been subject to tradition of disfavor by our laws?
- What is the public purpose that is being severed by law?
- What is characteristic of disadvantaged class that justifies disparate treatment?

4. Deference to Legislature

a. ***Case???*** - Depriving one set of unretired workers of dual benefits while continuing to give dual benefits to those who satisfied certain criteria did not violate equal protection

b. ***Kotch v. River Port Pilot*** - upholds incumbents awarding pilotage licenses to relatives, friends and family because unique nature of pilotage in LA

c. ***Railway Express v. New York*** – City decided that advertisements on motor vehicles are traffic hazards, so it banned such advertisements except for those on vehicles advertising the owner's own product. Even though the excepted advertisements were no less distracting than the banned ones, the Court upheld the "first step" law

d. ***Williamson*** – evils in the same field may be of different dimensions and proportions requiring different remedies

e. ***Moreno*** - exclusion of unrelated persons to be clearly irrelevant thus wholly without rational basis (hippie case)

f. ***Beazer*** - meth users excluded from employment is supported by legitimate inferences that as long as treatment program continues, degree of uncertainty persists

g. ***US Railroad Retirement v. Fritz*** – conceivably rational distinction between two hiring classes which cut benefits to help city avoid BK

5. Rational Basis With Bite (Follow Analysis Above)

a. Consider common dissenting opinions that argue that poor are qausi-suspect classes (***James v. Valtierra***) but majority standard – not in political position where they are deprived

b. Upheld unless they bear no rational relationship to any conceivable legitimate government interest

c. Nevertheless, if the government has no interest in denying a benefit or imposing a burden on a group of persons other than a societal fear or dislike of them, the classification will not meet the standard

i. ***Murgia*** – when individuals in a group have **distinguishing characteristics** relevant to the interests the state has the authority to implement, the courts have been reluctant to scrutinize legislative choices as to how those interests should be pursued

ii. ***Cleburne v. Cleburne Living Center*** – Denying special use permit displayed irrational prejudice against **mentally ill** because it displayed animus, desire to harm, unjustified fears, prejudice

1. Needs at least one rationally related purpose

iii. ***Romer v. Evans*** – state constitutional provision that identifies persons by a single trait [**homosexuality**] and then denies them the right to seek ***any*** specific protections from the law—no matter how local or widespread the injury—is so unprecedented as to imply animosity toward such persons and is thus not related to any legitimate state interest

iv. ***US v. Windsor*** – making certain marriages second class is unconstitutional pursuant to the rational basis doctrine

14th Equal Protection – Strict Scrutiny

Skepticism, Congruence, Consistency The Court said that these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny		
Ends	**Means**	**Burden of Proof**
There is a **compelling government purpose**…	For the achievement of which, the classification is **necessary**.	Government – this is a heavy burden which must be met with regard to all racial classifications, whether disadvantaging or helping minorities
Law will be upheld only if it is ***necessary*** to achieve a ***compelling*** **or** ***overriding*** **government purpose** **Trigger: Fundamental Rights** Court will always consider whether less burdensome means for accomplishing the legislative goal are available. Most governmental action examined under this test fails		

1. **Road to *Brown***
    a. **Overview**
        i. Graduate school level inequality in that specific benefits enjoyed by whites denied to black of same educational qualifications
        ii. Smaller scale at graduate level
        iii. Less emotional response
        iv. Reassured the court that it can successfully change separate but equal doctrine in educational sphere
    b. ***Strauder v. Virginia* –** state may prescribe qualifications ofr jurors but not based on race with the purpose to discriminate → males, freeholders, citizens, ages, education levels etc. ok
    c. ***Plessey v. Ferguson* –** separate but equal is ok in social sphere

i. 14th was to enforce absolute equality of two races before the law but could be intended to abolish distinctions on color o tot enforce social equality

1. Political purpose of 14th → social inequality: naturally resolve itself

d. ***Gaines v. Canada –*** state was obligated to furnish G within its boarders facilities for legal education substantially equal to those which state offered whites whether or not blacks sought the same opportunities

i. No black law schools so by definition they couldn't

1. ***Sipuel v. University of Oklahoma*** – admitted to law school at UO

e. ***Sweat v. Painter –*** required blacks admission to UT Austin *even though* state established separate one for blacks

i. No substantial equality in educational opportunities offered

ii. Working together in profession

f. ***McLaurin v. Oklahoma State Regents for Higher Edu –*** black students admitted to previously all-white grad institutions must not be segregated within the institution and must receive equal treatment in all aspects of education process

2. *Brown* and Its Implementation (Multiple Choice)

a. ***Brown v. Board of Education I*** – separate but equal is inherently unequal in educational sphere

i. ***Plessey*** overruled

ii. Education is most important function of the state – impart good citizenship

iii. Note: not strict scrutiny

b. Implementing ***Brown*** – with all deliberate speed (note oxymoron) → by lower courts

i. Little Rock 9 – *Brown* enforcement: Arkansas School Riots

ii. ***Bolling v. Sharpe –*** classifications based on race are scrutinized with particular care since they are *contrary* to traditions (race triggers***)

1. Constitutionally suspect

2. Liberty under law extends to full range of conduct which individual is free to pursue and it cannot be restricted except for proper governmental objective

iii. ***Keyes –*** plaintiffs prove that school authorities have carried out systematic program of segregation affecting a substantial proportion of students, schools, teachers, and facilities or where showing of intentional segregation in one area was probative as to intentional segregations in areas

iv. ***Milliken v. Bradley –*** before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district

1. Without an inter-district violation and inter-district effect there is no constitutional wrong calling for an inter-district remedy

v. ***Missouri v. Jenkins –*** court ordered end to school desegregation for Kansas city schools

vi. *Note – once school districts eliminated segregation, they wouldn't have it by law BUT they may have de facto (residential segregation)*

3. Facially Discriminatory Laws (Per se suspect) - *Central purpose of 14th was to eliminate all official state sources of invidious racial discrimination → DE JURE*

This usually refers to the situation where the government actor (executive body) carries out an otherwise non-discriminatory law

a. ***Korematsu –*** All legal restrictions which curtail the civil rights of a single racial group are immediately suspect.

i. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.

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

b. McLaughlin v. Florida – invalidated criminal adultery and fornication statute prohibiting cohabitation by interracial unmarried couples

c. ***Loving v. Virginia –*** law prohibiting interracial marriage unconstitutional

i. No legitimate overriding purpose independent of <u>invidious racial discrimination</u> . . . Perpetuates white supremacy

d. ***Palmore v. Sidoti –*** cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody

i. Private biases may be outside reach of the law but the court cannot give them effect

e. ***Johnson v. California –*** prison housing keeping racially distinct prisoners in separate housing was unconstitutional because it further breeds hostility among prisoners and reinforces racial and ethnic divisions [applied strict scrutiny]

f. ***Korematsu v. United States –*** EE 9066 by FDR requires internment of Japanese Americans – upheld under muster of strict security

i. Unable to readily ID pro-American vs. Japanese so compelling state interest during time of war → *note: never overruled*

4. Facially Neutral: Discriminatory Intent/Purpose (Must establish purpose) – DE FACTO (See flowchart)

a. **Order of Analysis**

i. π has to show law was enacted with discriminatory purpose

1. Motivating factor was non-discriminatory intent

2. When π establishes PF case of discriminatory intent, burden shifts to state to show that permissible racially neutral selection criteria and procedures were used to create the challenged result

b. **Racially discriminatory intent inferred absent stark statistical disparities**

i. ***Arlington Heights v. Metro Housing* –** official action **not** be held unconstitutional just because it results in racially disproportionate impact

1. **Motivating factors in the decision = HELDS**:

a. **H- Historical background**

b. **E - Events leading to the decision**

c. **L - Legislative or administrative records –** contemporaneous statements

d. **D - Departures from usual/normal procedure sequence**

e. **S - Substantive departures –** rule typically applied except here

i. Burden shifts to city to show that the same decision would have resulted even if the discriminatory motive was not present

c. ***Gomillion v. Lightfoot*** - Alabama law redefining city boundaries was device to disenfranchise blacks in violation of 15th

i. Discriminatory effect itself is usually insufficient to violate EPC BUT extreme disproportionate effect can be used to infer discriminatory purpose

ii. Tantamount to a mathematical demonstration of discriminatory purpose

d. ***Griffin v. County School Board* –** racially discriminatory purpose where closed public schools in counties and then gave vouchers to white kids for private school

i. One purpose: make sure B/W kids in separate schools

ii. Sole reason for plan was to ensure black and white children would not attend school together

iii. Opposition to desegregation is unconstitutional purpose

e. ***Washington v. Davis* –** black police force test failure rate – upheld under strict scrutiny because test was neutral on face and rationally serves purpose

i. Affirmative efforts of department to recruit officers changing racial comp of classes and force in general

ii. Relation to test and training program negated inference that this was on racial basis

f. Inference Application (*Arlington Heights*)

i. ***Rogers v. Lodge* –** racially discriminatory vote dilution from circumstantial evidence surrounding at-large election

