CONSTITUTIONAL LAW II OUTLINE

§1: FIRST AMENDMENT: RELIGION CLAUSES

§1.1: ESTATBLSHEMENT CLAUSE

I. TESTS AND GENERAL RULES

A. **Establishment Clause:** Congress shall make no law respecting an establishment of religion…

B. **G/R:** Incorporation: the establishment clause applies to the States through the 14th Amendment.

C. **G/R:** the government violates the Establishment clause if the government's primary purpose is to advance religion, or if the principle effect is to aid or inhibit religion, or if there is excessive government entanglement with religion.

D. **G/R:** Historical Views: there were three main views among the Framers' of the Establishment Clause:

1. *Evangelical View:* [Roger Williams]: concerned that government involvement would with religion would corrupt and undermine religion.
2. *Jeffersonian View:* feared that religion would corrupt and undermine the government; concerned with the safeguarding of secular interests.
3. *Madisonian View:* religious and secular interests alike would be advanced by diffusing and decentralizing power so as to assure competition among sects rather than dominance by any one. Viewed religion as one of many types of factions that existed and needed to be preserved.

E. **G/R:** Four Theories of Interpretation of the Establishment Clause:

E(1). Strict Separation: there should be a wall separating religion and government; to the greatest extent possible the government and religion should be separated—government should be secular and religion should be entirely in the ream of private society.

1. Religion clauses erect absolute barriers to formal interdependence of religion and the state. Religious institutions can receive not aid; direct or indirect. The State cannot adjust secular programs to alleviate burdens the religious programs place on believers.
2. Ex: government would be prohibited from providing police and fire protection to churches.

E(2). Neutrality Approach: attempts to prevent the government from favoring one religion over secularism, and it also prevent the government from favoring one religion over others. Thus, the States must use secular criteria as a basis for their actions. Some aid to religious institutions is permitted if they satisfy purely secular criteria for participation in the program—they don't have to be excluded from the generally available federal subsidies.

1. O'Connor's *No-Endorsement Test:* attempts to achieve neutrality by articulating a non-endorsement test:
    a. Under her approach, the government establishes religion if it encourages religion or if it *symbolically* endorses or disfavors either religion or secularism.
    b. Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion [*Lynch v. Donnally*].

c. Historically, many actions by the government simply recognize the role of religion in our society; these traditional practices are okay, they do not convey a message of endorsement.

i. Ex: Sunday closing laws, opening the legislative sessions with prayers, coins inscribed with "God We Trust."

d. *Problem:* line-drawing, the line between accommodation or acknowledgement on one hand and endorsement on the other is difficult to draw.

E(3). Coercion: prohibits all attempts to aid religion through government coercion. The government is prohibited from influencing a person's religious choices. Religion may be protected and encouraged as any other form of belief or association. A violation only occurs if the government establishes a church or coerces religious participation.

1. *Non-coercion:* religion clauses simply prohibit the government from influencing religious choice. The only aid that is prohibited is that intended to impose a religious belief or practice on others. Religion is not subject to any particular disability in public life.
2. This is more accommodating than O'Connor's "no-endorsement" approach.

E(4). Non-perferentialism: the government cannot favor one religion over another; nor, may it disfavor any particular religious view, but it may support religion in general.

E(5). Lemon Approach: [*Lemon v. Kurtzman*]: Three-prong Lemon Test combines elements of all the approaches and has been modified by O'Connor's no-endorsement principle. The test is valid and used the most in modern times. The three prongs (plus one) are:

1. The statute must have a secular legislative *purpose*;
   a. *Purpose:* the purpose prong asks whether the government's actual or perceived purpose is to endorse or disapprove of religion.
2. Its principal or *primary effect* must be one that neither advances nor inhibits religion;
   a. *Primary Effects Test:* in cases dealing with financial aid to schools:
      i. If the effect of the challenged funding advances religion, it violates the establishment clause; Justice Souter applies an eleven-factor test to determine whether a financial aid program to schools has the primary effect of advancing religion.
      ii. Four justices say that a financial aid program does advance religion so long as it is not attributable to the government and so long as the program offers no incentive to the recipients to undertake religious indoctrination; there is no violation if the aid is secular in content and is offered on a neutral basis.
      iii. O'Connor postulates that the court should strike down programs that actually result in more than a *de minimus* religious indoctrination.
   b. *Primary Effects Test:* in cases dealing with religious symbolism:
      i. A majority uses the endorsement test and asks whether the reasonable observer is likely to draw from the facts an inference that the government itself is endorsing a religious practice or belief.
      ii. If the reasonable observe would see in the symbol an official message that *non-adherents to the religious belief are symbolized as second class citizens*, the symbolism is unconstitutional.
3. The statute must not foster an *excessive government entanglement* with religion.
   a. *Excessive Government Entanglement:* to determine if there is excessive government entanglement the court looks at four factors:

i. the character and purpose of the institutions that are benefited;
ii. the nature of the aid the state provides;
iii. the resulting relationship between government and the religious authority; and
iv. the program must be designed to eliminate the need for pervasive monitoring.

b. Governmental Vouchers: possible exam question.

4. *Modification:* impermissible purposes: when the challenged law or governmental program is arguably religious, the court tends to be skeptical and often engages in motive inquiry to find out if the dominant purpose advances religion; when the court does not engage in motive inquiry, it is likely to ask whether the reasonable, well-informed observer would draw the inference from the relevant materials at hand, including historical practices, that the government intended to endorse or advance religion.

II. SCHOOL PRAYER

A. **G/R:** [*Engle v. Vitale* (1962)] the recital of non-denominational prayer is unconstitutional, even if students are given the option to opt-out. This was the first case to hold that prayers in public schools are unconstitutional. The government must stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the schools themselves (according to Black).

B. **G/R:** Secular Purpose Test: [*Schempp v. Abington Township* (1963)]: if the purpose and primary effect of the challenged governmental action advances or inhibits religion it is a violation of the Establishment Clause.

1. Students were selected by schoolteachers (although not forced to participate) to read aloud verses of the Bible over the school's intercom system.
2. *Secular Purpose Test:* (later evolved into three-part *Lemon Test*): the establishment clause is violated if:
    a. The purpose or primary effect of the law or practice;
    b. Advances or inhibits religion.
3. A violation of the Establishment Clause may be predicated on coercion (unlike the Free Exercise Clause).
4. **Held:** the practice was unconstitutional because the state failed to maintain strict neutrality.

C. **G/R:** [*Stone v. Graham* (1980)]: Public schools may not post the Ten Commandments on the walls because the primary effect is to advance religion.

1. This is so notwithstanding the fact that the school claimed, and the legislative history of the statute indicated that a secular purpose existed—to show that the 10 Commandments influenced the development of western legal codes.
2. **Held:** the primary effect, if not the sole purpose, was to advance religion.

D. **G/R:** [*Wallace v. Jaffree* (1985)]: a law authorizing a moment of silence for mediation and involuntary prayer has no secular purpose and is unconstitutional.

1. **Held:** the primary purpose of the law was to promote religion in schools as evidenced by the fact that the law had been changed from a pervious version to include the words "voluntary *prayer*."

E. **G/R:** Anti-Coercion Principle: [*Lee v. Weisman* (1992)]: extended line of cases invalidating school prayer at a middle school formal graduation ceremony in which a rabbi delivered a non-denominational prayer.

1. *Coercion*: (J. Kenndy for majority) a prayer given at a ceremony is coercive, coercion includes peer pressure and psychological coercion (adolescents are often susceptible to pressure toward conformity and students feel pressure to attend graduation ceremonies).
2. **Held:** the constitution prohibits coercion to be used as a means to induce an individual to support or participate in religion or its exercises.
3. Dissents: advocated an accommodation approach, defined coercion much more narrowly.

F. **G/R:** [*Santa Fe Ind. Sch. Dist. v. Doe* (2000)]: prayer at public high school football game is unconstitutional.
1. The student body was empowered to vote each year on whether to have a student speaker preceding football games and this is unconstitutional, although the chosen speaker was not required to deliver a prayer because the *expressed purpose of the policy encourages the selection of a religious message and that is precisely how the students understand the policy.*
2. The constitution demands that school may not force this difficult choice upon those students even if the attempt is to make prayer private, rather than governmental speech. The mere fact that the speech was student initiated did not make the program constitutional.
a. There is no protection for the *minority* who may not want to hear the prayer.
b. Also involved principles of coercion because many student want to attend football games and others feel immense social pressure to attend.
3. Dissents: (a) the case was unripe (no one even delivered a prayer); (b) the Court applied the most rigid version of the *Lemon Test*; (c) the Court engaged in intrusive motive inquiry; (d) the speech at issue in *Lee* was government speech; the speech here is private; and (e) the establishment clause does not demand complete neutrality.

III. RELIGIOUS SYMBOLISM

A. **G/R:** Endorsement Principle: [*Lynch v. Pawtucket* (1984)]: City sponsored and paid for a Christmas display that included both secular figures and a nativity scene. Court found that it was constitutional because it had two secular purposes: (a) celebration of a public holiday; and (b) depiction of the origins of the holiday.
1. O'Connor's Concurrence*:* No Endorsement: O'Connor engrafted a new conception of endorsement:
a. *Purpose Prong:* the purpose prong of the *Lemon Test* asks whether the government's actual or perceived purpose is to endorse or disapprove of religion;
b. *Effect Prong:* asks whether, irrespective of government purpose, the parctice3 conveys a message of endorsement or approval;
c. *Endorsement sends a message to non-adherents* that they are outsiders, not full members of the political community, and an accompanying message to adherents, that they are insiders, favored members of the political community;
d. **Reasonable Observer Test:** to decide whether impermissible endorsement or disapproval is perceived, O'Connor looks not only to the intentions of the government; but also to the perceptions of the relevant community; whether some *reasonable person* might think the government actually intends to send a message endorsing or disfavoring religion.
*Endorsement test is now followed, at least in party by a majority of the justices.

B. **G/R:** [*County of Allegheny v. ACLU*]: held unconstitutional a freestanding display of a nativity scene on the main staircases of a county courthouse; the crèche belonging to the catholic church and was it was not surrounded by other figures.

1. Shifting majorities in this case, upheld a Jewish menorah placed next to a Christmas tree and sing saying "Salute to Liberty" in the county building because it was removed annually by the city. Thus, if a non-secular symbol is accompanied with secular symbols, they may be constitutional.

C. **Non-Preferentialism v. Discrimination Against Religion:**

C(1). Equal Access for Religious Speech: A school district had opened its buildings after hours to outside groups for social and civic purposes to discuss family values; the district refused access to a group from the evangelical church the Court held that refusal to give equal access to the religious group did not violate the Establishment Clause; although it did violate the 1st Amendment's Free Speech guarantee [*Lamb's Chapel v. Moriches School Dist.*].

C(2). Religious Expression Test: the Court held that the Free Speech clause of the First Amend compelled city to allow KKK to erect a cross in a public square. The Court held that permitting the cross (a religious symbol) equal access to public property along with other private secular symbols would not violate the Establishment Clause. It was not endorsement by the city because it had an equal access policy and there was a *disclaimer of endorsement*.

1. **Test:** Religious expression cannot violate the Establishment Clause when:
    1. It is purely private;
    2. Occurs in a designated public forum, and
    3. Is publicly announced and open to all on equal terms.

IV. TAX EXEMPTIONS FOR RELIGIOUS INSTITUTIONS

A. **G/R:** tax exemptions are constitutional if they treat similarly situated organizations the same.

B. **G/R:** Accommodation Approach: [*Waltz v. Tax Commission* (1970)]: granting property exemptions to religious organizations, along with charitable and educational organizations is constitutional.

1. Tax exemptions are neither sponsorship nor hostility, because they are religiously neutral in that an exemption neither inhibits nor advances religion.
    a. Churches contribute to the well-being of the community, failing to give exemptions that are given to secular charitable and educational institutions would show hostility towards religion.
2. *Excessive Government Entanglement:* is a question of degree, determines the violation: the more the government becomes entangled the more likely the court's conclusion that there is an Establishment Clause violation.
3. This case is distinguished from other cases where only religious organizations get a tax exemption; its purpose and primary effect is to treat religious institutions the same as other charitable and educational institutions.

C. **G/R:** Sales' Tax Exemptions: [*Texas Monthly v. Bullock* (1989)]: Court invalidated a Texas statute that exempted religious periodicals and books from its sales tax on periodical and books, the Court found this case distinguishable from *Waltz* because **only** religious institutions were receiving the tax emption.

V. FINANCIAL AID TO SCHOOLS

A. **G/R:** Everson Rule: [*Everson v. Bd. of Educ.* (1974)]: No State or federal government can set up a church, or pass laws which aid one religion, aid all religions, or prefer on religion over another.

1. The government cannot influence a person to go to or to remain away from church against his will; or, force him to profess a belief or disbelief in religion.
2. No tax in any amount, large or small, can be levied to support any religious activities or institutions or their teachings.

B. **G/R:** Neutrality: [*Everson v. Bd. of Educ.* (1947)]: the State does not violate the Establishment Clause if it is *neutral* in its relation with groups of religious believers and non-believers. The government should not place religious adherents at a disadvantage by *denying them the public benefits of generally available subsidies*.

1. **Held:** the Court held that the Establishment Clause was not violated when children in public schools got free bus transportation, and district reimbursed parents with children in private schools for the cost of bus transportation.