1. No black ever elected to voting strength of minority groups by permitting political majority to elect all reps of district

2. *In order for EPC violation – invidious equality of law claimed must ultimately be traced to racially discriminatory purpose which needs only circumstantial evidence*

ii. ***Mobile v. Bolden*** – (outlier) at large system upheld because sociological evidence was not enough

iii. ***Hunter v. Underwood* –** struck down facially neutral law to reflect discriminatory purpose

1. Starkly disparate impact on circumstantial historical evidence – inferred intent

2. Alabama constitution had zeal for white supremacy and ran rampant

5. Facially Neutral: Discriminatory Effect/Application - <u>Racially selective enforcement</u> <u>presumptively violates EPC</u>

a. Laws that are racially neutral by their terms may constitute de jure discrimination violating equal protection if the challenger proves that the legislative motive was to discriminate against racial or ethnic minorities. GT 295.

b. However, facially neutral laws with a discriminatory impact without discriminatory intent are de facto discrimination, and thus it will be upheld if it is rationally related to a legitimate state interest (Rational Basis)

c. ***Yick Wo v. Hopkins* –** facially neutral law requiring consent of BOS to operate laundry in wooden building – permits were denied to 240 Chinese applicants

i. Law was so unequal and oppressive as to amount to a practical denial of state

6. Affirmative Action

a. Rule – discrete and insular minorities concept from *Carolene Products fn4*

i. Once the University has established that its goal of diversity is consistent with strict scrutiny, however, there must still be a further judicial determination that the admissions process meets strict scrutiny in its implementation.

ii. **COMPELLING STATE INTEREST =** having all students benefit from diversity in the classroom: insights, culture, etc. – DIVERSITY

iii. **NARROWLY TAILORED =** not unduly burdening individuals who are not members of the favored racial and ethnic groups

1. Necessary" for a university to use race to achieve the educational benefits of diversity

a. Does not require exhaustion of every *conceivable* race-neutral alternative," strict scrutiny does require a court to examine with care, and not defer to, a university's "serious, good faith consideration of workable race-neutral alternatives

b. **Education**

i. ***UC Regents v. Bakke*** **–** program setting aside specific number of seats [quota] for racial minority in UC Davis med school program was unconstitutional because program was not narrowly tailored to achieve state objective in diversifying the practice

1. BUT: academic freedom and right to choose diverse student body = CSI

2. Student body diversity that encompasses a . . . broad array of qualifications and characteristics of which racial or ethnic origin is but a single though important element

ii. ***Wygant*** **–** rejected argument for correction broader societal prejudice

1. Upon showing some prior discrimination by governmental unit involved before allowing limited use of racial classification in order to remedy such discrimination

2. No workable race-neutral alternatives would produce the educational benefits of diversity

a. If a nonracial approach . . . could promote the substantial interest about as well and at tolerable administrative expense

iii. ***Grutter v. Bollinger*** **–** race as a plus factor is constitutional under strict scrutiny because enriching benefits from diversity in classroom is CSI

1. **Consider:** Scope of harm occasioned by using race as a factor for non-minority students

iv. ***Gratz v. Bollinger*** **–** Race getting automatic +20 is unconstitutional because it's <u>not</u> narrowly tailored to achieve educational diversity

1. Automatic – no nuance and individuals were not looked at beyond racial diversity

2. Applicants are <u>not</u> getting individualized process – only justification is that they are members of minority group

v. ***Parents Involved in Community Schools v. Seattle SD*** **–** race was a tiebreaker as a important factor to consider but court found it unconstitutional

1. Racial balancing is not transformed from `patently unconstitutional' to a compelling state interest simply by relabeling it `racial diversity.

2. Way to stop discrimination on the basis of race is to stop discriminating on the basis of race

3. **Consider:** not actually narrowly tailored because effects of program didn't really hit everyone

a. **Racial diversity alone (vs. compelling interest) is <u>not</u> enough**

c. **Government Employment Contracts**

i. ***Fullilove v. Klutznick*** – minority set-aside in <u>Congressional (5th!)</u> program was <u>legitimate exercise of congressional power:</u>

1. 10% of federal funds for public works projects had to be used to purchase services or supplies from businesses owned by American citizens who belonged to any of 6 specific minority groups

2. Congress had abundant historical basis from which it could conclude the traditional procurement practices, when applied to minority business could perpetuate effects of prior discrimination

3. Reasonably determined that prospective elimination of these barriers to minority firm access to public contracting opportunities

4. Appropriate to ensure businesses not denied equal opportunity to participate

ii. ***Richmond v. Croson*** **-** generalized assertions" of past racial discrimination could not justify "rigid" racial quotas for the awarding of public contracts

1. Mere recitation of a `benign' or legitimate purpose for a racial classification is entitled to little or no weight.

2. No way of determining what classification are benign or remedial and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics

3. Evidence before it that nonminority contractors were <u>systematically excluding</u> minority

    a. Where there is a significant statistical disparities between number of qualified minority contractors willing and able to perform a particular service and number of such contractors actually engaged by locality or locality's prime contractors, an inference of discriminatory exclusion could arise

4. *** MUST *identify that discrimination with some specificity before they may use race-conscious relief*

iii. ***Adardand v. Pena*** **–** lowest bidder (White) but minority group got it because of voucher program making it cheaper to give job to minority – strict scrutiny must met regardless of preference

1. Any person has right to demand that any governmental actor subject to Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny

14th Equal Protection – Intermediate Scrutiny

<table>
<tr><td colspan="4">When a classification based on gender or legitimacy is involved. Under the intermediate scrutiny standard, a law will be upheld if it is substantially related to an important government purpose
Trigger: Facial discrimination OR Discriminatory (Impact + Purpose)</td></tr>
<tr><td>Ends</td><td colspan="2">Means</td><td>Burden of Proof</td></tr>
<tr><td>There is an important government ACTUAL purpose…</td><td>To which, the classification substantially relates.</td><td>Requires an “exceedingly persuasive justification.”</td><td>Government</td></tr>
<tr><td colspan="4">State must prove that a gender specific law is more effective than a gender neutral law would be to meet its actual purpose, and that there are no gender-neutral alternatives available.</td></tr>
</table>

1. **Evolution of Gender**
    a. ***Bradwell v. State –*** privileges and immunities don’t apply to women
        i. Man is woman’s protector and defender
        ii. Not a federal P/I violation to deny admission to a state Bar – natural and proper timidity and delicacy of female sex evidently unfits it for many of the occupations of civil life
    b. ***Minor v. Happersett –*** women can vote in election but do not have a place to participate in political or professional life
    c. ***Goeseart v. Cleary –*** upheld law only allowing daughters or wives of bar owners to work behind the bar
        i. Bartender’s license eligibility – Michigan statute required women to be married or to be daughter of owner of licensed liquor establishment
        ii. Applied – rational basis
    d. ***Reed v. Reed –*** probate code specified that contested situations – males must be preferred to females in appointing administrators of estate
        i. Preference for one gender over other did not bear rational relationship to legitimate state objectives of reducing the workload in state probate courts. . . the very kind of arbitrary legislative choice forbidden by EP
        ii. Objective of reducing work load on probate courts by eliminating one class of contests is not without some legitimacy BUT giving mandatory preference

iii. Doesn't change the standard but see *Craig* – it changes the scrutiny standard

e. ***Frontiero v. Richardson –*** sustained challenge that afforded male members of armed forces automatic dependency allowance for wife BUT not for women and their husbands

i. Brennan wanted strict scrutiny in plurality

f. ***Craig v. Boren –*** important ends and substantially related means

g. JEB v. Alabama – gender-based peremptory challenges are unconstitutional

2. **Intentional Discrimination Against Women**

a. ***Government*** bears the burden of proof in gender discrimination cases [**EPJ**]

i. ***Exceedingly persuasive justification*** is required in order to show that gender discrimination is **substantially related** to an **important government interest**

ii. Burden is on the state to show that a statute or regulation that treats the sexes differently is substantially related to an important governmental interest. This test applies whether the classification is invidious or benign, and it is now applied rather stringently, requiring the government to show that an "exceedingly persuasive justification" exists for the distinction, and that separate facilities (such as separate sports team facilities as state universities) are "substantially equivalent.

b. ***United States v. Virginia [VMI] -*** state institution's admissions policy unconstitutional where specifically excluded women because of military training type arguments

i. The justification must be genuine, not hypothesized or invented post hoc in response to litigation

ii. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females

iii. Considered – alum networks, physical training, group unity, military living, etc. → "separate but equal" women's institution was unequal

iv. **[Compare]** ***Geduldig v. Aiello –*** state law that excluded from state disability insurance benefits "disabilities" arising from normal pregnancy and childbirth was upheld on a holding that it did not constitute a gender classification and so did not constitute intentional discrimination

1. Federal corollary – T7 – expressly forbade discrimination on sex and pregnancy

v. **[Compare]** ***Massachusetts v. Feeney*** **-** state statute granting a hiring preference to veterans was upheld even though the result would disadvantage women since most veterans are men. The Court found that the purpose of the statute was to help veterans, not to discriminate against women

1. Two fold inquiry where disproportionately adverse

a. Whether statutory classification is neutral in sense that it is not gender based

i. If class itself, overt or overt, is not based upon gender

1. IF NOT – whether adverse effect reflects invidious gender-based discrimination

a. Impact provides an important starting point but purposeful discrimination is the condition that offends the constitution

c. ***Weinberger v. Wiesnefield*** – unjustifiable discrimination against covered female wage earners by affording them less protection for their survivors than that provided for survivors of male wage earners

3. **Affirmative Action Benefiting Women**

a. Gender classifications benefitting women are generally not allowed. However, when meant to remedy past discrimination, they are generally permitted. [CB 896]

b. Benefit and burdens as they relate to gender stereotypes has been at issue and changing, especially over the 60s and 70s. Ex. Alimony.

c. Classifications benefiting women that are designed to ***remedy past discrimination*** against women will generally be upheld.

d. ***Kahn v. Shevin*** **–** state tax law was reasonably designed to further state policy of cushioning the financial impact of spousal loss upon the sex for which that loss imposes a disproportionately heavy burden – **laws designed to rectify effects of past discrimination against women readily passed muster**

e. ***Califano v. Webster*** **-** Social Security and tax exemptions that entitle women to greater benefits to make up for past discrimination in the workplace are valid

i. **BUT COMPARE*: Califano v. Goldfarb*** **–** mere recitation of benign, compensatory purpose is not an automatic shield that protects against any inquiry into actual purposes underlying legislative scheme

1. Rejected attempts to justify gender classifications in fact penalized women wage earners or when legislative history revealed that classification was not enacted as compensation for past discrimination

f. ***Schilesinger v. Ballard -*** Navy rule granting female officers longer tenure than males before mandatory discharge for nonproduction is valid to make up for past discrimination against females in the Navy

   i. Note: Rational Basis

4. **Intentional Discrimination Against Men**

   a. Invalid Discrimination

      i. ***Mississippi v. Hogan -*** Denial to admit males to a state university or nursing school

      ii. ***Orr v. Orr -*** Law that provides that only wives are eligible for alimony

      iii. ***Caban v. Mohammed -*** Law that permits unwed mother, but not unwed father, to stop adoption of offspring

      iv. ***Craig v. Boren -*** Law providing a higher minimum drinking age for men than for women

   b. **Valid Discrimination** [despite discriminatory intent]

      i. ***Michael M v. Superior Court -*** Law punishing males but not females for statutory rape - classification was found to be substantially related to important interest of preventing pregnancy of minors

      ii. ***Rostker v. Goldberg -*** Male-only draft registration - classification was found to be substantially related to important interest of preparing combat troops

      iii. ***Nguyen v. INS -*** law granting automatic United States citizenship to nonmarital children born abroad to American mothers, but requiring American fathers of children born abroad to take specific steps to establish paternity in orderto make such children United States citizens

5. **Legitimacy Classifications [out of wedlock kids]**

   a. Substantially related to important government objective

   b. ***Clark v. Jeter -*** Struck down a state statute that required illegitimate children to bring paternity suits within six years of their birth while allowing legitimate children to seek support from parents at any time

      i. Law was not related to the state interest of preventing stale or fraudulent claims

6. **Alienage**

   a. *Graham v. Richardson* – state cannot deny welfare to non-citizens

   b. ***In Re: Griffiths* –** neither undoubted interests in high professional standards nor the role of lawyers in protecting clients' interests and serving as officers of the court established that the state must exclude aliens from practice of law

c. ***Sugarman v. Dougall* –** little if any relationship to state's substantial interest in having employee of undivided loyalty

d. ***Hampton v. Mow Sun Wong* –** unconstitutional to bar resident aliens from federal competitive employment

e. ***GOVERNMENTAL FUNCTION EXCEPTION -*** Rule: real question was not whether discrimination between citizens and aliens is permissible but *whether statutory discrimination within class of aliens – allowing be*

i. The classification that excludes aliens must be fairly specific as to the positions that are involved rather than a disqualification aimed at a wide range of positions.

ii. The position must involve broad discretionary authority in the formulation or execution of public policy; and

iii. The authority exercised must have an important impact on the citizen population.

iv. ***Foley v. Connelie* –** police officers ok

1. To require every statutory exclusion of aliens to clear high hurdle of strict scrutiny would obliterate all distinctions between citizens and aliens and thus deprecate the historic values of citizenship

v. ***Ambach v. Norwick* –** state may refuse to employ as elementary and secondary school teacher aliens who are eligible for citizenship BUT to seek naturalization

vi. ***Bernal v. Fainter* – LIMIT! –** political function exception must be narrowly construed

1. Otherwise exception will swallow rule and deprecate significance that should attach to the designation of a group of discrete and insular minority for whom heightened judicial solitude is appropriate

2. No exception where – essentially clerical and ministerial

3. In absence of either important policymaking responsibilities or broad discretion of the type exercised by teachers and other public employees – duties would not be deemed to be within governmental function exception

vii. ***Mathews v. Diaz* – Congress may condition alien eligibility for Medicare program on**

1. Admission for permanent residence AND

2. Continuous resident in united states for 5 years

Fundamental Rights

1. Certain fundamental rights are protected under the Constitution

    a. If they are denied to everyone, it is a substantive due process problem

    b. If they are denied to some individuals but not to others, it is an equal protection problem. The applicable standard in either case is strict scrutiny.

        i. Thus, to be valid the governmental action must be ***necessary*** to protect a ***compelling interest***.

2. **Procreation**

    a. ***Skinner v. Oklahoma –*** unconstitutional where statute subject to sterilization for repeat offenders unless committed white collar crime

3. **Voting**

    a. The right of all United States citizens over 18 years of age to vote is mentioned in the 14th, 15th, 19th. 24th, 26th Amendments

        i. Extends to all national and state government elections, including primaries. The right is fundamental; thus, restrictions on voting, other than on the basis of age, residency, or citizenship, are ***invalid*** unless they can pass strict scrutiny

        ii. **Poll Taxes – prohibited under 24th Amendment**

            1. ***Harper v. Board of Elections –*** also violate equal protection because wealth is not related to the government's interest in having voters vote intelligently

        iii. ***Richardson v. Ramirez –*** exception unusual EP standard in recognition of ex-felons disenfranchisement in rarely invoked § 2 – exclusion of felons has affirmative sanction which was not present in cases of other restrictions invalidated by *Harper-Kramer*

        iv. ***Crawford v. Marion County Election board –*** State may require in-person voters to show a government-issued voter ID [balanced interests: fraud]

            1. Evenhanded protection of the integrity of the electoral process and is justified by "**sufficiently weighty**" interests of detecting voter fraud and protecting public confidence in elections.

            2. The requirement is plainly legitimate and is not ***"facially invalid***

b. **Property Ownership - Conditioning the right to vote, to be a candidate, or to hold office on property ownership is usually invalid under the Equal Protection Clause since property ownership is not necessary to any CSI related to voting**

   i. ***Kramer v. Union Free School District -*** requirement of owning property or having children in schools to vote in school board elections struck

   ii. ***Cipriano v. Houma -*** Court invalidated law permitted only property owners to vote in elections regarding issuance of municipal utility bonds

   iii. ***Phoenix v. Kolodziejski –*** restriction of vote to property owners was no more valid in elections on general obligation bonds than in elections on revenue bonds

      1. Differences between interests of those who did and did not own property were not sufficiently substantial to justify excluding latter from franchise

   iv. ***<u>However</u>****, certain special purpose elections (e.g., water storage district elections) can be based on property ownership*

      1. The government can limit the class of persons who are allowed to vote in an election of persons to serve on a special purpose governmentunit if the government unit has a special impact on the class of enfranchised voters

      2. ***Salyer Land v. Tulare Lake Basin-*** election scheme for water storage district under which only landowners were permitted to vote and which votes were proportioned according to assessed valuation of land

         a. District's main purpose was to assure water for farming and that project costs were assessed upon land in proportion to benefits received

         b. <u>Limited purpose elections</u>

            i. Special limited purpose

            ii. Disproportionate effect on people included in category of eligible voters

c. **Re-Districting**

   i. ***Shaw v. Reno -*** state law establishing districts for the election of Representatives to the United States Congress should be deemed to use a racial classification on its face because one bizarrely shaped district could not be explained except in terms of establishing a district where minority race voters would control the outcome of the election

      1. Court did not rule on the question of whether this racial classification was narrowly tailored to a compelling interest, such as remedying proven past discrimination, because that question had not been addressed in the lower courts

4. **Access to Courts – Strict**

    a. Griffin v. Illinois – violated equal protection to deny free trial transcripts to indigent criminal defendants who were appealing their conviction

    b. ***Douglas v. California –*** government must provide indigent criminal defendants free counsel on appeal, at least for their initial appeal which state law requires the courts of appeals to hear

        i. ***Ross v. Moffitt –*** government is not required to appoint counsel for an indigent defendant's discretionary appeal to the highest state court or to the United States Supreme Court

    c. ***Halbert v. Michigan –*** unconstitutional practice of denying appointed appellate counsel to indigents convicted by guilty or nolo contender pleas