C. **G/R:** Lemon Test and Analysis: [*Lemon v. Kurtzman* (1971)]: the State reimbursed non-public schools, including religious schools, for the money spent to help them pay for the salaries of teachers who taught secular subjects.

1. **Held:** he Court retreated from the accommodation approach of *Waltz* and held that because state officials had to audit the accounts of religious schools to make sure the funds were diverted to sectarian pursuits, it constituted *excessive entanglement* with religion.
2. **Lemon Test:** (1) the statute or government activity must have a secular purpose, (2) its primary effect must not advance or inhibit religion; and (3) no excessive entanglement by the State with religions.

D. **G/R:** [*Grand Rapids v. Ball* (1985)]: a State's shared time program (remedial classes) violated the Establishment Clause under the Lemon test. The Court held that the program had the *primary effect of aiding religion*.

1. OVERRULED.

E. **G/R:** [*Aguilar v. Felton* (1985)]: a similar program to the one in *Grand Rapids* was a violation of the Establishment Clause under the Lemon test because it had the effect of aiding religion.

1. OVERRULED.

F. **G/R:** Direct Aid to Students: [*Witters v. Washington Dept. of Social Services for the Blind* (1986)] if the aid from the State goes directly to the student, and he applies it to attend a religious institution, there is no Establishment Clause violation, as long as the State is not encouraging the choice.

1. Statute authorized payment to a visually handicapped person for vocational rehabilitation services and recipient planned to use the funds to go to a Christian college and become a minister.

G. **G/R:** Benefiting Handicapped: [*Zobrest v. Catalina Foothills Sch. Dist.* (1993)]: Court held the Establishment Clause is not violated when government funds are sued to pay for sign-language interpreters for deaf children attending religious school.

1. The statute provided the benefits without regard for the school that a particular handicapped children attended.
2. The Court found no excessive entanglement because handicapped students, not the sectarian schools, were the primary beneficiaries of the aid program.

H. **G/R:** [*Rosenburger v. Rectors of Univ. of Virginia* (1995)]: the Court held the Establishment Clause did not bar a public university from including a religious student magazine in a student activities subsidy program, which inclusion was otherwise compelled by the Free Speech Clause.

1. Any benefit to religion, which is incidental to the government's provision of secular services, for secular purposes on a religion neutral basis is not unconstitutional. Payments made directly to a printer, and not directly to an institution or group engaged in religious activity is constitutionally permissible.

I. **G/R:** [*Agostinin v. Felton* (1985)] [*overruled* Aguilar v. Felton; Grand Rapids v. Ball]: the Court held that the NYC Title I program: (1) had a secular purpose; (2) primary effect was not the advancement of religion; (3) the risk of excessive government entanglement was not substantial.

1. **Question:** (like *Witters* and *Zobrest*]: the key inquiry is whether religion benefits disproportionately to other beneficiaries of the aid program; or whether the aid recipients are given any incentive to modify their religious beliefs and practices to obtain public services.
2. **Test For Aid to Religious Schools:** the Court announced a new test (replacing the *Lemon Test*) for financial aid to religious schools. For the aid to be constitutional it must:
    a. be based on "neutral" criteria;
    b. provide adequate safeguards to ensure that the program is secular; and
    c. include no religious indoctrination provided by teachers in the parochial schools.

J. **G/R:** Neutrality Test: [*Mitchell v. Helms* (2000)]: the plurality held that a program which provides publicly funded computers and other teaching aids to public and *private* elementary schools, including parochial schools was constitutional.

1. The Establishment Clause does not require the exclusion of pervasively sectarian school from otherwise permissible aid programs.
2. The issue, in these cases, is whether the program has impermissible effect on religion.
3. **Neutrality:** should be assessed by asking whether any religious indoctrination that occurs in a sectarian school could reasonably be attributed to the governmental action.
    a. If numerous private choices, rather than the single choice of government determine the distribution of aid pursuant to neutral eligibility criteria, then the government cannot grant special favors that might lead to a religious establishment.

§1.2: FREE EXERCISE CLAUSE

I. GENERAL RULES

A. **Free Exercise Clause:** [First Amendment]: Congress shall make no law…prohibiting the free exercise [of religion].

B. **G/R:** Beliefs and Conduct: religious beliefs are absolutely protected by the First Amendment; however, the Court must set limits with regard to conduct.

C. **G/R:** Religiously Motivated Conduct: is given qualified protection when:

1. Generally applicable laws substantially burden sincerely held beliefs (rational basis test); and
2. Laws that are not generally applicable and not religion neutral prohibit a religious practice (strict scrutiny).

D. **G/R:** Burden of Persuasion and Level of Scrutiny: there are three general rules, the Court will apply in a modern challenge under the Free Exercise Clause:

1. The plaintiff always has the initial burden of persuasion to demonstrate that he conduct is dictated by sincerely held religious beliefs; and, that the statute in question *substantially burdens* those beliefs;
2. If she succeeds, then the burden of persuasion shifts to the government in strict scrutiny cases;
    a. Strict scrutiny does NOT apply in most cases.
    b. Strict scrutiny only applies if the challenged law is not a religiously neutral, generally applicable law or if the case is a hybrid case.
3. In most cases, the deferential rational bases test now applies if the religious claimant seeks an exemption.

II. REQUIRED ACCOMMODATIONS

A. **G/R:** Speech and Conduct Dichotomy: [*Reynolds v. U.S.* (1879)]: the first free exercise case, upheld the federal anti-bigamy law as applied to Mormons, rejecting a free exercise defense. This created the distinction between speech (or mere opinion) and actions that violate social duties or are subversive to social order. The court, continues to maintain this dichotomy.

B. **G/R:** Sunday Closing Laws: [*Braunfeld v. Brown* (1961)]: the Court upheld, and rejected a free exercise challenge, to Pennsylvania's Sunday closing laws from a challenge by Orthodox Jews, who argued that this law but them at a competitive disadvantage because they had to close on Saturdays.

1. The Court said that the religious belief or opinion was not made criminal, it just made it more expensive.
2. **Test:** if the State regulates conduct by enacting a *general law* within its police powers, the purpose and effect of which is to advance the States' secular goals, the statute is valid despite its indirect burden on religious observance.
    a. *Caveat:* this is true unless the State may accomplish its purposes by means which do not impose such a burden.
3. *Less Burdensome Alternatives:* the court inquires into whether the law imposed a substantial burden on religion that can be avoided by a less burdensome alternative.
4. Dissents: (a) *Brennan*: administrative convenience is not a governmental interest that outweighs the importance of the right to free exercise of religion—the strict scrutiny approach. (b) *Stewart:* a choice that that the law compels an Orthodox Jew to make is cruel which a State should not be able to constitutionally demand.

C. **G/R:** Exemptions to Religiously Neutral Laws: [*Sherbert v. Verner* (1973)]: Sherbert, a 7th Day Adventist, was fired from her job because she refused to work on Saturday (her Sabbath) and was unable to find another job. She filed for unemployed for unemployment and failed the "good cause" requirement, which required a person to accept suitable work when it was offered by the State's Employment office. The statute in question did not, *on its face*, discriminate against Sherbert on the basis of her religion, and it was not motivated by religious bigotry.

1. **Held:** the State law imposes an unconstitutional burden on the free exercise of religion because it, in effect, forces an individual to choose between her religion and aid from the State.
2. **Strict Scrutiny:** the statute imposed *undue pressure* upon religious persons, therefore strict scrutiny is applied.

a. Strict scrutiny places the burden of persuasion on the State to show that *NO LESS BURDENSOME ALTERNATIVE* form of regulation would combat the evils cited by the State without infringing on First Amendment Rights.

i. Here, exemptions could be administered without undermining the unemployment compensation system.

3. Dissents: believed the holding mean that the State must single out for financial assistance those whose behavior is religiously motivated, while denying assistance to those whose behavior is not religiously motivated.

D. **G/R:** Laws Substantially Burdening Religious Belief: [*Wisconsin v. Yodder*]: Amish parents refused to send their children to public schools after they completed the 8th grade. They were convicted, and fined, for violating the State's compulsory school attendance laws. The statute was not aimed at any religion, and it applied to everyone generally. The Amish argued that they were entitled to an exception because the law burdened their right to the free exercise of religion.

1. **G/R:** person who rely on the Free Exercise Clause have the burden of coming forward with evidence demonstrating that the enforcement of religiously neutral laws ***substantially burdens*** **their** ***sincerely held*** religious beliefs.

2. **Strict Scrutiny:** the Court applied the strict scrutiny, and refused to rubber stamp the law under the rational basis test. The Court required the State to demonstrate:

a. There is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause;

b. Only those interests *of the highest order* and those not otherwise served can overbalance legitimate claims to the Free Exercise of religion.

3. The court declared that without carrying their burden, the State is required constitutionally to carve out exceptions for sincerely held religious beliefs.

E. **G/R:** Taxation: [*United States v. Lee*]: rejected a claim for constitutionally required free exercise exemption from paying social security tax because of religious opposition (Amish) to the social security tax. The court took a function approach, distinguished *Yoder*, and held that the government could not administer a social security system with a lot of exceptions flowing from a wide variety of religious beliefs. In other words, the State interest overrode the Free Exercise interest.

F. **G/R:** Restricted Environments (Military): [*Goldman v. US* (1986)]: the Court did not apply strict scrutiny; and is more differential to the Military, and military judgments. Court rejected a free exercise challenge to an air force regulation prohibiting the wearing of head gear (yarmulke) indoors.

1. Military judgments concerning the need for discipline, incentive, and obedience outweigh free exercise of religion concerns.

2. *Concurrence:* noted that this case presented an attractive case for an exception, but worried that application for members of other religious groups could subvert order in the military.

F(1). **G/R:** Restricted Environments (Prisons): [*O'Lone v. Estate of* Shabazz] Prison regulations alleged to infringe constitutional rights are to be judged under the ***reasonable test*** (more deferential) than ordinarily applied to alleged constitutional infringements of fundamental constitutional rights.

1. Muslim prisoners challenged a rule that prevented them from attending a weekly congregational service mandated by the Koran. Prison regulations, adopted for security reasons, kept prisoners with their classification from being in the building where the services were held.

G. **G/R:** Internal Government Operations: [*Bowen v. Roy* (1986)]: the Free Exercise Clause does NOT require the *government itself* to behave in ways that the individual believes will further his spiritual development.

1. The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion, it does NOT afford an individual a right to dictate the conduct of the government's internal procedures.
2. Thus, the Court rejected religious based objections to a statute that required applicants for welfare benefits to provide the States with their social security numbers and requiring states to use the numbers in administering the program.

G(1). **G/R:** Internal Government Operations: [*Lyng v. N.W. Indian Cementary Protective Ass'n* (1988)]: governmental actions that may make it more difficult to practice certain religions, but do not coerce individuals into acting contrary to their religious beliefs are constitutional.

1. Court rejected a free exercise challenge to a Forest Service Plan to permit timber harvesting and road construction in part of a national forest that was traditionally used by various Indian Tribes as sacred areas for religious rituals.
2. **Held:** the burden was not sufficiently severe as to require the government to show a compelling need to engage in the relevant projects.

F. **G/R:** Demise of Strict Scrutiny: [*Employment Division v. Smith* (1990)]: Smith was fired from his job for using peyote as part of a Native American church ritual. He sought unemployment benefits, which were denied because he was fired for work-related misconduct. Using peyote was against the law in Oregon, and it was a generally *applicable criminal law*.

1. **Issue:** whether the Free Excise Clause permits a State to include religiously inspired peyote use within the reach of its general criminal prohibition of that drug thus permitting the State to deny unemployment benefits to persons dismissed from their jobs because of peyote use. No.
2. **Held:** the Court has never held that the exercise of religion excuses a person from compliance with an otherwise valid criminal law prohibiting conduct that the State is free to regulate.
    a. In other words, a person because of the exercise of religion cannot be beyond the reach of a generally applicable criminal law.
    b. This cases *differs* from those cases in which the Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action.
        i. In other cases, such as *Yoder* (which is an exception to the usual rule that permits the State to apply a neutral generally applicable law to religiously motivated) the Free Exercise Clause was considered along with other constitutional protections, such as freedom of speech and press, or the right to direct the education of their children.
        ii. This case is also distinguishable from *Sherbert* (unemployment cases) because the conduct that gave rise to the termination in those cases was legal conduct.
3. **Strict Scrutiny and Free Exercise Clause:** strict scrutiny only applies to the free exercise clause in three situations when the State is refusing to carve out an exemption from religion neutral, generally applicable laws:
    1. *Unemployment Cases:* where a person's claim for benefits depends on an already established system;
    2. *Hybrid Cases*: [like Yoder] in hybrid cases involving a free exercise claim joined with another claim involving a substantially protected activity; and

3. *Speech Cases:* cases involving communicative activity protected by the guarantees of free speech, press or association, when joined with a Free Exercise Clause claim.

II. PERMISSIBLE ACCOMMODATIONS

A. **G/R:** Governmental Accommodation: [*Church of Jesus Christ of Latter Day Saints v. Amos*] the Court has long recognized that the government may accommodate religious practices, and that it may do so without violating the establishment clause.

1. A statute that is neutral on its fact and motivated by the *permissible purpose* of limiting governmental interference with the exercise of religion. If a statute passes the *Lemon Test*, there is no justification for applying strict scrutiny.

§2: 14TH AMENDMENT: EQUAL PROTECTION CLAUSE

§2.1: LEVELS OF SCRUTINY

I. EQUAL PROTECTION CLAUSE, LEVELS OF SCRUTINY, AND MODES OF ANALYSES

A. **Equal Protection Clauses:** [5th and 14th Amendments]: No State shall make or enforce any law which shall…deny to any person within its jurisdiction the equal protection of the laws.

B. **Generally:** The Court applies different levels of scrutiny to equal protection challenges, and the level of scrutiny depends on whether the court is suspicious of the classification used by the legislature. There are four levels of review:

1. Minimum rationality;
2. Minimum rationality with a bite;
3. Intermediate scrutiny; and
4. Strict Scrutiny.

B. **G/R:** Rational Basis: **99.9%** of Equal Protection challenges are reviewed under the rational basis standard of review. The rational basis test is a deferential approach.

1. When the Court applies the minimum rationality standard of review, the Court routinely rubber-stamps the law, even it is unwise, unnecessary, or unfair.
2. The legislature can usually treat groups differently rather than equally without violating the Equal Protection Clause of the 14th and 5th Amendments.
3. The legislature can usually treat groups differently, rather than equally, without violating the Equal Protection Clause.

B(1). **Minimum Rationality:** (rational basis test) minimum rationality uses a means and ends scrutiny.

1. Means Scrutiny: is an analysis of the legislature's classification of groups of people. If a classification is:
    a. A *wholly irrational means* to achieve any legitimate legislative objective, the classification violates the Equal Protection Clause; or
    b. if the classification is designed to achieve an illegitimate purpose, the classification violates the equal protection clause.
2. Ends Scrutiny: is an analysis of the ends of the legislation, i.e. the purposes, goals, and objectives.

a. The court asks whether the challenged governmental classification is *supported by some conceivable legitimate purpose*; such as, health, welfare, safety, environment, consumer protection, morals and general welfare.
b. If the Court can hypothesize (within the realm of conceivable ends) any legitimate end (goal, objective, purpose, interest) that the government *MIGHT* have had in mind, that hypothesized legitimate end is deemed the legislative end.
i. Proof is *not* required to demonstrate that the lawmakers actually had the hypothesized end in mind.
ii. The burden is on the *challenger* to disprove the existence of every objective.

3. The Court will then inquire into the relationship between the means and the ends. The court asks whether:
a. the end is permissible, and
b. the means are rationally related to the end.
4. The Court has recognized that in minimum rationality cases lawmakers are presumed to have acted rationally despite the fact that, in practice, the law results in some inequality.
5. *Burden:* the party challenging the rationality of legislation bears the burden of negating every conceivable basis for the law, regardless of whether or not such supporting rationale was cited by, or actually relied on by the promulgating authority.
6. The legislature is not required to articulate its reasons for enacting a statute, it entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature.
**RATIONAL BASIS APPLIES, if the law does not fall under any of the other categories, it is the default.

B(2). Minimal Rationality is Inappropriate: the deferential rational basis test standard of review is inappropriate if the challenged legislation classifies:
1. Along suspect or quasi suspect lines (race, ethnicity, gender, alienage, legitimacy of birth); or
2. Deprives persons of a constitutionally significant liberty and/or fundamental right.
**If these two exceptions are unavailable, as a general rule, the courts will apply the minimum rationality test.

C. **G/R:** Minimal Rationality With Bite: applies if the Court suspects that the challenged legislation is a product of a desire to harm a politically unpopular group.
1. Applies when the classification is so over or under inclusive that if fails to dispel the suspicion that the classification is based on animosity.
2. **G/R:** *hint*, if the record of the case clearly shows the existence of an illegitimate objective, that seems to be the dominant objective, and if the challenged classification makes it more difficult for an unpopular group of citizens to obtain aid from the government, the Court will not always defer to the government.

D. **G/R:** Intermediate Scrutiny: classifications based on race or gender, or legitimacy of birth are *quasi-suspect* and the court applies intermediate scrutiny, which more than minimum rationality, but not as stringent as strict scrutiny.
1. Applies to classifications based on gender, and illegitimate children.

E. **G/R:** Strict Scrutiny: if a classification is suspect, it signifies that the Court suspects the classification based on race is either the product of race prejudice or is intended to give the benefited race an unjustifiable preference and the court will apply strict scrutiny.

1. Strict scrutiny applies to classifications based on race, ancestry, or ethnicity.
2. **Ends/Means Scrutiny:** strict scrutiny requires careful scrutiny of both ends and means to require a tight fit between the means and ends. The statute cannot be overinclusive or underinclusive.
    a. *Ends:* are the government's purpose, and must be a COMPELLING STATE INTEREST.
        i. Further there must not be an impermissible purpose—the end must be a legitimate state end.
    b. *Means:* refers to the racial classification and it must be *necessary* to achieve the compelling state interest.
    c. If a less discriminatory means is available, race specific classifications are unnecessary and constitutionally invalid.
3. Strict scrutiny is a much higher standard of review than minimal rationality, or rationality with a bite.
4. If a person is disadvantaged because of race, even though all races are treated alike, strict scrutiny applies.
5. **Test:** strict scrutiny places a heavy burden on the government to show that the race specific classification is NECESSARY to achieve a COMPELLING STATE INTEREST (or overriding legitimate interest) of the government.
    a. If there is an LESS DISCRIMINTORY ALTERNATIVE that promotes the governmental interest, just as well, then the race specific law is an unnecessary and unconstitutional denial of equal protection.
6. *Policy:* strict scrutiny applies because:
    1. elected officials often vote in accordance with the stigmatizing racial preferences of the majority;
    2. stereotyping is often stigmatizing;
    3. the Court cannot rely on the political process, which often malfunctions, strict scrutiny is necessary to protect individuals disadvantaged because of their race.

F. **G/R:** Classifications: legislative classifications are difficult to scrutinize because the must be made, and they are difficult without being over and under inclusive:

1. Almost all classifications are not perfect fits;
2. The court compares the classification to the legislative end (i.e. goal, objective);
3. Most laws are simultaneously over, and under, inclusive to some extent;
    a. *Overinclusive:* the legislative classification unnecessarily include people who do not contribute to the problem;
    b. *Underinclusive:* the legislative classifications do not cover all persons contributing to the problem the legislature is attempting to remedy.
4. The Court is usually not bothered by this imprecision, the minimum rationality test rubber stamps administratively convenient, imprecise "fits," and if this were not the general rule, few statutory classifications could survive an equal protection challenge because it is very difficult to narrowly tailor a classification into a perfect fit.

G. **G/R:** Objective Prohibited by the Equal Protection Clause: there are several things the equal protection clause seeks to prohibit:

1. Unadorned desire to harm or stigmatize a politically unpopular group (like an ethnic group);

2. In cases involving State taxes; an intent to discriminate in favor of domestic industries at the expense of out-of-state firms;
3. Deterrence of out-of-state indigents, or out-of-state persons who migrate to a State in order to obtain welfare, jobs, business opportunities, etc..;
4. Attempts to create fixed permanent distinctions between long-time state residents and recent arrivals who are bona fide state residents; and
5. An intention to prevent a group's enjoyment of a fundamental right.

§2.2: MINIMAL RATIONALITY CASES

A. **G/R:** [*NY Transit Authority v. Beazer* (1979)]: if a government's classification of individuals, or special classification, serves the general objectives of safety and efficiency; the court will uphold the policy. No matter how unwise a government's policy, the Constitution does not permit a federal court to interfere in that policy decision.

1. Thus, the Court rubber stamped a law prohibiting persons who use methadone from working for the Transit Authority, although rule was overinclusive.

B. **G/R:** [*Railway Express Agency v. N.Y* (1949)]: NY law prohibited advertising vehicles, but not placing of businesses notices on business delivery vehicles. Court upheld regulation even though the law seemed rather arbitrary and underinclusive.

C. **G/R:** [*Williams v. Lee Optical* (1955)]: the Court upheld an Okalahoma statute making it unlawful to replace lenses in glasses if they were not a licensed optometrist. The Court that the legislature may select on phase of one field and apply a remedy there, while neglecting others, but the prohibition of the equal protection clause goes no further.

D. **G/R:** [*McGowan v. Maryland* (1961)]: a Constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.

E. **G/R:** [*Vacco v. Quill* (1997)]: the court applied rational basis test in upholding a statute banning physician-assisted suicide.

§2.3: MINIMUM RATIONALITY WITH A BITE

A. **G/R:** [*U.S. Dept. of Agriculture v. Moreno* (1973)]: A bare Congressional desire to harm a politically unpopular group cannot constitute a legitimate government interest.

1. Government wanted to prevent hippies who lived in "hippie communes" from using Food Stamps, and passed a law under the Food Stamp Act prohibiting individuals living together in a house without being related to another member of the household. The court struck it down, although the government postulated that it had a legitimate interest.

B. **G/R:** [*City of Cleburne v. Cleburne Living Center* (1985)]: minimal rationality with a bite is applied when the classification or government action is so over-inclusive or under-inclusive that it fails to dispel suspicion, that it was motivated by animosity toward the disadvantaged class.

1. Thus, the Court struck down a City ordinance that required a permit for a group home of retarded children; despite arguments by the City that would clearly satisfy the rational basis test. The court felt that law was motivated by animosity towards retarded kids, and struck it down.

C. **G/R:** [*Romer v. Evans* (1996)]: a bare desire to harm a politically unpopular group *CANNOT* constitute a legitimate governmental interest. If the only objective that is rationally related to the classification is an ***illegitimate one*—**a bare desire to harm a politically unpopular group, the law is unconstitutional. If the law inflicts a real, immediate, and continuing injury on the politically unpopular group, any legitimate interests claimed in defense of it are outweighed by the injury put on the group.

1. The Court said they were applying the rational basis test, but it was obvious they were not. The Court struck down Colorado's Amendment 2, which banned local ordinances outlawing discrimination against homosexuals and bisexuals, because the law was overinclusive, and removed from the State's legitimate goals.

§2.4: RACE AND THE CONSTITUTION

I. OVERVIEW

A. Reconstruction Amendments: during the Reconstruction, Congress passed the 13th, 14th, and 15th Amendments, shortly after the Civil War.

1. The 13th Amendment abolished slavery.
2. The 14th Amend, §1, made all persons born in America citizens of the US, which overruled *Dred Scott*.
3. The Equal Protection clause was designed, in part, in the words of the Court, to protect the civil rights of the newly emancipated slaves.
4. The 14th Amendment also requires due process of law (substantive).
5. The 15th Amendment prohibited the US and any State from denying or abridging the right to vote on the account of race, color or pervious condition of servitude.

B. **Slaughter House Cases:** (1873): dealt with a Louisiana statute that granted a monopoly to a company to engage in slaughtering animals in New Orleans.

1. **Held:** one pervading purpose of the Reconstruction Amendments was the freedom of the slave race and protection from oppression. But the Framers of the Amendments did not intent to transfer the general responsibility for protection of civil rights from the States to the federal government.
2. *Privileges and Immunities Clause:* [14th Amend, §1, cl. 2]: Court held that the privileges and immunities clause did not provide for the general protection of citizens; instead, it protected only a few rights that owed their existence to the federal government—the national charter, its constitutions or laws. In effect, the privileges and immunities clause was rendered a virtual nullity.
3. **Analysis:** the Court took a two-tier approach to Equal Protection Analysis:
    1. When the rights of newly freed slaves were at stake, the amendments must be read expansively to provide comprehensive federal protection;
    2. But when racial discrimination was not at issue, the protections of federal citizenship are narrower, and a State resident's primary recourse for protection of civil rights remains with the State governments.

C. **G/R:** Discrimination Against Blacks: [*Strauder v. W. Virginia* (1879)]: federal protection is available when blacks are singled out for discrimination. Thus, the Court overturned the conviction, based on the 14th Amend, to reverse a murder conviction of a black tried before a jury from which members of his race were excluded by law.

D. **G/R:** Scope of the 14th Amend: [*US v. Harris* (1882)]: the 14th Amendment governs only governmental discrimination and DOES NOT reach purely *private conduct*. Thus, the Court held that Congress lacked the power to punish members of a lynch mob under the KKK Act.

E. **G/R:** Private Discrimination: [*Civil Rights Cases* (1883)]: neither the 13th Amend, nor the 14th Amend, provide Congress with the power to prohibit *private* racial discrimination in places of public accommodation. Thus, the Court invalidated the public accommodations section of the Civil Rights Act of 1875.

F. **G/R:** Racial Discrimination and Federal Rights: [*Ex Parte Yarbrough* (1884); *Logan v. US* (1892)]: where racial discrimination affects federal rights (such as voting) Congress has the power to regulate, and punish, discrimination under the 14th Amend.

G. **G/R:** Separate but Equal: [*Plessy v. Feruson* (1896)]: Court upheld a State statute mandating racial segregation because the statute was carrying on a tradition, black persons were denied only social inequality. The case stood for the proposition of separate but equal.

1. *Harlan Dissent:* stated that the purpose of the statute was to exclude blacks from the parts of the train occupied by whites. Harlan suggested that laws which proceed on the ground that blacks are so inferior they cannot be allowed to be in public with whites is certainly sure to arouse race hate.
2. OVERRULED.

H. **Brown v. Bd. of Educ.** (1954): the Court espoused the principle that the Constitution is color-blind (not so anymore because the Court has allowed affirmative action). The Court's opinion stated: to separate children in grade and high schools generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way very likely to be undone…whatever may be the extent of psychological knowledge at the time of *Plessy*, this finding is amply supported by modern authority.