5. **Food and Shelter**

    a. ***Dandrige v. Williams -*** upheld a state law that put a cap on welfare benefits to families regardless of their size

        i. Rational basis review was appropriate because the law related to economics and social welfare

            1. State's interest in allocating scarce public benefits as sufficient to justify the law

                a. Note: DP distinction where they can't pull it without hearing

    b. ***Lindsey v. Normet -*** Court rejected a challenge to a state's summary eviction procedure

        i. Constitution does not provide judicial remedies for every social and economic

6. **Education**

    a. Not yet held education to be a fundamental right

        i. Not found that children are denied equal protection when the government provides greater educational opportunities for children who can afford to pay for access to the best state-operated schools

    b. San Antonio v. Rodriguez - upheld the use of a property tax to fund local schools where the tax system resulted in children in districts with a high tax base getting a significantly better education than children in tax districts that could not afford significant taxes for education

c. ***Plyler v. Doe -*** unconstitutional a Texas law that provided a free public education to citizens and to children of documented immigrants, but required undocumented immigrants to pay for their public education

i. Illegal aliens and their children, though not citizens of the United States or Texas, are people "in any ordinary sense of the term" and, therefore, are afforded 14th protections

1. ***Martinez v. Bynum -*** upheld a state statute that permitted a school district to deny tuition-free education to any child (whether or not he was a United States citizen) who lived apart from his parent or lawful guardian if the child's presence in the school district was for the "primary purpose" of attending school in the district

a. State does not have to consider such a child to be a bona fide resident of the school district

b. Public education is not a 'right' granted to individuals by the Constitution. But neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation

d. Note: Because of impunity – (1) Held completely unable to pay for some desired benefit AND (2) as consequence sustained absolute deprivation of meaningful opportunity to enjoy that benefit

Religion

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof - both have been incorporated into the DPC of 14th and therefore applicable to the states – 1st federal or 14th for state

1. **Overview**
    a. **Doctrines**
        i. **Voluntarism**
            1. Advancement of church comes only from people who chose to support that religion as opposed to support coming from government
            2. Madison was a little of this
        ii. **Separatism**
            1. Wall between church and state
            2. Usually Jeffersonian concept
            3. Functions of churches should be completely separate from operation of governed
            4. Madison was a little bit of this
            5. **M+J believed** that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or to otherwise assist any or all religions, or to interfere with beliefs of any religious individual or group – **separatism**
        iii. **Non-preferentialism**
            1. Government not prefer specific religion
            2. Treat all religions equally
2. **Definition of Religion**
    a. Note: Attenuated and government interests – prisons and military vs. narrow definition of burden: rejects Free Exercise and development of federal property
    b. **Attempt under Selective Service Act**
        i. ***United States v. Seeger -*** Exemption from combat training for individuals (religious beliefs) conscientiously opposed to participating in war - broadly defined religion to include such nontheistic views . . .
            1. One possible definition is that the "belief must occupy a place in the believer's life parallel to that occupied by orthodox religious beliefs

ii. **TEST for belief in supreme being**

1. Is given belief sincere and meaningful?

    a. Court may determine whether the person is sincerely asserting a belief in the divine statement

2. Does it occupy a place in life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption?

3. Do you act consistently with the belief?

iii. ***Welsh v. United States -*** person seeking an exemption from the draft on religious grounds indistinguishable from ***Seeger***

1. Affirmed on those applications that they held deep conscientious scruples against taking part in wars where people were killed

2. Belief in God is characteristic of most religions, but not a prerequisite for religion

c. ***Gillette v. United States -*** free exercise clause did not require that individuals who objected to a particular war on religious grounds be given an exemption from the draft

i. Conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position

ii. Draft laws that did not create a religious exemption for those opposed to particular wars "are strictly justified by substantial government interests

iii. **Religious Gerrymanders – conscientious scruples relating to war and military service must amount to conscientious opposition to participating personally in any and all war**

1. Valid neutral reasons exists for limiting exemptions to objectors of all war, and that the section therefore cannot be said to reflect a religious preference

2. Government's interest was sufficient to justify any burden on selective objectors' rights of free exercise

    a. **If you have exceptions that allow wars, you do not qualify because you can't really pick and choose what wars you want**

d. ***States v. Ballard –*** I Am religion said they were divine messengers and had power to cure diseases – 1st amendment barred submission to jury about the truth of religious beliefs but could go to jury as to sincerity of their belief

3. **Overview of Establishment Clause –** prohibits laws respecting the establishment of religion

    a. **Sect Preference** – if a law or government program includes a preference for *some* religious sects over others, it will almost certainly be held invalid because STRICT SCRUTINY applies . . . to be valid, the law or program must be narrowly tailored to promote a compelling interest

        i. ***Board of Education of Kiryas Joel v. Grumet –*** unconstitutional: state law created a public school district whose boundaries were intentionally set to match the boundaries of a particular Jewish neighborhood (so that several handicapped students would not have to be sent outside their neighborhood to attend special education classes that the state required and which the students' private school could not adequately provide)

    b. **No Sect Preference – *Lemon* Test:** Not every governmental action that impacts religion is unconstitutional

        i. Governmental action that benefits religion is valid where

            1. It has a **secular purpose**

            2. Its principal or primary effect **neither advances nor inhibits religion AND**

            3. It does not result in **excessive government entanglement with religion**

4. **Establishment Clause** – prohibits laws respecting establishment of religion

    a. **Religion Outside Curriculum**

        i. ***McCollum v. Board of Education -*** unconstitutional a school's policy of allowing students to be released, with parental permission, to religious instruction classes conducted during regular school hours in the school building by outside teachers

            1. Violating wall of separation between church and state

        ii. ***Engel v. Vitale –*** unconstitutional non-denominational school prayer recited daily, even individual students could opt out

            1. EC does not depend upon any showing of direct government compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not

        iii. ***Abington School District v. Shempp -*** declared unconstitutional a state's law and a city's rule that required the reading, without comment, at the beginning of each school day of verses from the Bible and the recitation of the Lord's Prayer by students in unison

iv. ***Wallce v. Jaffree –*** see other notes – moment of silence for meditation or prayer at beginning of day

v. ***Lee v. Weisman –*** unconstitutional clergy-delivered prayers at public school graduations

    1. Nonsectarian prayer at middle school graduation (attendance optional) student not required to recite or respond verbally

    2. Government may not coerce anyone to support or participate in religion or its exercise

        a. ***Engel*** and ***Schempp*** recognize that prayer exercises in public schools carry a particular risk of indirect coercion

    3. Note ***Engle-Schempp-Wallace***

    4. What matters: given social conventions, reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it

vi. ***Santa Fe Independent School District v. Doe -*** unconstitutional student-delivered prayers at high school football games and expressly rejected the argument that this was impermissible discrimination against religious speech

    1. School had encouraged and facilitated the prayer at a school event

vii. ***Good News Club v. Milford Central School –*** permissible under EC use of school facilities for worship and prayer when led by private evangelical Christian club as part of extracurricular

    1. Elementary school could not exclude a religious group from using school facilities after school

    2. Never extended EC to foreclose private religious conduct during non school hours merely because it takes place on school premises where elementary school may be present

b. **Religion Inside Curriculum**

i. A government statute or regulation that **<u>modifies</u>** a public school curriculum will violate the Establishment Clause if it fails *Lemon* Test

1. ***Epperson v. Arkansas -*** A state statute that prohibited the teaching of human biological evolution in the state's public schools violated EC

    a. Legislature had religious purpose for enacting statute

2. ***Edwards v. Aguillard -*** invalidated a state statute that prohibited instruction regarding "evolution science" in the public schools unless that instruction was accompanied by instruction regarding "creation science," because the Court found that the legislature enacted this statute for the purpose of promoting religion

3. ***Epperson v. Arkansas –*** invalidated anti-evolution law – selects from body of knowledge a particular segment which it proscribes for sole reason that is deemed o conflict with a particular religious doctrine

    a. Unconstitutional an Arkansas law that made it unlawful for a teacher in a state-supported school or university "to teach the theory or doctrine that mankind ascended or descended from a lower order of animals" or "to adopt or use in any such institution a textbook that teaches" this theory

4. ***Edwards v. Aguillard –*** unconstitutional law that prohibited the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science

    a. Law's primary purpose was to change the science curriculum of public schools in order to provide persuasive advantage to a particular religious doctrine that rejects the factual basis of evolution in its entirety – clearly wanted to advance particular religious belief

ii. **Recipient-Based Aid**

1. ***Zelman v. Simmons-Harris –*** establishment includes inclusion of religious schools in public education funding schemes

a. Upheld a program that provided tuition vouchers to parents of poor children in kindergarten through the eighth grade which could be used to pay for attending participating public or private schools of their parents' choice, even though a very high percentage of the recipients chose to attend religiously affiliated schools

b. Note secular purpose and other prongs

c. **Accommodation of Religion**

i. ***Larkin v. Grendel's Den –*** government may not delegate governmental power to religious organizations because such action would involve excessive governmental entanglement

1. Struck down law that gave churches and schools power to veto liquor license applications that were within 500 feet of school

ii. ***Estate of Thornton v. Caldor –*** State may not force employers to grant all employees an absolute right to refrain from working on their Sabbath, because the primary effect of such a law is to advance religion

1. Struck down law providing Sabbath exception

2. Absolute deference constituted establishment of religion

iii. ***Corporation of Presiding Bishop v. Amos –***federal government may exempt religious organizations from the federal statutory prohibition against discrimination in employment on the basis of religion, at least regarding their nonprofit activities.