1. *Overturned* Plessy v. Ferguson.
2. **Held:** the segregation of children in public schools, solely on the basis of race, deprives children of the minority group of educational opportunities. Separate but equal has no place under the Constitution because separate education facilities are *inherently unequal*.

I. **Brown v. Bd. of Educ. II** (1955): the initial *Brown* opinion did not answer the question of what remedy would be given to blacks. The Court held in *Brown II* that school authorities must act in good faith and the Courts will have to consider whether the action of school authorities constitutes a good faith implementation of the governing constitutional principles—desegregation must proceed with all deliberate speed, but the Court did not clearly require integration, which meant that each school in a school district must have a ratio of balcks and whites identical to the ratio of blacks and whites enrolled in the district's public schools.

1. The ambiguities in the opinion resulted in a very slow process of desegregation.

II. RACE AND DESEGREGATION

A. **G/R:** each type of segregation, de jure or de facto, calls for the application of different standards and a different type of remedy.

B. **G/R:** De Jure Segregation: segregation by law or State action; that is, an official policy of intentional segregation.

1. District Courts have broad, equitable powers, to end de jure segregation and remedy the past effects of illegal segregation. The Courts can:
    a. alter attendance zones;
    b. order cross town bussing;
    c. reject freedom of choice plans;
    d. direct school building site selection;
    e. allocate resources to particular schools; and
    f. convert all dual school systems into racially balanced unitary school districts.
2. Restrictions on the Courts power to remedy segregation:
    a. The remedies must be tailored to a constitutional violation—there are no inter-district remedies *unless* inter-district segregation is caused by:
        i. the state;
        ii. conspiring school districts; or
        iii. the segregative effect in one district is the result of segregative acts in another district.
    b. *White Flight:* re-segregation caused white flight (all whites moving to the suburbs) cannot be remedied once the school district (a district which had a past violation of the equal protection clause) has adopted in good faith an adequate desegregation plan.
    *[*Pasadena v. Spangler*].

C. **G/R:** De Facto Segregation: segregation in fact, not by law or State action; where reaction imbalances in the schools are not caused by an official's segregative intent. Segregation that occurs a result of residential demographics.

D. **G/R:** Presumptions: if the schools have a history of government-mandated segregation, any racial imbalances are presumed to be vestiges of that and schools have an affirmative duty to desegregate to the greatest degree practical.

1. This means that "good intentions" by the school district do not count.
2. There is a similar presumption of guilt if any one section of a school district was intentionally segregated.
3. This had the result of creating greater scrutiny of Southern schools, than Northern.
    a. In the post *Brown II* period, all racial imbalances in the South were presumed to be intentional; this intentional racial segregation violates the equal protection clause because it has the effect of stigmatizing blacks as second class citizens.

E. **G/R:** Southern Schools: southern school boards had an affirmative duty to present a desegregation plan to the district court showing that its pupil assignment will in fact eliminate all vestiges of the unconstitutional segregated school system.

1. In the South, the *entire burden of persuasion* was placed on the school board; outside the South, the burden of persuasion was entirely on the plaintiffs and they had to prove that racially imbalanced schools were caused by intentional acts of the school board.

F. **G/R:** Bussing Orders: [*Swan v. Charlotte-Mecklenburg Bd. of Educ.* (1971)]: the nature of the violation determines the scope of the remedy; the district court cannot require any particular degree of racial balancing or mixing; but the court has broad power to remedy past wrongs.

1. The Constitution prohibits only deliberate attempts to fix or alter demographic patterns that affect the racial composition of schools.
2. **Held:** the court upheld a massive forced cross-town bussing order; and its opinion contained several principles that are relevant in discussing racial preferences (affirmative action):
    a. Courts have no inherent power to order bussing; nevertheless, they do have the power to remedy constitutional violations by states that had unconstitutionally required segregation;
    b. The nature of the constitutional violation determines the extent of the remedy;
    c. In States where segregations was mandated by law (de jure), if a school district's schools are for the most part disproportionately black and white, it will be presumed that the segregation in each school is intentional and the school district will have the burden of persuasion to prove that the racial imbalance was not intentional;
    d. Other remedies that can be approved are decrees ordering a gerrymandering of attendance zones;
    e. Lower courts will be required to retain jurisdiction in all desegregation cases where constitutional violations have occurred until there is a unitary school system; after a school system achieves a unitary, rather than dual, school system then and only then, may the lower courts dismiss the case form the docket.
        i. A unitary school system is one where there is no distinction between black and white schools.

G. **G/R:** Burden of Persuasion and Burden Shifting: [*Keyes v. Denver Sch. Dist. #1* (1973)]: the Court held that a Northern school district did not have remedy a racial imbalance in other areas of the city because of past de jure segregation.

1. The plaintiffs have the initial burden of showing that segregated schools had been brought about or maintained by *intentional State action*.
    a. Constructive intent: purposeful segregation can be demonstrated if the plaintiff shows that school district officials have engaged in cognitive acts or omissions that had a *foreseeable* and *anticipated* impact on the reaction composition of the schools in the district.
        i. With a presumption of constructive intent, the plaintiffs burden of persuasion can be satisfied by an objective evaluation of the facts—the likelihood of a connection between well know policy choices leading to well known consequences.
2. Once the showing has been made, for a *substantial part of the system*, the plaintiffs need not bear the additional burden of showing deliberate segregation as to each school within the system.
3. The burden then shifts to school authorities to prove that other segregated schools in the system are not also the result of intentionally segregative action.

H. **G/R:** Inter-District Remedies: [*Milliken v. Bradely* (1974)]: the Court held that an inter-district desegregation effort was inappropriate unless:

1. State officials had contributed to the racial separation;
2. District lines where drawn with the purpose of achieving racial separation;
3. By conspiring school district officials; or
4. by racially discriminatory actions of one or more school districts directly causing racial segregation in an adjacent district.

I. **G/R:** Annual Adjustments and Segregation: [*Pasadena Bd. of Educ v. Spangler* (1976)]: the Court held that the 14th Amend does not require a school board to make annual adjustments to the racial mix in its public schools, once the school board adopts a racially neutral student assignment plan. Outlined the power of the district courts and the remedies they can provide.

J. **G/R:** Relinquish of Authority: [*Freeman v. Pitts* (1992)]: Court held that federal courts have the authority to relinquish supervision and control of school districts in incremental stages, before full compliance has been achieved in every areas of school operations. If the remaining racial imbalance *results from demographic factors not traceable to the initial constitutional violations* the court can relinquish control.

III. RACE SPECIFIC CLASSIFICATIONS THAT DISADVANTAGE RACIAL MINORITIES

A. **G/R:** Race-Specific Classifications: [*Strauder v. W. Va.* (1879)] on Equal Protection grounds the Court invalidated a race specific classification excluding blacks from juries.

1. **Today,** the Court applies *strict scrutiny to all race specific*, statutory classifications.

B. **G/R:** Exception (War): [*Korematsu v. US* (1944)]: the court, purporting to apply strict scrutiny, held that during war it was not beyond the power of Congress and the Executive to exclude persons of Japanese ancestry to camps.

1. This is the last case that the Supreme Court upheld a race specific statute disadvantaging a racial minority, and although not overruled is not of much utility in modern times.
2. Despite the holding in *Korematsu* the opinion stands for the proposition that statutes that facially discriminate against racial minorities are almost always unjust and unconstitutional.

C. **G/R:** Compelling State Interest and Less Discriminatory Alternative: [*McLaughlin v. Florida* (1964)]: the Court struck down a state statute that made inter-racial co-habitation or marriage illegal. The statute applied equally to both races, however, the court made it clear that the pertinent question is NOT whether the race specific classification applies equally to all races:

1. **G/R:** if a person is disadvantaged because of race, even though all races are treated alike, strict scrutiny applies.
2. **Test:** strict scrutiny places a heavy burden on the government to show that the race specific classification is NECESSARY to achieve a COMPELLING STATE INTEREST (or overriding legitimate interest) of the government.
    a. If there is an LESS DISCRIMINTORY ALTERNATIVE that promotes the governmental interest, just as well, then the race specific law is an unnecessary and unconstitutional denial of equal protection.

IV. RACE NEUTRAL CLASSIFICATIONS

A. **Overview**:

1. Strict scrutiny applies when the law is race-specific;
2. Strict scrutiny does not apply if statute is race neutral; the court applies a rational basis test;
3. If you have a race-neutral statute, but enacted for discriminatory purpose, P must show DRI.
    a. It must be discriminatory purpose causing discriminatory effect.

B. **Analysis:**

1. The Court must first determine if the classification is race-specific;
    a. if so, the Court will use strict scrutiny
    b.if motivated by racial purpose, the Court will shift the burden to the D to show that the impermissible purpose is not a "but for" cause of the disadvantage to members of a minority race;
        i. If it is, the challenger to the gov't action will prevail
        ii. If it is not, the gov't will prevail
2. The P must show a discriminatory purpose and a discriminatory effect; merely showing a discriminatory purpose is a "but for" cause is not enough; there must also be a discriminatory effect
3. Stats standing alone are rarely sufficient to prove a discriminatory purpose, although six situations in which the stats (either standing alone or with a little more circumstantial evidence) will suffice
4. The applicable rule is that P must prove that the gov't selected a particular course of action "because of", not merely "in spite of" its adverse effect upon an identifiable group

THE EQUAL PROTECTION CLAUSE SEEKS TO TREAT SIMILAR SITUATED PEOPLE SIMILARLY.

B. **G/R:** Plaintiff's Initial Burden to Show Impermissible Intent when Challenging Race Neutral Laws: with a facially neutral race classification law that has a disproportionate racial impact (DRI) adversely affecting blacks, the Court does NOT apply strict scrutiny, it applies the rational basis test.

1. The plaintiff in such cases must show that the government has an impermissible purpose—otherwise the racially neutral classification will be upheld even if it disadvantages racial minorities or other suspect classes (disparate impact cases).
2. The challenger has a chance to prevail only if the Court determines that an illicit discriminatory purpose was a but-for cause of the DRI, which is very difficult to prove.
3. The general rule is that statistical studies showing a DRI, standing alone, are insufficient to prove an impermissible purpose—even if it is foreseeable that neutral and probable consequences of the law is to comparatively disadvantage some members of minority races and the court does not apply strict scrutiny simply because there is a DRI if the challenged governmental policy is race-neutral unless the plaintiff proves there is a racially discriminatory purpose.
    a. Ex: African-American applicants doing much worse than white applicants on a test used as a screening device for employment; plaintiffs have not demonstrated an impermissible purpose.

C. **G/R:** Proving Impermissible Purposes: [*Arlington Heights*] 5-kinds of circumstantial evidence that might suffice to prove an illegitimate (racially discriminatory) purpose:

1. statistics (sometimes so overwhelming, Court can't ignore them);
2. the historical background of the law or prior history of official actions taken for invidious purposes;
3. departures from the normal procedural sequence in the enactment of laws or rules might help prove that improper purposes are the inspiration for the laws or rules;
    a. The legislative history or the record of the administrative agency's rulemaking process is often deemed highly relevant in Equal Protection cases;
    b. In unusual cases, members of legislative bodies might be deposed or called to testify during a trial
4. There must be both a discriminatory purpose and a "BUT FOR" discriminatory effect – once the P proves a discriminatory purpose, the burden of persuasion shifts to the gov't, the gov't must establish that the same decision would have resulted even had the impermissible purpose not been considered

a. In other words, if the gov't can prove that the discriminatory purpose was not the "but for" cause of its action, the P's EP cause of action will be dismissed

5. G/R: if a law is racially neutral or gender-neutral, a challenger must show both a discriminatory purpose and a discriminatory effect on the challenger.

C(1). *McClesky v. Kemp* (1987): the court rejected an appeal of a black Georgia man convicted of murder and sentenced to death.

1. **Held:** to prevail under the Equal Protection clause the P must prove that the decision makers in HIS PERSONAL case acted with discriminatory (impermissible purposes).
2. *Discriminatory Purpose:* implies that the decision maker, in this case the State, selected or reaffirmed a particular course of action at least in part because of, and not merely in spite of, its adverse affects upon an identifiable group.

C(2). *Personnel Administrator v. Feeney* (1977): discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that course of action was selected at least in party because of, and not merely in spite of, its adverse effects upon an identifiable group.

D. **G/R:** Exceptions to Statistic Rule: six exceptions to general rule that Statistics Standing Alone, Are Inadequate to Prove Impermissible Purpose:

1. **Discriminatory Administration –** laundry permits issued although no permits issued to Chinese nationals; the D could not identify any race-neutral explanation for these statistics, therefore the Court inferred that the gov't purpose was impermissible purpose; in this unusual case, the statistics demonstrated beyond any reasonable doubt that the law was applied with discriminatory intent, therefore the laundry law AS APPLIED violated Equal protection clause [*Yick Wo v. Hopkins*].
2. **Jury Selection Cases –** burden shifts to gov't if stats disclose a DRI; blacks, as well as whites, are entitled to a jury of their peers drawn from a cross section of the community
3. **Public School Segregation Cases –** once de jure segregation is established; there is also a diminished burden on P to prove impermissible purposes were the cause of racial imbalances.
4. **Vote Dilution Cases –** the Court will infer impermissible purposes from statistical evidence disclosing a DRI in vote dilution cases – so long as there is also evidence of racially polarized voting in the district and a history in the district indicating that blacks never win elections.
5. **Gerrymandered Districts –** in this unusual case, the applicable race-neutral statute was obviously enacted for a discriminatory purpose [*Gomillion v. Lightfoot*].
    a. The 28-sided gerrymandering district infringed on the right of blacks to vote because it removed the majority of black voters.
6. **Congress May Enact Civil Rights Legislation –** makes DRI patterns sufficient evidence for a judicial finding that the civil rights of members of minority races have been intentionally violated

E. **G/R:** Justifications for Strict Scrutiny of Race-Specific Classifications:

1. *Framers' Intent:* the Framer's intent was that the central purpose of the 14th Amend. was to protect African Americans.
2. Race is rarely, if ever, relevant to any legitimate governmental purpose.
3. A higher degree of scrutiny should be applied when a discrete and insular minority is unable to protect itself in the political process.
4. If history shows that a minority, b/c of an immutable characteristic, has long been victimized by the majority race, the Court is justified in being suspicious of distinctions in legis. that are race-specific.