1. Janitor can be discharged from his employment at a gymnasium owned by a religious organization (which was open to the public and run as a nonprofit facility) because he was not a member of that religious organization

iv. ***Texas Monthly Inc. v. Bullock –*** Although religious schools or religious associations may be included in tax exemptions available to a variety of secular and religious organizations, a tax exemption that is available only for religious organizations or religious activities violates the Establishment Clause

1. Exemption from the sales and use tax for religious magazines or books (but no other publications) violates the Establishment Clause

v. ***Board of Education v. Mergens –*** rejected establishment by mandating school sponsorship of religious organizations

1. Couldn't refuse funding for Christian organization by public school

vi. ***Cutter v. Wilkinson –*** prisons could not prohibit prisoner's exercise of their religion

5. **Free Exercise of Religion** – Prohibits the governmentfrom punishing conduct merely because it is religious or displays religious belief

a. ***Torcaso v. Watkins –*** The federal government may not require any federal office holder or employee to take an oath based on a religious belief as a condition for receiving the federal office or job, because such a requirement is prohibited by Article

VI of the Constitution. State and local governments are prohibited from requiring such oaths by the Free Exercise Clause

i. Challenge to Maryland's refusal to allow a man to be a notary public because he would not declare his belief in God

1. Neither a State nor Federal Government can constitutionally force a person to profess a belief or disbelief in any religion

2. No religious test shall ever be required as qualification to any officer or public trust under the united states

a. ***McDaniel v. Paty –*** unconstitutional for government to exclude clergy members from holding government offices

i. Overturned provision disqualifying clergy from being legislators or constitutional convention delegates

ii. History indecisive and invalidated law – free exercise

ii. Does act of government deliberately disadvantage religion or particular religion?

iii. Are religious practitioners entitled to exemptions from generally applicable laws that conflict with dictates of their faith?

b. **NO Punishment of Religious Conduct Solely Because It's Religious**

i. ***Church of Lukumi Babalu Aye v. City of Hileah -*** city law that prohibited the precise type of animal slaughter used in the ritual of a particular religious sect **violated** the Free Exercise Clause **USE Arlington Heights**

1. If object of law is to infringe upon or restrict practices because of religious motivation, law is NOT NEUTRAL

2. Law was designed solely to exclude the religious sect from the city

3. Law was not a neutral law of general applicability; nor was the law necessary to promote a compelling interest

4. Consider: criminal liability, exempted Kosher slaughter, certain religions could petition, under inclusive

ii. ***COMPARE: Locke v. Daley -*** state law that excluded pursuit of a degree in devotional theology from a college scholarship program for all students did not violate the Free Exercise Clause

a. Although a school could provide such scholarships without violating the Establishment Clause (see infra), the Free Exercise Clause does not require such scholarships

b. Exclusion from scholarship eligibility does not show animus toward religion, but rather merely reflects a decision not to fund this activity.

c. Burden that the exclusion imposes on religion is modest, and there is substantial historical support against using tax funds to support the ministry.

d. NOTE: no criminal or civil sanctions, not supporting or punishing

iii. ***Larson v. Valente –*** unconstitutional a Minnesota law that imposed registration and reporting requirements on charitable organizations, but exempted religious institutions that received more than half of their financial support from members' contributions

6. **Neutral Laws Affecting Religion**

a. **Free exercise** are more commonly raised against facially neutral laws that are not targeted at a religious practices, but which have a disproportionate and adverse impact of religious practitioners

b. ***Reynolds v. United States –*** constitutional for Congress to outlaw bigamy (criminal) government may not compel or punish religious beliefs; people may think and believe anything that they want

i. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions

c. ***Cantwell v. Connecticut –*** free exercise: believe and act – beliefs are absolute but the act cannot necessarily be

i. Power to regulate must so be exercised as not in attaining a permissible end unduly to infringe the protected freedom

d. ***Prince v. Massachusetts –*** upheld law making criminal for child under 18 to sell newspapers in public places even as applied to child of Jehovah's Witness whose faith viewed it as a religious duty to perform such work

e. ***Braundfeld v. Brown –*** freedom to act, even when the action is accord with one's religious convictions, is not *totally* free from legislative restrictions

i. If it doesn't make it criminal the holding of any religious belief or opinion nor force anyone to embrace religious belief

ii. If state regulates conduct by enacting general law within its power, purpose and effect of which is to advance the state's secular goals, statute is valid

despite its indirect burden on religious observances unless the state may accomplish its purpose by means which do not impose such a burden

iii. Beliefs are absolute

f. Unemployment Compensation Cases

g. States must grant religious exemptions. Thus, if a person resigns from a job or refuses to accept a job because it conflicts with her religious beliefs, the state must pay her unemployment compensation if she is otherwise entitled.

i. ***Sherbert v. Verner -*** state **cannot** deny unemployment compensation merely because the applicant quit a job rather than work on a "holy day" on which religious beliefs forbid work

1. ***Lying v. Norwest Indian Cemetery –*** no violation where road built through timber harvesting area of national forest used by several Indian tribes as sacred area [**note development of government land**]

a. No affected individual coerced into violating their beliefs and no penalties

b. Indirect coercion or penalties on free exercise, not just outright prohibitions are subject to scrutiny under

c. BUT incidental effects of governmental programs that have no tendency to coerce individuals into acting contrary

ii. ***Employment Division v. Smith [*****discarded** ***Sherbert] -*** If prohibiting or burdening exercise of religion **is not the object of the burden** but merely the **incidental effect** of a generally applicable and otherwise valid provision, 1st amendment not violated

1. Free exercise of religion means first – right to believe and profess whatever religious doctrine one desires

2. But exercise often involves not only belief and profession but performance or abstention from physical acts

a. General neutral law – generally applicable

3. **TRIGGER when you can inhibit– in conjunction with other constitutional protections – speech, press, parents, direct education of kids**

a. ***Sherbert*** – governmental actions that substantially burden religious practice must be justified by CSI

b. If individual exemptions – state may not refuse to extend that system to cases of religious hardship without compelling reason

4. Where state has placed system of individual exemptions it may NOT refuse to extend that system to cases of religious hardship without CSI

    a. If CSI – must be applied to all actions religiously commanded

5. Free Exercise Clause cannot be used to challenge a law of general applicability unless it can be shown that the law was motivated by a desire to interfere with religion

h. ***Hossana v. EEOC -*** If law of general applicability would otherwise permit an action against religious congregation for employment discrimination against religious instruction teacher – 1st amendment compels ministerial exception

    i. Congregation gets to select own minister notwithstanding ADA requirements

Free Speech

1. **Overview**

    a. ***Meiklejohn –*** speech on public issues of self government should be immune from regulation

        i. Private speech can receive less protection

    b. ***Chaffee –*** private speech such as art, lit, help electorate acquire intelligence, devotion to gen welfare that is expressed through ballot

    c. ***Bork –*** 1st amendment protection should be constrained within outer limits of free speech

2. **Methodology**

    a. **1st Amendment created rough hierarchy of constitutional protection**

        i. Core political speech + Commercial speech + non-obscene

        ii. Sexually explicitly speech = second class

        iii. Obscenity and fighting words = least protection

    b. **Content-Based and Content-Neutral**

        i. CB – presumptively invalid AND must meet strict scrutiny

        ii. CN – need only meet intermediate scrutiny

            1. Must be viewpoint and subject matter neutral

    c. **Vagueness [void]**

        i. Statute is voided where it fails to provide persons of ordinary intelligence with fair notice of what is prohibited

        ii. Individual who is charged with a crime have the ability to understand that their behavior has been criminalized

            1. If you have a vague statute an individual cannot be sure whether their behavior is criminalized – not enough information to give the individual warning that the behavior is going to result in the violation of law

        iii. There has to be a sufficiently ascertainable standard of guilt

            1. If there is no such standard, then a law can be struck down as vague

2. Even if the person was fairly sure that what they were going to do was going to violate the law, the fact that the law could capture situations where it wouldn't be clear

iv. Federalism issue that arises – Federal courts usually defer to states

d. Overbreadth [regulation invalid]

i. When you have overbreadth argument

1. Do facts involve speech only?

2. If so – court more likely to apply standard overbreadth analysis BUT

a. If it's about expressive conduct for example, then the court will probably apply: substantial overbreadth occurring as a *de minimis* overbreadth

ii. Since purpose of speech is to encourage free flow of ideas, regulation **NOT UPHELD** if it is overbroad

1. Prohibits substantially more speech than is necessary

iii. If a regulation of speech or speech-related conduct punishes a ***substantial amount of protected speech,*** judged in relation to the regulation's plainly legitimate sweep, the regulation is ***facially invalid***

iv. Not even a person engaging in activity that is not constitution- ally protected) unless a court has limited construction of the regulation so as to remove the threat to constitutionally protected expression

v. If a regulation is not substantially overbroad, it can be enforced against persons engaging in activities that are not constitutionally protected

vi. It's about capturing protected speech and by prohibiting protected speech, a law can be found unconstitutional even if the specific speech that is the subject of the case is **not** protected

1. It protects unprotected speech to preserve protected speech

vii. An entire law can be unconstitutional on its face because it reaches some portion of speech that the speaker should be allowed to make

viii. Point out that something protected is reached by that law – law is invalid

ix. ***Broadrick v. Oklahoma -*** overbreadth has to be substantial before law can be found facially invalid - upheld the constitutionality of an Oklahoma law that prohibited political activities by government employees.

1. Particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep

2. Conduct as opposed to speech – overbreadth analysis is less applicable

3. Here there was a restriction on political activities (reaching conduct but also area in which the speech is accorded highest level of protection) . . . Activity went beyond spoken words

x. Chilling effects is the justification for overbreadth doctrine

xi. Unprotected speech escapes punishment because it's so important to protect the speech that's constitutionally protected

xii. Overbreadth that invalidates law on its face raises Conlaw 1 questions – balance of power between legislature and the courts

xiii. Limit overbreadth where there is NO way to more narrowly construe the statute

xiv. Court only applies facial overbreadth invalidity IF regulation involved could not be more narrowly construed in a way that would uphold the legislation

xv. ***Brockett v. Spokane –*** an obscenity law, while striking down the part of the law that defined "lust" as unduly broad

1. Term prurient interest didn't apply to materials that provoked normal sexual desires

e. Prior Restraints

i. Prior restraint occurs in advance of expression – presumed unconstitutional

ii. How they operate

1. Permit situation

2. Clear standards for person to defer to

3. Quick review process for permit issuance – can't use it just to postpone decision past the time that is relevant

a. But quick review lets get you around it since unfettered discretion is the major issue with prior restraint

iii. Laws must be adequately specific to give people information as to what is/not allowed

1. ***Freedman v. Maryland –*** unconstitutional a Maryland law that made it unlawful to unlawful to exhibit a motion picture without having first obtained a license

a. Chilling effect is relevant here – in having to go to licensing

iv. Goes to self-censorship issue because people don't want to go through the process

v. Discretion is in the government official as to what is/not permitted: too much

vi. Issue with anticipating adverse effects – to suppositious

vii. **Trigger!**

1. **Threshold by government, permit**

2. Exhibit a motion picture without having first obtained a license

viii. Exception

1. Particular harm to be avoided AND

2. Certain procedural safeguards are provided to the speaker

Unprotected and Less Protected Speech

3. Incitement of Illegal Activity

a. Clear and Present Danger

i. ***Dennis v. United States -*** are words criminalized used in such a circumstance and of such a nature as to create CPD that would bring about substantive evils that the government had a right to prevent

1. Does gravity of evil [discounted by its improbability] justify an invasion of free speech as it is necessary to avoid the danger

2. Does <u>not</u> require government to wait until harm happens and then act

3. Government is aware that group is aiming to overthrow

b. *Bradenburg* Test . . . speech prohibited if

i. Imminent harm/lawless action [that moment]

ii. Likelihood of inciting/producing illegal action **AND**

iii. Intent to produce illegal action

c. Theory Development

i. *Brandenburg v. Ohio* - Free speech/press <u>do not</u> permit a State to forbid or proscribe advocacy of the use of force or of law violation <u>except where</u> such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action

ii. ***NAACP v. Claiborne Hardware –*** overturned a judgment against the NAACP for a boycott of white-owned businesses that it alleged engaged in racial discrimination

iii. ***Planned Parenthood v. American Coalition of Life Activists –*** Redefined the test for incitement in much more speech protective terms.

1. Individual can be convicted for incitement only if it is proved that there was a likelihood of imminent illegal conduct and if the speech was directed at causing imminent illegal conduct

4. Fighting Words [unprotected]

a. **Does NOT protect <u>true threats</u> –** statements meant to communicate an intent to place an individual or group in fear of bodily harm

b. **States May Ban Words Likely to Incite Physical Retaliation**

i. ***Chaplinsky v. New Hampshire –*** States are free to ban the use of "fighting words," *i.e.*, those <u>personally</u> abusive epithets that, when <u>addressed to the ordinary citizen</u>, are inherently likely to incite immediate physical retaliation

1. Where it is likely to cause a violent response against the speaker and where it is an insult likely to inflict immediate emotional harm

ii. ***Cantwell v. Connecticut –*** A Jehovah's Witness's conviction for disturbing the peace was overturned due to absence of a clear and present danger

1. Distinction: fighting words and provoking-audience

a. Provocative language which has been held to amount of breach of peace consisted of profane, indecent or abusive remarks directed to person of hearer

b. Resort to epithets or personal abuse is not in any proper sense

iii. ***Cohen v. California –*** state may not punish for wearing Fuck the Draft jacket which was clearly **not** directed at the person of the hearer

iv. Fighting words established as an **unprotected** speech:

1. ***Where it is likely to cause a violent response against the speaker/incite an immediate breach of the peace***

a. But ask whether the appropriate response is to punish the speaker or the person who resorts to violence

AND

2. ***Where it is an insult likely to inflict immediate emotional harm/breach of the peace***

    a. But ask whether speech should be punished because it is upsetting or deeply offensive to an audience

c. **Statutes Regulating Fighting Words Tend to Be Overbroad or Vague**

i. ***Gooding v. Wilson -*** Fighting words laws invalidated as vague and overbroad

1. GA law preventing "opprobrious and abusive language" challenged by man convicted under it for saying to a police officer "white son of a bitch, I'll kill you…I'll choke you to death."

2. **Statute must be carefully drawn or authoritatively construed to punish *only* unprotected speech and not be susceptible of application to protected expression**

ii. ***Gregory v. Chicago –*** overturned convictions for disturbing the peace for a group of civil rights demonstrators who had been arrested when an angry group threatened the marchers

1. Law did not limit convictions to instances where there was a threat of imminent violence

2. Police have made all reasonable efforts to protect the demonstrators,

3. Police have requested that the demonstration be stopped.

4. Look it as protecting speech or not sufficient evidence under the circumstances to justify a conclusion of an imminent threat to a breach of the peace

d. **Prior Restraint Type: Permit Cases give government unfettered discretion**

i. ***Kunz v. New York –*** unconstitutional an ordinance that prohibited the holding of a religious meeting on a public street without a permit

1. Government "cannot vest restraining control over the right to speak… in an administrative official where there are no appropriate standards to guide his action – **government officials cannot have limitless discretion**

ii. ***Forsyth County v. Nationalism Movement –*** unconstitutional an ordinance that required a permit in order for a demonstration to occur and that vested discretion in the government to set the amount of the fee up to $ 1,000

1. No articulated standards either in the ordinance or in the county's established practice

2. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of the fees

3. 1st Amendment prohibits the vesting of such unbridled discretion in a government official

5. **Hate Speech**

   a. Generally **no tolerance** fighting words statutes restrictions that are designed to punish **only certain viewpoints**

      i. Ex: proscribing fighting words only if they convey a particular message

   b. If they prohibit only some forms of hate, they will be invalidated as impermissible content-based discrimination

      i. But if the codes are more expansive and general, they likely will fail on vagueness and overbreadth grounds

   c. R.A.V. v. St. Paul – ordinance that applies only to those fighting words that insult or provoke violence on the basis of race, religion, or gender is invalid

      i. Very narrow fighting words law likely will be declared unconstitutional as impermissibly drawing content-based distinctions as to what speech is prohibited and what is allowed

   d. Non-verbal expressive activity can be banned because of the action it entails, but **not** because of ideas it expresses

      i. Virginia v. Black - a state may ban cross burning done with an intent to intimidate; because of cross burning's long history as a signal of impending violence, the state may specially regulate this form of threat, which is likely to inspire fear of bodily harm

         1. Cross burning is protected speech and cannot be completely outlawed, but the government may prohibit it when done in a manner that constitutes a true threat

         2. True threats – statements where the speaker means to communicate serious expression of an intent to commit act of unlawful violence to particular group or individual or group of individuals

   e. 1st **DOES NOT** protect conduct simply because it happens to be motivated by a person's views or beliefs

i. ***Wisconsin v. Mitchell –*** state can increase a convicted defendant's sentence for aggravated battery based on the fact that Δ selected the victim of his crime because of the victim's race

1. **Limited to laws that <u>limit expression</u> note distinction between conduct**

ii. ***Watts v. United States*** – conviction of an individual for violating the law that made it a crime to "knowingly and willfully…threaten to take the life of or to inflict bodily harm upon the President → **state may ban true threat**