§2.5: AFFIRMATIVE ACTION

I. GENERAL RULES AND TESTS

A. **G/R:** Strict Scrutiny: Today, strict scrutiny applies in all affirmative action cases. The Court applies **strict scrutiny to all affirmative action plans;** in fact, quotas are per se unconstitutional.

A(1). **Generally:** The current standard is **strict scrutiny**, but it is possible to survive this level of scrutiny if the program is:

1. narrowly tailed (i.e. very little overinclusiveness or underinclusiveness);
2. based on substantial evidence;
3. remedies prior illegal or systematic racial discrimination (a compelling goal) and is the least discriminatory alternative available to advance that compelling goal
    a. the gov't cannot survive the least discriminatory alternative prong unless it explains why race-neutral alternatives are impractical;
    b. strict scrutiny is designed to "smoke out" impermissible purposes by officials and it is designed to prevent overreaching by such officials who often create over and underinclusive classifications and perpetuate stereotypes
    c. *Croson and Adarand* strongly suggest that remedial justification is the only compelling basis for upholding affirmative action (casting doubt that diversity of student body would be a compelling interest)
    d. *Croson and Adarand* require the gov't to demonstrate that affirmative action is either:
        a. remedying particularized illegal discrimination perpetrated by the gov't unit that has enacted the affirmative action plan; or
        b. that it is a passive participant in a system of racial exclusion maintained by private actors.

B. **G/R:** There is no right to affirmative action, but upheld as a remedy for past discrimination; it is designed to help the minority races that were supposed to be protected by the EP Clause

1. Justice Thomas argues that affirmative action is bad policy as well as unconstitutional because it often:
    a. places a stigma of inferiority upon some beneficiaries;
    b. imposes unjustified costs on "innocent," socio-economically disadvantaged whites; and
    c. produces a backlash that hardens racial division

C. **Theories:** two theoretical, polar positions on affirmative action:

1. Affirmative action is always unconstitutional since it violates the principle of color-blindness; advertence to race in preferential programs is forbidden for any and all purposes;
2. Affirmative action is always constitutional b/c the majority should be free to impose voluntary disadvantages on itself (no Justice has ever endorsed this approach).
3. The Court is somewhere between these two views, holding that *affirmative action can be upheld against equal protection challenges (usually by whites*); although review is strict, some plans can and do survive.

D. **G/R:** Government's Voluntary Affirmative Action Plans: The government's voluntary affirmative action plan must be:

1. Temporary: the plan may remain in effect for a designated temporary period – only so long as it is necessary to remedy the vestiges of the targeted and identifiable racial/ethnic discrimination; the plan may not be designed to maintain racial imbalances indefinitely
2. Flexible: plan must be flexible; it must have adequate waiver and exemption provisions; if it does it will not be deemed an impermissible quota
3. Not unduly harsh on innocent persons: policy must not unfairly discriminate against members of any disfavored racial or ethnic group by unduly burdening innocent individuals
4. Classification must be least discriminatory alternative: or, at least, the gov't must show that race neutral alternatives were considered and rejected an inadequate remedies; and
5. Classification must be closely linked to the remedial end: not be either overinclusive or underinclusive

E. **G/R**: Affirmative Action Elements:

1. The gov't entity defending the plan is obliged to overcome a strong presumption of unconstitutionality
2. It will have to prove that the challenged justification furthers a compelling interest and is narrowly tailored
3. To remedy racial discrimination, the gov't will have to show that it is remedying illegal racial discrimination or possibly racial discrimination

F. **G/R:** To Know About Affirmative Action (to pass exam):

1. Strict scrutiny applies to all race-specific affirmative action programs
2. The only compelling end that could justify a race-specific, affirmative action plan is to remedy past discrimination
3. The least discriminatory alternative test is used to test the validity of such plans – waiver, temporary, narrowly tailored, gov't must show it has considered race-neutral alternatives and that they are impractical
4. To what degree can a program be over or underinclusive, and how do you determine whether a program is over or underinclusive.
5. A rigid quota system is per se unconstitutional
6. The hallmarks of an affirmative action program that is not too rigid: the program must be temporary, flexible and not unduly harsh on innocent persons disfavored by the plan.
7. *Remedying societal discrimination* is too amorphous of a goal to qualify as a compelling state interest and survive strict scrutiny; the plan must be related to remedying discrimination in a specific area.
    1. To remedy racial discrimination through affirmative action programs, those who establish racial preferences or establish racial classifications—will have to show it is remedying racial discrimination that is illegal, or discrimination that is pervasive, systematic, and obstinate.

II. AFFIRMATIVE ACTION IN RACE CASES

A. **G/R:** Strict Quotas: [*Bakke v. Regents* (1978)] the Court invalidated a program that set-aside places for minority students in a state medical school; Justice Powell noted, in dictum, that it would be constitutional to use race as one factor in an admissions decision, since it advances the compelling goal of diversity of student body (is diversity a compelling state goal?).

B. **G/R:** Things That Are Not Compelling State Interests: [*Wygant*]: invalidated the lay-off of senior white teachers in a state public school ahead of junior black teachers; Court had not yet reached a consensus concerning the appropriate level of scrutiny; the formula the Court used was "any racial discrimination must be justified by a compelling governmental interest and must be narrowly tailed to the achievement of that goal; therefore any plan is unconstitutional if it is not temporary, not flexible (waiver provisions) nor narrowly tailored as a remedy for past racial discrimination. The Court found several things that were not compelling interests of the State:

1. Affirmative action as a remedy for societal, as opposed to illegal or unconstitutional discrimination, is NOT a compelling state interest if innocent individuals are disadvantaged by a racial preference;
2. Affirmative action in education to furnish role models for minority students is NOT a compelling interest;
3. Affirmative action to give minority groups a fair slice of economic pie is NOT a legitimate governmental interest if the program is not narrowly tailored to remedy for past racial or ethnic discrimination;
4. Affirmative action to achieve a more diverse student body in colleges and universities MAY BE a legitimate and compelling interest but it is not settled yet.

C. **G/R:** Waivers and Federal Affirmative Action Programs: [*Fullilove v. Klutznik* (1980)]: the Court upheld a federal affirmative action program, which was challenged as unconstitutional on its face; the Court seemed to ease up on strict scrutiny b/c the racial and ethnic classifications were clearly both over and under inclusive (i.e. not narrowly tailored).

1. The Court noted that *the plan was only temporary and that there were waiver provisions* that would be invoked when a contractor who could not find qualified minorities was severely injured by the set-aside provision; because of the waiver provisions the *plan was deemed flexible* and not invalidated as an impermissible quota.

D. **G/R:** Adoption of Strict Scrutiny: [*Croson v. Richmond* (1989)]: The Court made clear that it would not accept race conscious measures as the norm, and it would not approve loosely drafted race-conscious measures not closely tied to the remediation of prior violations.

1. The Court invalidated a set-aside program for minority business enterprises (MBEs) (virtually identical to one in *Fullilove*); the Court applied strict scrutiny; absent direct evidence of illegal discrimination against qualified MBEs by the city's prime contractors, a race-specific remedy was not deemed justified.
2. Strict scrutiny's function is to "smoke out" illegitimate uses of racial classifications; proponents of strict scrutiny also argue that it prevents the improper use of racial stereotyping and it helps prevent stigmatic harm (the perception that unqualified minorities are given preferences solely b/c of race).
3. The record suggests that the city's goal was "outright racial balancing" – an impermissible objective; program grossly overinclusive (b/c the provisions for Eskimos and Aleuts, none of which reside in Richmond); there were less discriminatory alternatives

E. **G/R:** Adoption of Strict Scrutiny for Federal Programs: [*Adarand Construction v. Pena* (1995)] the federal program sought to favor businesses that are, at least 51% owned by "socially disadvantaged groups"; Adarand, who was a subcontractor, was not getting contracts – even though he was a low bidder

1**. HELD**: all racial classifications must be analyzed by a reviewing court under strict scrutiny; strict scrutiny requires narrowly tailored measures that further compelling governmental interests. The Court held that strict scrutiny applies to all racial classifications, whether imposed by federal, State, or Local, governments or actors.

a. The Court directed the district court, to ascertain whether the federal government made any effort to determine if a race neutral alternative was available to increase minority business participation in government contracting
b. According to the Court all racial classifications are suspect b/c race is so rarely a relevant basis for disparate treatment of individuals.

2. The Court rejected the idea that benign racial classifications trigger intermediate scrutiny if such classifications deny individuals benefits solely because of their race or ethnic heritage.
3. All race classifications racial classifications are suspect because race is so rarely a relevant basis for disparate treatment of individuals.

§2.6: GENDER DISCRIMINATION

I. HISTORY, LEVEL OF REVIEW, AND GENERAL RULES

A. **History**:
1. The modern court rejects legislation that imposes role-typing on women and men; legislation is invalid if it embodies the stereotype that women are the "weaker sex" and that women are more likely to be child rearers or dependent upon men
2. Similarly the idea that men are the breadwinners in the family and always obligated to pay for alimony and child support is a stereotype and will not survive the Court's **intermediate level of scrutiny**
3. The Court is simply not interested in eliminating discrimination against women
4. Before the Court began to apply an intermediate level of scrutiny, the outcome of gender-discrimination cases was very predictable under minimal rationality, which applied until 1971
5. Legislation did not protect women at all (laws limiting the number of hours women could work in factories deprived women of job opportunities since men (who were permitted to work longer) were hired instead of women; most states enacted minimum wage laws for women but not for men)

B. **G/R:** Standard of Review: the court, today, applies intermediate scrutiny to all gender based discrimination claims.

C. **Gender Discrimination Test:** Test to apply in Gender Discrimination Cases:
1. **Ends Scrutiny:**
a. The attorney defending the gender-based classification MUST articulate a legitimate and important objective that is not, explicitly or implicitly, based on traditional, often inaccurate, assertions about the proper roles of men and women
b. The end articulated must not be a pretext or a post hoc rationalization conjured up by the attorney defending the gender-based classification; the end must be the actual end that the legis. had in mind when it adopted or reaffirmed the challenged gender based policy; courts must engage in "searching analysis" to make sure that purpose recited by the State is not used as a shield that protects the State from any inquiry into the actual purpose underlying a statutory scheme
c. With intermediate scrutiny, some legitimate ends are not deemed important enough to survive judicial review; administrative convenience, for example, is rarely considered an important enough interest to justify a gender-based classification
2. **Means Scrutiny:**

a. The attorney defending the statute (usually the gov't attorney) must present an exceedingly persuasive justification showing that a challenged classification is a substantially effective means to achieve an important and legitimate gov't interest (called the efficacy requirement)
b. The challenged gender-based classification must substantially relate to the actual objective (i.e. not be grossly over or underinclusive) (called the fit requirement)
c. The gov't's gender-based classification must not be based on archaic stereotypic notions about gender roles and abilities (e.g. generalizations indicating that women are inferior or less competent or less experienced in business)

i. The gov't must provide an exceedingly persuasive justification to discriminate on the basis of a stereotype
ii. Until the VMI case, it was not clear that the Court's emphasis on archaic, demeaning stereotypes made it virtually impossible for the gov't to show that the stereotypes it relied on were reasonably accurate in most situations
iii. So it appears that the gov't's distinction btwn men and women is a stereotype (role-typing), the heavy burden on the gov't will be virtually impossible to carry.

D. **Diluted Least Discriminatory Alternative Test:**

1. The substantial relationship test, which evaluates the relationship btwn means and ends, is not as demanding as the means scrutiny used in strict scrutiny cases; in strict scrutiny cases, the Court requires the gov't to carry a heavy burden of persuasion; it must present substantial evidence (statistical accurate information) that its challenged classification is a NECESSARY means to achieve its important goal; moreover, if a less discriminatory alternative is available, and if it works just as well to advance the compelling interest, the challenged race-specific classification is not necessary

a. On the other hand, a diluted test is used in race specific affirmative action cases and in all the gender discrimination cases
b. **TEST**: the gov't is required to show that its decision makers, at least, gave due consideration to gender-neutral alternatives; and the gov't must have an exceedingly persuasive justification for selecting the gender-based classification instead of gender neutral (less discriminatory) alternative

E. **G/R:** In short, whether the Court is applying means or ends scrutiny, or the diluted test, the BURDEN ON THE GOV'T IS TO DEMONSTRATE AN "EXCEEDINGLY PERSUASIVE JUSTIFICATION" FOR ANY GENDER-BASED DISCRIMINATION

II. GENDER DISCRIMINATION CASES

A. **G/R:** Gender Classification and Equal Protection Clause: [*Reed v. Reed* (1971)] The first case to invalidate a gender classification under the EP clause.

1. Idaho's probate law mandated a preference for male administrators of decedents' estates – whenever competing applications for the job were filed by both male and female family members (i.e. a son rather than a daughter would always be appointed as administrator of a deceased parent's estate); to justify its overinclusive burden of women, Idaho argued that men are more likely than women to have sophistication in business affairs

a. The Court labeled Idaho's administratively convenient, conclusive presumption "arbitrary" rather than "rational"; this was surprising since minimum rationality was the applicable test
b. The court was moving towards intermediate scrutiny.

c. What the Court would say today is that the stereotypes indulged by the Idaho legislature are not substantially related to the interest in appointing competent administrators.

B. **G/R:** [*Frontiero v. Richardson*] the Court invalidated federal statutes that were based on the presumption that female spouses of servicemen in the Armed Forces were financially dependent on their husbands – while similarly situated male spouses were deemed not dependent on their wives who serve in the Armed Forces

1. four Justices applied strict scrutiny;
2. the Majority did not adopt strict scrutiny.

C. **G/R:** Adoption of Intermediate Scrutiny: [*Craig v. Boren* (1976)] the Court finally settled on **intermediate scrutiny**

1. **TEST**: "To withstand constitutional challenge . . . classifications be gender must serve important government objectives and must be substantially related to achieve those objectives"; the Court required only "important" objectives rather than "compelling" objectives; there was no least discriminatory alternative test (the gov't did not have to show that gender-based classification were necessary to achieve its objectives so long as the classifications "serve important interests")
    a. Intermediate scrutiny is less predictable than both minimum rationality and strict scrutiny; the judgments appear to be ad hoc judgments based upon each Justice's perceptions of the gender classifications at issue
    b. The Court has made it clear that gender-based classifications should not burden an individual's economic rights
2. **Analysis** of how test works pursuant to this case:
    a. *Facts*: Oklahoma permitted the sale of 3.2 beer to women and at age 18; males were not permitted to buy the same beer at the same store until they were age 21; obviously the classification was gender-based; OK argued that its classification advanced and was substantially related to its legitimate and important interest in traffic safety
    b. *Issues*: 1) whether the State's gender-based classification substantially advanced its traffic safety objective; and 2) whether it was substantially related to the achievement of an important interest; the State failed to carry its burden of proof
    c. *Evidence*: the State offered stats showing that males were ten times more likely than females to be arrested for drunk driving (2% v. .18%); however the ban on all males between ages 18 and 21 was 98% overinclusive; therefore there was no substantial relationship btwn the classification and the State's objective
    d. *Holding:*: b/c the classification was grossly overinclusive, a substantial relationship btwn it and traffic safety was deemed lacking; moveover, the Court concluded that the State failed to prove that its goal of traffic safety would be substantially advanced

D. **G/R:** Gender Discrimination Against Males: [*MUW v. Hogan*]: males challenged the gender-based admissions policy of a state-supported, single sex nursing school; men were not allowed to enroll as full-time students; MUW claimed its exclusionary admissions policy was an affirmative action program designed to aid women; the Court again applied its **intermediate scrutiny test** and decided objective was a pretext and concluded that MUW's gender-based exclusionary policy was fatally flawed by a stereotype (nursing is a job for women).

1. **CAVEAT**: the Court did not rule that single sex education was unconstitutional; it merely held that MUW's nursing school could not exclude males since it relied on discredited gender based stereotypes and its role typing could not be concealed by a phony affirmative action objective

E. **G/R:** Gender-Based Peremptory Challenges: [*J.E.B. v. Alabama*]: the Court ruled that the intentional use of peremptory challenges to exclude men from a jury is a violation of the Equal Protection Clause.

F. **G/R:** Male-Only Schools: [*United States v. Virginia* (1996) *VMI* case]: the Court (per Justice Ginsburg) concluded that Virginia failed to prove that the State's legitimate and important educational objectives were jeopardized by the admission of women into an all male school. The Court held equal protection clause prohibited Virginia from maintaining male-only VMI.

1. VMI method of training men included a severe basic training regime called the adversative method
2. Virginia had argued that: 1) the admission of women would make the choices of different kinds of educational programs offered at state colleges less diversified; and 2) the unique and renown adversative method of training at VMI would have to be radically altered if women were admitted and VMI would no longer we unique
3. **Held:** As to the first justification, the Court held it was a pretext and that in any event, the diversity of choices offered to students were only offered to males so the classification was 50% underinclusive; as to the second justification, Justice Ginsberg concluded that 1) altering the adversative method to accommodate females is not that "radical" to destroy VMI's program and that its argument to the contrary was not "exceedingly persuasive"; and 2) that VMI's broad goal to produce citizen soldiers was the real goal and that goal was broad enough to accommodate women; also, the Court held that the program that was adjusted for women's capabilities was based on demeaning stereotypes and were not real differences

III. GENDER-BASED AFFIRMATIVE ACTION

A. **Generally:**

1. Since 1976, a majority of the Justices, in each case, have asserted that they are now applying the **intermediate test**, which determines whether there is substantial relationship btwn the gender-based classification and an important (legitimate) governmental interest
2. The Court will not tolerate gender-based classifications that, with respect to benefits and burdens, are grossly overinclusive or underinclusive
    a. However, the intermediate test cannot be applied with entirely predictable results; all sorts of subjective judgments determine the outcome of the case
3. This much is clear: the intermediate test neither prohibits the use of all gender classifications nor does it require (like a rational basis test) deference to the legislature
    a. thus, each Justice independently evaluates the importance of the government's interest ("end") and he or she takes a "hard look" at the relationship btwn the gender-based classification and that asserted end
    b. the Court refuses to accept at face value the purpose (end) asserted by the gov't to justify sex discrimination

B. **G/R:** Discrimination Against Females Violate Equal Protection Clause: [*Califano v. Goldfarb* (1977)] the law contained a rebuttable presumption that men are NOT dependent on their wage-earning wives; the law also contained a conclusive presumption that women are dependent upon their wage-earning husbands

1. The gov't argued that the conclusive presumption that women are financially dependent on their husbands saves time, effort, and money since most of these widows are in fact dependent on their husbands; the gov't also claimed that the statute was an affirmative action remedy
2. Plaintiff claimed that this statutory scheme amounted to discrimination against female wage earners who are not given the same survivors' benefits as male wage earners

3. **Holding**: the Court agreed with the P's argument that the law discriminated against female wage earners and that it stigmatized female spouses of male wage earners; HELD: the challenged statutory discrimination against female wage earners violates the EP component of the 5th Amend.'s due process clause

a. Although the gov't argued that the conclusive presumption costs less than individual hearings, the gov't's argument was unsupported by any statistical evidence

b. The law was declared unconstitutional primarily b/c it was based, in part, on a "presumption that wives are usually dependent"; according to the Court, "such assumptions do not suffice to justify a gender-based discrimination in the distribution of employment-related benefits"

i. Any time you see an employment related benefit that is based on the premise that women are economically dependent upon men, you can be sure that the statutory scheme will not survive intermediate scrutiny

ii. Most gender-based cases that reach the S.C. have been brought by men

4. The Court made a searching inquiry into the purposes of Congress; the statute's language indicated that the law was based on the presumption of dependency, and such assumptions may not be the basis of gender-based classifications

5. The Court rejected the gov't's affirmative action argument

C. **G/R:** Gender-Based Affirmative Action: [*Califano v. Webster* (1977)]: the Court held that the gov't may enact bona fide affirmative action remedies to compensate women who have been discriminated against by private employers

1. It is okay to provide a remedy for women who are victimized by past discrimination, if the stats are offered and if affirmative action is the gov't's actual purpose, but it is not okay to generalize by indulging in assumptions that women are dependent on their husbands

2. The Court applied **intermediate scrutiny**

3. The congressional record showed that this legislation was deliberately intended to be an affirmative action measure (Congress's actual legitimate, important objective (end) was really affirmative action); the record showed that Congress' specific intent was to compensate women as a class for the economic hardships they have suffered due to gender discrimination

4. *Reasoning*: the classification serves an important gov't objective (affirmative action), and it is substantially related to the achievement of that end (not grossly under of over); since most women were paid lower wages than most similarly situated men as a result of discrimination by their employers, it is permissible for Congress to increase the retirement benefits of women as a remedy to decrease any disparity in retirement income

5. Distinguish btwn *Webster and Goldfarb:* preferential treatment for women can survive intermediate scrutiny if it is compensatory for past discrimination against women as a class, but not when it unreasonably denies social security benefits to men;

a. In *Webster*, the Court held that the challenged statute operated directly to compensate women for past economic discrimination, and, by implication, it did not unreasonably deny social security benefits to men; *therefore, it is constitutionally permissible for the gov't to provide, voluntarily, a remedy for women (as a class) who are victimized (as a class) by society's discrimination*, if the evidence supports the congressional finding of past societal discrimination, and if affirmative action is the gov't's actual purpose, but it is not permissible for the gov't (as in *Goldfarb*) to indulge in assumptions that widowed women are dependent on their deceased wage earning husbands

6. Irony: intermediate, not strict scrutiny, applies in gender cases; the irony is that the EP Clause was designed to protect first and foremost African Americans, *but the Court views affirmative action programs*

for black citizens with stricter scrutiny and it applies intermediate to affirmative action programs for women; therefore, it is not a compelling interest to remedy societal discrimination against minority races (as a class), but it is an important interest to remedy societal discrimination against women (as a class); it is easier for the gov't to defend an affirmative action program for women than it is for it to defend an affirmative action program for men.

§2.6: DISCRIMINATION AGAINST THE POOR

A. **G/R:** Standard of Review: the court nearly always applies minimum rationality test for legislation that disadvantages the poor. The Exceptions are for:

1. Benefits for services that deal with fundamental, necessary rights (meaningful access to the criminal justice system, access to the ballot, right to vote, parental termination case, and the right to migrate and settle in a new state).
2. For these limited exceptions, a higher level of scrutiny applies.

B. **G/R:** a classification that comparatively disadvantages the poor (a group of impoverished individuals) is not a suspect classification

1.*Caveat:* on the other hand, no gov't official or body (including a legislature) may intentionally discriminate against the poor either b/c of hostility or b/c the classification is based on discredited stereotypes

C. **G/R:** SUMMARY OF APPLICABLE LAW: absent evidence that legislation was motivated by hatred, hostility, or negative attitudes, legislation adversely affecting the poor is usually upheld under the minimal rational basis test (except in very limited classes of cases); in these special cases (associated with severe government-imposed burdens of interests deemed fundamental for purposes of equal protection clause), the legislation is deemed unconstitutional – simply b/c the effect of the gov't action unduly burdens an individual's interest that is closely tied to her fundamental constitutional rights.

C(1). **G/Rs:** To Apply and Understand for Exam: **what to understand for test:**

1. *Generally:* the person who challenges a law, on the ground that it discriminates against the poor, is usually complaining about the effects of the law; the challenged statute, on its face, does not usually single out the poor (the way a race-specific law singles out a particular race for a disadvantage); if a flat fee is charged by the gov't, the poor cannot afford the fee whereas the more affluent segments of society can afford it
2. *Harm to Indigent:* b/c the indigent person challenging the law is *harmed by the effect* of the law, these de facto wealth-classification are analogous to the *Washington v. Davis* line of cases
    a. ***Washington v. Davis***: the Court upheld the validity of a race neutral law that had a disproportionate impact on African Americans; the Court applied the rational basis test; the Court did not apply heightened scrutiny (strict or intermediate) and it did not impose an affirmative duty on the gov't to guarantee equal outcomes of African Americans; the Court adhered to the principle that the law should be applied to whites and blacks in the same way; EQUAL PROTECTION, NOT EQUAL OUTCOMES, IS GUARANTEED
3. The applicable principle in de facto wealth classification cases (not involving fundamental rights) is this: the equal protection clause does not impose an affirmative obligation on the gov't to compensate anyone for unequal outcomes produced by facially neutral gov't policy

4. *Economic and Social Welfare:* In the area of economic and social welfare, a State does not violate the EP Clause merely b/c the classifications made by its laws are imperfect; if the classification has some reasonable basis, it does not offend the Constitution; to be sure, the cases enunciating this standard have in the mainly involved state regulation in business or industry; the administration of public welfare assistance, by contrast involves the most basic economic needs of impoverished human beings; we recognize the dramatically real factual differences btwn the business cases and this one, but we can find no basis for applying a different constitutional standard
   a. In these welfare cases, the challenger is not asking the gov't to leave him alone, he is asking the gov't for money;
   b. of course, any law that purposely discriminates against the poor violates equal protection if it is motivated by animosity
   c. when flat fees unintentionally burden the poor more harshly than the rich, the Court today applies the **rational basis test**
5. *Summary*: welfare is not a fundamental right, and heightened scrutiny does not apply when the poor are deprived of a benefit that is not a fundamental right b/c wealth classifications do not get heightened scrutiny

D. **G/R:** Summary of Holdings:
1. fees charged to persons who want to run for elective office and have access to the ballot were invalidated; the "poll tax" was deemed an exclusion of poor people from the franchise
2. fees charged to persons accused of crimes, which prevented them from having "meaningful access to the CJS" were struck down
3. the state has to pay for transcripts and other fees charged to persons forced into court by gov't prosecutors
4. the state has to pay for appellate counsel for appeals as of right (but not for counsel on discretionary appeals)
5. a fee to obtain a divorce was invalidated
6. court fees charged to a parent in a case involving termination of parental rights were unconstitutional
7. fees for blood tests needed by an indigent person defending a paternity action filed against him were invalidated
8. upheld filing fees for bankruptcy petitions
9. upheld laws that paid for childbirth but not abortion

**Most of the cases are really substantive due process or procedural due process cases rather than equal protection cases, since the fees charged by the gov't totally denied persons their fundamental rights; the Court realizes this now.