6. **Defamation**

a. **Defamatory speech** – category traditionally unprotected category by 1st

b. **Libel** –any defamation that can be seen, such as writing, printing, effigy, movie or statute

c. **Standard** = ***NY Times*** -1st protects all statements, even false ones, about the conduct of **<u>public officials except</u>**:

i. Statements are made with **<u>actual malice</u>**

1. With <u>knowledge that they are false</u> or <u>reckless disregard of truth/falsity</u>

a. Actual pecuniary damages must be shown

b. Convincing clarity to establish statement made with actual malice

d. ***NY Times*** **& Identity of π – Public/Private Figures**

i. ***Curtis Publishing Co v. Butts & Associated Press v. Walker –*** public figures are prominent public persons

1. **Public figures have to prove ACTUAL MALICE**

a. Public figures who were **NOT <u>officials</u>** may recover **damages** for libel stemming from false reports based on "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers

e. ***NY Times*** **& Identity of Δ - Non-media/Media**

i. Gertz v. Welch - public/private distinction – A public figure can recover for defamation only by meeting the ***NY Times***

1. Private figure can recover compensatory damages for defamation by proving **<u>falsity of the statement</u> AND <u>negligence</u>**

a. Public figures, like public officials, usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals usually enjoy

b. Assumed roles of especial prominence in affairs of society

c. **You can be a public figure for a limited range of issues**

d. States cannot impose strict liability for defamation

e. Private πs can recover out of pocket losses demonstrated injury to reputation, mental anguish

f. States can only permit recovery of presumed or punitive damages IF π establishes **NY Times Actual Malice!**

f. **Ways to become a public figure**

i. General fame or notoriety

ii. Involvement in particular controversy

iii. BUT NOT

1. Spouse of wealthy person

2. Person engaging in criminal conduct

3. Scientist in federally funded program

g. ***NY Times* & Nature of Issue – Public/Private Concern**

i. ***Dun & Bradstreet v. Greenmoss Builders -*** distinction must be drawn in suits against private figures between speech that involves matters of public concern and that which does not

1. It is speech on 'matters of public concern' that is 'at the heart of the First Amendment's protection

a. In contrast, speech on matters of purely private concern is of less

2. ***Gertz*** requirement that presumed or punitive damages require proof of actual malice only applies in suits involving private figures and matters of public concern

ii. If π is a **<u>private figure and the matter is of public concern</u>**, a state can allow recovery of **compensatory** damages if the π proves:

1. Falsity of the statement **<u>and</u>** negligence by the speaker

a. But presumed or punitive damages require proof of actual malice.

2. The Court has expressly ruled that the plaintiff must bear the burden of proof in this category, just as when the plaintiff is a public official or a public figure

h. **Intentional Infliction of Emotional Distress**

i. ***Hustler Magazine v. Falwell -*** held that recovery for the IIED had to meet the ***NY Times*** **Standard**

1. Public officials and public figures who are targets of parody **cannot** recover for IIED unless there is proof of **actual malice**

2. Refused to allow liability of IIED when offensive parody about public figure could not have reasonably been interpreted as stating actual facts about π

3. Even though bad motive can impose liability in the other areas, 1st protects speech in public debate about public figures

ii. ***Cox Broadcasting Corp. v. Cohn –*** 1st Amendment barred liability because the information had been lawfully obtained from court records and truthfully reported

1. Protects the publication of information "obtained from public records— more specifically from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection

iii. ***Florida Star v. BJF –*** no liability for invasion of privacy when there is the truthful reporting of information lawfully obtained from public records, at least unless there is a state interest of the highest order justifying liability

iv. ***Bartnicki v. Vopper –*** Press protected because didn't participate in illegal recording so they could use it

v. ***Zacchini v. Scripps-Howard –*** right of publicity - state may allow liability for invasion of this right when a television station broadcast a tape of an entire performance without the performer's authorization.

7. **Obscenity**

a. ***Roth & Alberts –*** Obscenity is an unprotected category of 1st amendment speech

i. Kingsley Int'l Pictures Corp. v. Regents – Court held that a state could not prohibit the film Lady Chatterley's Lover because it shows adultery and thus "portrays acts of sexual immorality [as] desirable, acceptable or proper patterns of behavior

ii. ***Stanley v. Georgia –*** the mere private possession of obscene matter cannot constitutionally be made a crime

1. Person in home has right to choose what to read or watch

2. States have legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending sensibilities of unwilling recipients or of exposures to juveniles

b. **TEST = *Miller v. California***

i. [Local] Whether average person applying contemporary community standards would find that the word, taken as a whole, appeals to the prurient interest

1. **<u>Prurient</u> - means that which excites lustful or lascivious thoughts**

ii. [Local] Whether work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable law <u>AND</u>

iii. [National] Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value

1. Expert witnesses

c. ***Miller* Application**

i. ***Jenkins v. Georgia* –** occasional scenes of nudity, but nudity alone is not enough to make material legally obscene under the Miller standards . . . sexual content in film is not patently offensive

1. There are limits on what a state may deem to be patently offensive

ii. ***Hamling v. United States* –** local rather than state or nationwide standards for obscenity prosecutions

iii. ***Smith v. United States* –** determination of local community standards was for the jury

iv. ***Pope v. Illinois* –** social value is to be determined by a national standard—how the work would be appraised across the country— and not a community standard . . . value of work does not vary from community to community

1. Would reasonable person find such value in material?

d. **Erogenous Zoning**

i. **<u>Secondary Effects</u>** – nuisance type regulation, 1st isn't implicated as much – not as constitutionally offensive as opposed to something just aimed at the content of the material

1. Intermediate-type scrutiny of free speech – serve a substantial government and allow for reasonable alternative avenues of communications

2. **Time place and manner regulations generally apply to public (not privately owned) property**

    a. **Secondary effect targeted statute is generally viewed as content neutral – they're not making a distinction on viewpoint per se**

    b. **Content discrimination = stricter analysis**

ii. ***Young v. American Mini Theatres -*** upheld a city's ordinance that limited the number of adult theaters that could be on any block and that prevented such enterprises from being in residential areas

1. **Adult Theatre –** if it presented material that met the ordinance's definitions of "specified sexual activities" or "specified anatomical areas

2. Even though the First Amendment protects communication in this area from total suppression, State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures

iii. **1st amendment – looks to effect of ordinance on freedom of expression . . . two questions:**

1. **Does ordinance impose any content limitation on craters of adult movies or their ability to make them available to whom they desire AND**

2. **Does it restrict in any significant way the viewing of these movies by those who desire them?**

iv. ***Renton v. Playtime Theatres -*** a facial content-based restriction will be deemed content-neutral if it is motivated by a permissible content-neutral purpose

1. Rejected a First Amendment challenge to a zoning ordinance that prohibited adult motion picture theaters from locating within 1,000 feet of any residential zone, single or multifamily dwelling, church, park, or school

2. Content-neutral because it said that the law was **motivated by a desire to control the secondary effects of adult movie theaters**, such as crime, and not to restrict the speech

3. Test of whether a law is content-based or content-neutral not its terms but, rather, its justification. A law that is justified in content-neutral terms is deemed content-neutral even if it is content-based on its face

v. ***City of Los Angeles v. Alameda Books –*** LA may reasonably rely on a study it conducted some years before enacting the present version of section 12.70(C) to demonstrate that its ban on multiple-use adult establishments serves its interest in reducing crime

vi. ***FCC v. Pacifica Foundation*** **[indecent language but not sexually explicit]** – Government could not prohibit all use of these words but it could ban them from being aired over broadcast media

1. Time Place and Manner – Audience, medium, time of day, and method of transmission are relevant factors in determining whether to invoke sanctions – limit decision to this

e. **Captive Audiences**

i. ***Sable Communications Inc. v. FCC –*** unconstitutional a federal statute, designed to eliminate the "dial-a-porn" industry; the law prohibited obscene or indecent telephone conversations

1. Distinction: obscene vs. indecent

2. While law constitutional in prohibiting obscene speech, unconstitutional to ban indecent speech – can't ban simply because indecent

3. Although FCC's interest in protecting children is still valid – prohibition was insufficiently narrowly tailored

4. **Note** strict scrutiny type standard for indecency

ii. ***United States v. Playboy Entertainment Group –*** block/restrict sex stuff to times kids not watching - Strict scrutiny applies to content-based speech restrictions on cable television.

1. Compelling government interest + least restrictive means (government burden of proof that no lesser restrictive means exists)

2. Holding: Section 505 failed strict scrutiny because less restrictive means existed: individuals who did not want channels primarily dedicated to sexually-oriented programming could have them blocked.