E. G/R: Rational Basis Test: [*Dandridge v. Williams*] the Court clearly held that *only the **rational basis test** should be used for review of so-called wealth classifications*; the Court upheld a state law that put a cap on welfare benefits to families, regardless of their size; the State has a legitimate interest in allocating scarce financial resources

F. **G/R:** Inequalities in School Financing Systems: [*San Antonio School v. Rodriquez*]: the Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review and not any form of heightened scrutiny.

1. Education is not a fundamental right under the Equal Protection Clause; therefore, inequalities in funding between school districts is a matter of State concern because education is not required by the federal constitution.

G. **G/R:** the EP Clause does not impose an affirmative obligation to compensate for unequal outcomes produced by facially neutral gov't policy

H. **G/R:** it is not unconstitutional for the State to deny services or benefits to those who cannot afford to pay for them; the gov't's de facto wealth discrimination is usually rubber stamped

1. CAVEAT: no state can enact a law that is designed to keep out indigents; the legislature may not charge fees for services in order to penalize the poor or to express animosity towards the poor; however, normally when fees burden the poor more harshly than the rich, that is the effect of the law, not the purpose of the law
2. The State has no affirmative duty to lift the handicaps flowing from economic circumstances.

I. **Remember:** the Supreme Court repeatedly points out that neither the States, nor the federal government, have an affirmative duty to guarantee the financial resources needed by desperately poor people to pay for the government services they want.

1. The poor are NOT considered a suspect or quasi-suspect class; the State has no affirmative duty to lift the handicaps flowing from economic circumstances.
2. *Caveat:* even early cases suggested there were serious constitutional obstacles to laws that *expressly discriminated* against indigents, such as statutes that bar indigents from coming into a State.

§2.7: DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

A. **Generally:** State policies discriminating on the basis of sexual orientation remain widespread:

1) the federal exclusion of gay people from armed forces;
2) exclusions of gay people from teaching or police jobs at the local or state level
3) judicial decisions singling out homosexual but not heterosexual oral and anal sex
4) rules against child custody or adoption by gays

B. **G/R:** Level of Scrutiny: [two competing theories] [Majority = minimal rationality] [Minority = strict scrutiny, analogous to race discrimination]:

B(1). **Strict Scrutiny Approach:** [*Watkins v. United States*]: Judge Norris debated with Judge Reinhold; one facet of this type of discrimination is very analogous to race discrimination cases

1. Almost all the courts of appeal have applied **minimum rationality** in these cases brought by gay and lesbian Ps, except *Watkins*
2. In *Watkins,* Judge Norris ruled that the Army's policy that excluded gay men, bi-sexuals, and lesbians form serving violated equal protection
   a. **Applied strict scrutiny**: applied the criteria that the S.C. has identified as the hallmarks of a suspect classification (triggering strict scrutiny):
      i. whether the group at issue has suffered a history of purposeful discrimination (the Army conceded this point);
      ii. whether the disadvantaged class is defined by a trait that "frequently bears no relation to ability to perform or contribute to society" (sexual orientation is a trait that lacks relevance to a person's ability to perform or contribute to society);

iii. whether the group has been subject to unique disabilities b/c of inaccurate stereotypes or prejudice; and
iv. whether the trait defining the class is unchangeable (the trait is usually immutable based on recent controversial research)

b. **Held:** sexual orientation does not impair a person's ability to perform well in the Army, that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes and that sexual orientation, whether immutable or not, rests outside the conscious control or choice of the individual

i. Therefore, the court held that the gov't could not satisfy strict scrutiny

3. Dissent: Army's regulation reflected the fact that most homosexuals are sodomists and that sodomy is a major military crime wholly unconstitutional under *Bowers v. Hardwick* (holding that prison terms for same sex sodomy does not violate due process); in essence, the Army argued that homosexuals couldn't be a suspect class b/c they are criminals; Norris responded by saying that the class burdened by the Army's regulations is defined by sexual orientation, not by their sexual conduct; he observed that homosexual orientation has never been criminalized in the USA; he argued that the discrimination is based on mere status

B(2). **Minimal Rationality Approach:** [*Steffan v. Perry*] the D.C. Circuit applied **minimum rationality** – noting that the test is applied even more deferentially than usual in the military context; the court concluded that it is rational to tie one's sexual orientation to likely sexual conduct

C. **G/R:** Don't Ask, Don't Tell Policy: [*Thomasson v. Perry*] "Don't Ask, Don't Tell" policy; the 4th Circuit held that:

1. the Policy was subject to **rational basis review** (toothless minimal rationality) b/c the;
2. class comprised of service members who engage in or have a propensity or intent to engage in homosexual acts is *not inherently suspect*, for purposes of EP review, and;
3. because there is *no fundamental right on part of service member to engage in homosexual acts*

D. **G/R:** Impermissible Purposes: [*Romer v. Evans*] Amendment 2 prohibited all Colorado lawmakers in any community from enacting and enforcing any law or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices, or relationships shall entitle any person . . . to claim minority status, protected status or claim of discrimination:

1. **HELD**: Amendment deemed a violation of the EP Clause
2. The Court declined to apply strict or intermediate scrutiny
3. The Court's holding that Amendment 2 was unconstitutional is based on two different grounds:
   a. **the new per se rule**:
      i. a law declaring that, in general, it shall be *more difficult for one group of citizens than for all others to seek aid from the gov't is itself a denial of equal protection in the most literal sense*
      ii. this "*per se*" rule is not limited to homosexuals; if a state constitution declares that people over 65 may not get protection from lawmakers in any community, that provision would violate EP
      iii. if the class is denied the right to be protected by the state legislature and the state courts, then the statute violates this per se rule
   b. *Limitations:* the per se rule has very limited application; although it protects all classes of people, it only applies when a state constitution prohibits duly elected officials from enacting laws that help a group that is excluded from the democratic process; in short, the *Romer* per se rule would not be applicable very often b/c it is unlikely that state constitutions would single out and deny many groups all protection from the law

c. Applied what he called the rational basis test (but it is obvious that he did not apply the wimpy, toothless version of the rational basis test)
d. *Impermissible Purposes:* a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest
    i. The state argued that it had legitimate interests (respect for other citizens' freedom of association, respect for liberties of landlords and employers who have personal or religious objections to homosexuality); here is where the rational basis test is usually applied and here is where the Court usually rubber-stamps this classification regardless of its underinclusiveness or overbreadth;
    ii. However, this court did not rubber-stamp Amendment 2; when the Court says that the "breadth of the Amendment is so far removed" from the states legitimate justifications, the Court is saying it is not a good fit; it is extremely overbroad (overinclusive); the only objective that fits the classification is the illegitimate one -–a bare desire to harm a politically unpopular group
e. What exactly is wrong with Amendment 2:
    i. the law deprives gay people of the right to participate in the political process (a fundamental right);
    ii. the law was a denial of "equal protection of the laws", as it closed off state process to one vulnerable group;
    iii. the state cannot, without justification, single out one social group, by creating a constitutional right to discriminate against that group, or the state has an obligation to remedy pervasive discrimination against a vulnerable group similar to those that state does protect (racial, religious, ethnic minorities, women);
    iv. the measure was overbroad

§2.8: CLASSIFICATIONS THAT GET HEIGHTENED SCRUTINY UNDER E.P. CLAUSE

A. **Classifications that Get Strict Scrutiny:**
1. Classifications based on alienage sometimes get strict scrutiny;
2. Strict scrutiny ALWAYS applies when the classification on its faces is based on **race, ethnicity, ancestry or religion.**

B. **Classifications that Get Intermediate Scrutiny:**
1. Classifications based on illegitimacy of birth sometimes get intermediate scrutiny;
2. Intermediate scrutiny ALWAYS applies to classifications based on **gender.**

C. **Classifications that Get Minimum Rationality with a Bite:**
1. When one of the government's ends is a bare desire to harm a politically unpopular minority; or when the government caters to the prejudices of some members of the electorate, the court (un-acknowledgely) applies minimum rationality with a bite.

D. **All other Classifications Get Minimum Rationality:**
1. Classifications based on mental retardation do not get heightened scrutiny
2. Classifications *based on sexual orientation do not get heightened scrutiny* (strict or intermediate)
    a. One can make the argument that sexual orientation discrimination is similar to sex discrimination:

i. classifications based on sexual orientation, like those based on sex, tend to stigmatize (or role type) classes of people based on stereotypes that have not been scientifically validated;
ii. gays and lesbians, like women, have been similarly marginalized in the public sphere; and
iii. have been brutalized in the private sphere (with similar patterns of violence, job discrimination and verbal abuse against each);
iv. there is increasing evidence that sexual orientation, like sex, is an immutable personal characteristic

3. At this time, the Court has never accepted an argument for heightened scrutiny and neither has any lower federal court
   a. *Bowers v. Hardwick:* denied application of the "right of privacy" to "homosexual sodomy."

§2.9: EQAUL PROTECTION IN A NUTSHELL

A. **G/R:** Classifications:
1. *Strict Scrutiny:* always applies when the classification on its face is based on race, ethnicity, ancestry or religion (should try to use First Amend. clauses first)
   a. sometimes applies when the state's classification, not the federal gov't's, is based on alienage (alienage won't be on test)
   b. for analysis, always use analogy to race
2. *Intermediate Scrutiny:* applies when the classification is based on gender and classifications based on illegitimacy of birth (although it is easier for the gov't to survive this test when compared to gender classifications)
3. *Rational Basis Scrutiny:* applies to all other classifications except when one of the gov't's ends is to harm a politically unpopular group or when the gov't caters to the prejudices of the members of the electorate

B. **G/R:** Reverse Representation Reinforcement: the Court's levels of scrutiny place certain groups in pigeonholes; once it designated racial classifications as suspect to other classifications that were analogous or partially analogous to race, were also deemed suspect or quasi-suspect; the heightened scrutiny is justified b/c the Court feels no need to defer to the political process if it feels the political process is malfunctioning and the group lacks the political power to correct it
   a. *Caveat:* however, by the time of *Cleburne*, the Court saw that it was on a slippery slope and that every time a new classification was added to the suspect or quasi suspect list, some other group could claim that it was just as victimized and as politically impotent; the Court has apparently decided that the list is full and there will be no more additions
      i. The problem is that certain individuals who are unfairly discriminated against cannot get equal protection under the law, but the Court needs a judicially manageable system of deciding these cases that is predictable and which gives direction to lower court judges
   b. *Sexual Orientation Problem:* some of the Ps in the sexual orientation cases have been denied EP in the classic sense b/c there sexual orientation is not related to the gov't's legitimate objectives, but they are lumped together with other gays and lesbians whose behavior arguably is related; but the Court, b/c of its perceived need to treat these cases wholesale rather than retail closes its eyes to the injustices
      i. *Minimal Rationality:* part of the problem is caused b/c minimum rationality is too deferential in many cases; but minimum rationality is predictable and makes the law more stable and certain;

so the Court selected certain other classifications for heightened scrutiny b/c there was a higher probability of injustices perpetrated with say gender classifications; but when the suspect and quasi-suspect classifications began to add up, the Court said, that's it, no more; it is a cost benefit analysis that is not acknowledged in the opinions; the Court has concluded that some injustices (the cost) is outweighed by the benefits of stability, certainty, predictability and the curtailing of discretion by lower court judges who are sympathetic to the plight of the P challenging a classification

ii. *Arguments:* the best arguments homosexuals have: **minimal rationality**, they are a politically disfavored group which the gov't is prejudicing and it worked in *Romer*, notwithstanding *Bowers;* the decision is limited

iii. *Don't Ask, Don't Tell Policy*: demonstrates the injustices of minimal rationality, balanced against the policy of reasons for stability and predictability

C. **G/R**: minimal rationality does not make individualized exceptions.

§3: IMPLIED FUNDAMENTAL RIGHTS

I. OVERVIEW

A. **Generally:** fundamental rights and liberties trigger strict or heightened scrutiny. They can be expressly protected, as in the Bill of Rights; or they can be judicially implied from the privileges and immunities clauses of the 14th Amendment, or the due process clause of the 14th Amendment (substantive due process).

B. **Privileges and Immunities Clause:** [Art. IV, §2]: prohibits discrimination by a State against non-residents—citizens of each state shall be given all the privileges and immunities of citizens in the several states.

1. Includes all kinds of commercial and economic rights.

C. **14th Amend. Privileges and Immunities Clause:** [14th Amend, §1. cl. 2] No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the U.S. In other words, the privileges and immunities clause prohibits states from denying their own citizens as well as out-of-state persons the privileges and immunities of *national citizenship*.

1. The Court since 1873, has interpreted this clause narrowly and strictly, holding that it protects only six privileges:
   a. the right to vote in federal elections;
   b. the right to have access to seaports;
   c. the right to enter federal lands;
   d. the right to come to the seat of government;
   e. rights when in custody of federal officers; and
   f. the right to travel across state lines.

C(1). **Today,** the Court's source of substantive rights that trigger heightened scrutiny is the word "liberty" in the Due Process Clause as its source of fundamental rights (and the Equal Protection Clause) protected by strict scrutiny.