3. Court for the first time struck down a law that regulated indecency on a non-broadcast medium that fell short of a total ban

4. When plausible, less restrictive alternatives is offered to a content-based speech restriction it is government's obligation to prove that the alternative will be ineffective achieving its goals

iii. **Standards May be Different for Minors**

1. ***Reno v. ACLU -*** Government could **NOT** regulate - The CDA's provisions for regulation of indecent speech over the Internet violated the 1st Amendment.

    a. Statute is capturing things adults are allowed to see

    b. Sexual expression which is indecent but not obscene is protected by the 1st Amendment, and while the government has a compelling interest in protecting children from harmful materials it must use the least restrictive means to further that interest.

        i. **Government may not reduce the adult population… to… only what is fit for children**

2. ***Ashcroft v. ACLU -*** A statute that effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another is **unacceptable** if less restrictive means would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve

    a. Upheld preliminary injunction blocking COPA's implementation – πs were likely to prevail on issue of unconstitutionality due to the availability of numerous, plausible, less restrictive, more effective alternative such as blocking software **CHILLING STUFF**

	Pacifica	Reno v. ACLU
	The declaratory order was issued by the FCC, an agency that had been regulating radio stations for decades	The CDA's prohibitions were not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet
	The declaratory order was targeted to a specific broadcast and was made to designate *when* – rather than whether – it would be permissible to air such a program in that particular medium	The CDA's prohibitions were not limited to particular times (not a time, place, manner restriction)
	The declaratory order was not punitive	The CDA was a criminal statute which could impose up to 2 years in prison for each act of violation
	The broadcast medium had historically received the most limited 1st Amendment protection	The Internet has no comparable history of limited 1st Amendment protection
	The Court believed that warnings in broadcast media could not adequately protect the listener from unexpected program content	The Court believed that the risk of encountering indecent material by accident on the Internet was remote because a series of affirmative steps is required to access specific material

8. **Child Pornography**

    a. ***New York v. Ferber –*** state has interest in safeguarding children so no real children in child porn

        i. Distribution of photos and films depicting this is intrinsically related to sexual abuse of children

        ii. Permanent record of participation – harm exacerbated

        iii. Distribution network must be closed if production is to be effectively controlled

    b. ***Osborne v. Ohio –*** state can proscribe possession of child porn – aim to protect victims of child porn

    c. ***Ashcroft v. Free Speech Coalition –*** must have actual children in production to constitute child pornography
        i. Didn't involve children, no crimes in production of film – no harm to children

9. **Campaign Finance**
    a. ***Citizens United –*** Federal government may not prohibit direct corporate and union spending on ads for candidates elections
        i. Laws that bar those interest from continuing directly to candidate remain in place
    b. **American traditional partnership v. Bullock** affirmed CU application to the state

Free Speech – Time Place and Manner (Conduct)

A government faced with the public access claims by speakers is entitled to giver consideration, without unfair discrimination, to time, place and manner

1. **Public Forums and Designated Public Forums** – government may regulate speech with reasonable TPM restrictions

    a. **Public Forum** – property that has been open to speech-related activities - constitutionally obligated to make available for speech

        i. Streets, sidewalks, public parks

    b. **Designated Public Forum –** public property that has not historically been open to speech related activities but which the government has thrown open for such activities on a permanent or temporary basis by practice or policy

        i. School rooms open for after school use by social, civic, rec groups

    c. **TEST –** to be valid, government regulation of speech in PF and DPF must

        i. Be **content neutral** (subject matter and viewpoint neutral)

        ii. Be **narrowly tailored [reasonable TPM]** to serve an **important** government interest **AND**

        iii. Leave open **alternative channels** of communication

        iv. **BUT** even if test is satisfied, statute may be invalidated because of overbreadth, vagueness, prior restraint/unfettered discretion

    d. **Content Neutral**

        i. Cannot be content based unless substantial justification aka strict scrutiny

        ii. EXPRESSIVER CONDUCT = *O'Brien* [draft card could not be burned] – When speech and non-speech elements are combined in the same course of conduct – sufficiently important governmental interest in regulating non-speech elements can justify incidental limits on 1st amendment freedoms **TEST:**

            1. Does government have power to regulate in field

            2. Does regulation advance an important or substantial interest

            3. Is the interest unrelated to the suppression of speech

            4. Is the incidental burden no greater than necessary to achieve the interest

iii. ***Texas v. Johnson –*** statute banning flag burning unconstitutional because political protest may not be criminalized

iv. ***Christian Legal Society v. Martinez*** **[Hastings] –**

e. **Narrowly Tailored**

i. May not burden substantially more speech than is necessary to further the significant government interest BUT

1. Regulation **need not** be the least restrictive means of accomplishing the goal

ii. ***Cox v. New Hampshire –*** upheld conviction for violating state law prohibiting parades or processions on public streets without permit and payment of license fee

1. If a municipality has authority to control use of public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to giver consideration without unfair discrimination to tie, place and manner in relation to other proper uses of street

2. Neutral time/place/manner application

f. **Important Government Interest**

i. Includes traffic safety, orderly crowd movement, personal privacy, noise control, litter control, aesthetics

ii. ***Saia v. New York –*** unconstitutional an ordinance that required a permit in order to use a sound amplification system on a motor vehicle

1. Ordinance that gives unfettered discretion to government officials to decide who can use such vehicles violates the First Amendment

iii. ***Kovacs v. Cooper –*** upheld a restriction on the use of sound amplification devices, such as loudspeakers on trucks

1. Emphasized that the law did not prohibit all such devices, but rather was a reasonable time, place, and manner restriction

2. Court finds an appropriate MANNER of regulation

iv. ***City of Ladue – Gilleo –*** ordinance prohibiting most signs to minimized visual clutter

1. Overbroad – banned too much speech

2. Even if it was a complete ban and was content ban problematic because it ban too much speech

v. ***Metromedia v. San Diego –*** Court considered a city's ordinance that prohibited all outdoor advertising display signs – sufficient state interest in aesthetic regulations but here unconstitutional

1. The Court upheld the law in its prohibition of commercial messages, but declared it unconstitutional in its prohibition of noncommercial messages

2. Content-based distinction drawn in the law was unconstitutional because it "bears no relationship whatsoever to the particular interests that the city has asserted

vi. ***City Council v. Taxpayers for Vincent –*** If the regulation is content and viewpoint neutral, and serves legitimate state interests, and leaves *ample alternative means* of regulation, city can regulate use of its public property in a constitutional manner

vii. ***Clark v. Community for Creative Non-Violence –*** regulation that forbade sleeping in symbolic tent areas in a city was <u>valid</u>

1. The message regarding plight of homeless **could be communicated in other ways**

g. **Alternative Channels Open**

i. Must leave open other reasonable means for communicating the idea

ii. ***Schneider v. State –*** flat ban on leafleting unconstitutional

1. Purpose to keep the streets clean and of good appearance is insufficient to justify an ordinance which prohibits a person rightfully on a public street from handing literature to one willing to receive it

2. **<u>Expressly rejected the city's contention that it could restrict distribution of leaflets because other places were available for the speech</u>**

3. City must allow speech on its property even if doing so will impose costs on the city

iii. ***Martin v. Struthers –*** law that prohibited distribution of handbills to homes by ringing doorbells was constitutional: working class so people were sleeping during the day, crime, etc.

iv. **See *Clark* above**

2. **Limited Public Forums and Non-Public Forums -** government may regulate speech in such forums to reserve them for their intended use

    a. **Limited Public Forum –** most public property is considered to be a limited public forum

        i. Government property opened up for expressive activities on a particular topic – school gym hosting debate

    b. **Non-Public Forum –** Public property which is not by tradition or designation a forum for public communication

    c. **Test**

        i. **Viewpoint Neutral** AND

        ii. **Reasonably related to a legitimate government purpose**

    d. **Viewpoint Neutral**

        i. Regulations on speech in nonpublic forums need not be content neutral BUT such regulations must allow both sides [abortion/life/choice]

        ii. Government may discriminate based on the identity of the speaker in non-public forums

    e. **Reasonableness**

        i. Need only be rationally related to a legitimate government interest

    f. **Examples/Application**

        i. **Prisons**

            1. ***Adderly v. Florida –*** upheld convictions for malicious trespass: protestors outside jail in driveway used for transporting prisoners – court found no content or viewpoint discrimination

                a. The state like private property owner has the power to reserve the property under its control for the use to which it is lawfully

        ii. **Schools**

            1. ***Grayned v. Rockford –*** ordinance barring demonstrations near a school that disturb the peace and order of a school session

                a. Nature of a place, the pattern of its normal activities determine the reasonableness of time place and manner restrictions

                b. Is the manner of expression basically incompatible with the normal activity of a particular place at a given time

iii. **Libraries**

1. ***Brown v. Louisana* – <u>libraries</u> –** Brown arrested for breach of peace for not leaving segregated library when asked

    a. Rights of speech, assembly, and freedom to petition the government through silent, reproachful protest, no disturbance of other people's library use by the demonstration . .. statute APPLIED to reasonable, orderly and limited right to protest <u>unconstitutional</u> segregation

    b. Sitting in library silently is compatible with regular use of library

    c. Look at petition to government – *statute AS APPLIED IN THIS CASE*

iv. **Airport Terminals**

1. Distinguish between monetary and distributing information

2. Complete solicitation bans impact protected speech
    a. However limited restrictions may be acceptable: SFO + Security