1. The privileges and immunities clause was designed to protect substantive rights; and the Due Process clause of the 14th Amend was designed to protect procedural rights, the existence of this anomaly is because of the *Slaughter House Cases*.

D. **Theories of Interpretation:** there are four main theories of constitutional interpretation:

1. *Natural Law:* there are immutable principles of morality justice which may be a source of unwritten constitutional rights;
2. *Moral Philosophy*: argues that judges should rely on moral philosophy (Locke, Kant, Hume, Aristotle, Plato, ect…) to influence their decisions.
3. *Textualism* and *Originalism*: the court will answer the question before it by starting with the text of the constitution and its structure, and relating scheme of which the clauses interact with one another. Also relies heavily on the Framers' original intent.
4. *Non-Interpretivism:* feels more free to set aside the general and specific intent of the Framers, and believes that the constitution evolves and therefore needs constant interpretation to keep in tune with evolving social issues.

II. EARLY CASES

A. **Slaughter House Cases** (1873)**:** court held that the 14th Amend does not protect a butcher's right to stay in business and/or work as a butcher. Court upheld state monopoly law that deprived butchers of those rights on the basis that it was a rational health measure.

1. Court was seeking to preserve federalism—healthy state-federal balance.
2. Purpose of the 14th Amend is to protect blacks after the civil war.
3. The Court distinguished between the privileges and immunities protected by Article IV and those protected by the 14th Amend.
4. Even though the 14th Amend privileges and immunities clause was actually designed to protect substantive rights against State action, the Court ***rendered the 14th Amendment privileges and immunities clause a virtually nullity*, because it made clear that it was NOT intended to protect the citizen of one state against the legislative power of his own state.**
    a. The Court arrived at this conclusion because it did not want to upset the federal-state balance as it existed then and have the federal government acting as a perpetual censor striking down numerous state laws.

B. **Barron v. Baltimore** (1833): Court held that the *rights guaranteed in the First Eight Amendments do NOT* apply to the States. The Bill of Rights only limited the federal government and did not apply to or limit the States.

C. **Twining v. New Jersey** (1908): the Court held that the 5th Amend right against self incrimination did not apply to State prosecutions (and an unfavorable jury instruction) because it was not fundamental or an essential part of due process of law.

D. **Palko v. Connecticut** (1937): the Court upheld the constitutionality of a state statute that allowed the prosecution to appeal in criminal cases. If it had been enacted by the federal government it would have violated the *Double Jeopary Clause* of the 5th Amend.

1. The Court rejected the argument that the statute violated the due process clause of the 14th Amend, although the court had incorporated some amendments to apply to the States through the 14th Amend at this time.
2. *Harlan's Concurrence:* [constitutional interpretation—TRADITION]: the ***dominant* theory** of constitutional interpretation today in cases dealing with the identification of fundamental rights

protected by the 14th Amend is the one mentioned by Harlan—if the text, Framers' intent, and previous precedent does not yield the answer to the question of whether something is a fundamental right, then tradition should be invoked and it may provide the answer.

a. Those provisions of the Bill of Rights that are selectively incorporated are those **rooted in the traditions and conscience of our people…judges may identify, as fundamental rights, protected by Due process, are those rights that are the very essence of ordered liberty or implicit in the concept of ordered liberty.**

§3.1: SELECTIVE INCORPORATION

A. **Generally:** the Bill of Rights limits the power of the federal government. By its language, it does not apply to the states. However, by using a method of selective incorporation, the Court has held that most, but not all, guarantees of the federal Bill of Rights apply to the states.

B. **Incorporated Amendments:** the 14th Amendment incorporates every provision of the first 8 Amendments: *EXCEPT* for 5-provisions:

1. The Second Amendment (right to bear arms); the Third Amendment (not to have soldiers quartered in a person's home, there has never been a case on it); Fifth Amendment (right to a grand jury indictment) and Seventh Amendment (right to a jury trial in civil cases).
2. In addition the Court has never ruled whether the prohibition against excessive fines in the Eighth Amendment is incorporated.

*The rest of the Bill of Rights are deemed incorporated.

C. **G/R:** the privileges and immunities clause of the 14th Amend never recovered from the *Slaughter-House Cases* and today when the court wants to protect a fundamental right it relies on the word liberty in the due process clause, and to some extent the Equal Protection Clause.

**The incorporation theory is important because only if fundamental rights and liberties are implicated will strict or heightened scrutiny apply.

§3.2: SUBSTANTIVE DUE PROCESS

I. SUBSTANTIVE DUE PROCESS V. PROCEDURAL DUE PROCESS

A. **Procedural Due Process:** includes procedural safeguards guaranteed by the Due Process Clause:

1. Notice of charges;
2. Opportunity to answer;
3. Right to confront and cross examine witnesses;
4. the right to an impartial tribunal;
5. the right to counsel; and
6. the privilege against self incrimination.

B. **Substantive Due Process:** Court's focus is on substantive policy judgments embodied in law; the court will inquire if the law has a legitimate end and whether the substantive provisions of the law are arbitrary or fundamentally unfair.

1. If the law does not survive the court's substantive due process scrutiny, all the procedural safeguards in the world will not save the law.
2. the Due Process clause is limited to deprivations of life, liberty, or property; the Equal Protection clause is not so limited.
3. Iinstead of reversing its decision in *Slaughter-House*, the Court transplanted the SUBSTANTIVE rights deleted from the Privileges and Immunities clause and added them to the due process clause

C. Due Process Today: today in economic liberty cases, the modern Court is very deferential – as in the EP cases, the Court today rubber-stamps legislation challenged on DP grounds, so long as there is some imaginable set of facts that will justify the substantive provisions of the challenged law; the Court will bend over backwards to conceive of some legitimate end that is advanced by the challenged law – so long as the law does not substantially burden a person's exercise of a fundamental right; as a result, neither the DP clause nor the EP clause provide much protection to persons harmed by legislation that deals with the economy.

II. ECONOMIC LIBERTIES: RISE OF LOCHNER

A. **Generally:** Economic liberties were vigorously protected for some 40-years by the Court's interpretation of the Due Process Clause. Between 1895-1937 the Court struck down hundreds of laws that attempted to regulate the economic marketplace and protect people. The Court had a strong pro-business, laissez-fair orientation in economic matters. It was big period of judicial activism.

1. After the "switch in time that saved 9" the Court changed it modes of analysis and became very deferential to legislative policy goals in economic liberty cases.

B. **Lochner v. New York** (1905) the Court invalidated a State law that prohibited bakers from working more than 60 hours in any one week or more than 10 hours a day; the State presented substantial evidence supporting its claim that its law (restricting contractual freedom) protects the health of bakery employees.

1. The Court identified **liberty of contract as the liberty protected by the DP clause**; the law is invalid if it is unreasonable, unnecessary, or arbitrary; the Court concluded that the challenged law violated due process
2. the alleged vices of *Lochner* are these:
    a. DP is solely procedural;
    b. liberty does not include liberty of K;
    c. the means-end connection was close enough;
    d. pluralism-political process is inevitably a self-interest struggle;
    e. redistribution and paternalism are permissible public ends;
    f. the Court saw as natural a common law system that was itself a product of public choices;
    g. economic liberties are less entitled to protection than personal liberties.

C. **Coppage v. Kansas** (1915): the Court state laissez fair views candidly. The Court invalidated federal labor law, emphasized liberty of contract between employer/employee.

D. **Adkins v. Children's Hospital** (1923): Court stuck down federal minimum wage law for women, after a women challenged it. Court held that the law violated the P's liberty of contract and arbitrarily interfered with the bargaining process.

III. ECONOMIC LIBERTIES: DEMISE OF LOCHNER

A. **Nebbia v. New York** (1934): the legislature empowered an agency to fix the retail price of milk; this kind of legislative interference with the free market had never been approved by the Old Court; the New Deal Court upheld the law; the Court applied the **rational basis test**; the end was legitimate

B. **West Coast Hotel v. Parrish** (1937): Court decided the legislature has the power to change the status quo by regulating previously unregulated business activities; the Court held the legislature could protect women exploited by ruthless employers; the legislature could equalize the bargaining power of employers.

1. *Overruled*: Atkins v. Children's Hospital. Watershed case
2. **Liberty of Contract is not a liberty deserving heightened judicial scrutiny.**

C. **U.S. v. Carolene Products** (1938): the Court upheld the validity of a federal statute making it a crime to ship a certain kind of milk in interstate commerce; the statute was challenged on its face as a violation of substantive DP; the Court emphasized *in economic liberty cases, a* ***statute is presumed facially valid so long as any set of facts either known or reasonably inferred might support the legislative judgment***.

1. Ushered in a new period of judicial deference in economic liberty cases—the court became a rubber stamp in these kinds of cases.

D. **Williamson v. Lee Optical** (1955): illustrates the modern Court's "hands-off" approach in substantive due process cases involving economic liberties; the Court hypothesized a set of facts that made it a rational means.

1. Now, not all that is needed to survive rational basis test, is for the court to conjure up some rational basis for the law, even if the legislature did not.

E. **Ferguson v. Skrupa** (1963): the challenged statute was upheld b/c the legislature was deemed free to decide that the business of debt adjusting could be regulated; does the Court have SOME limits on the police power of the States (in economic liberty cases). The case was seemingly upheld without application of the rational basis test; Harlan however reminded the court that no matter how week the test, the Court had a duty to apply it.

F. **Economic Liberties Today:** Courts today still apply the **rational basis test** <u>but they exhibit an extreme degree of deference; the courts today routinely uphold legislation interfering with economic liberties and property rights.</u>

G. **Double Standard of Substantive Due Process**: according to this judicial double standard, we see that most *laws are presumptively valid* but 3 categories of laws are presumptively invalid and unconstitutional if and only if they interfere with:

1. voting, expression and political associations; or
2. are SPECIFIC prohibitions contained in the written Constitution; or
3. laws directed at particular racial religious and ethnic minorities (suspect classifications)

in short, the modern Court takes a **"hands-off" approach in economic liberty cases, but it engages in very active (intrusive) judicial review in certain cases involving NON-economic liberties.**

IV. <u>FUNDAMENTAL RIGHTS AND CONSTITUTIONALLY SIGNIFICANT LIBERTIES</u>

A. **G/R:** <u>FUNDAMENTAL RIGHTS: SOURCE OF WHICH IS EQUAL PROTECTION CLAUSE:</u>

1. meaningful access to criminal justice system;
2. meaningful access to court in parental termination cases
3. right not to be segregated by race including race separation in gerrymandered voting districts
equal voting rights (one person = one vote)

B. **G/R:** OTHER FUNDAMENTAL RIGHTS OR CONSTITUTIONALL SIGNIFICANT LIBERTIES FOR BOTH DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE:

1. right to choose whether to have offspring (procreation and abortion)
2. right to purchase and use contraceptives
3 right to marry and dissolve marriage
4. right to have custody of and direct upbringing of one's child
5. right to live with family members including extended family
6. right to migrate without penalty
7. right to migrate without being deprived of right to vote
8. right to refuse medical treatment
9. right of political association
10. right to read obscene material in one's home
11. right of competent person to have physician remove life-support system.

§3.3: FUNDAMENTAL RIGHTS STRAND OF THE EQAUL PROTECTION CLAUSE

I. THE THIRD STRAND OF EQUAL PROTECTION

A. **Generally:** the fundamental rights strand of the Equal protection clause; the other strands were (a) suspect classifications; and (b) quasi-suspect classifications, where strict and intermediate scrutiny apply, respectively.

1. The equal protection clause applies when the government treats similarly situated persons differently.
2. The Due Process Clause can be violated even though the government treats all individuals the same.

B. **G/R:** Standard of Review: STRICT SCRUTINY APPLIES when fundamental rights under the Equal Protection Clause are implicated.

C. **G/R:** Triggering Due Process Review: DP review is triggered by the *deprivation of protected personal interests* regardless of whether a classification is challenged; DP can apply regardless of how other individuals in the same situation are treated.

1. Durational residency requirements trigger **strict scrutiny in EP cases if they deny residents the right to vote and benefits such as welfare and medical care** b/c they potentially inhibit the right to migrate

D. **G/R:** The Courts' New Substantive Equal Protection: the Court has entangled it substantive due process analysis with its equal protection analysis:

1. *Equal Protection Analysis:* in Equal Protection cases, if the challenged classification denies individuals a **fundamental right** and if those individuals are similarly situated as other individuals who are not covered or burdened by the law, *the Court places a burden on the gov't*; the gov't is required to show that its classification furthers a compelling interest and that its classification is not overinclusive or underinclusive, and that is was necessary to create the classification

2. *Substantive Due Process:* strict scrutiny <u>in substantive DP cases</u> is slightly different: the Court inquires whether the substantive provision of law (instead of the classification) advances a compelling interest, and whether some less burdensome alternative (instead of some less discriminatory alternative) is available;
3. *Equal Protection cases involving fundamental rights*: the Court asks whether the classification is related to the compelling governmental interest

E. **G/R:** <u>Equal Protection Argument:</u> **the Equal Protection clause argument should focus on the relationship btwn the challenged classification and the legislature's legitimate and compelling goal.**

F. **G/R:** <u>Due Process Argument:</u> **the DP clause argument should focus on the burdened constitutional right or liberty and ask**

1. whether it has been burdened directly and substantially and, if so,
2. whether it is outweighed by an important and legitimate goal.

II. <u>CASES IN THE FUNDAMENTAL RIGHT STRAND OF EQUAL PROTECTION</u>

A. **Skinner v. Okalahoma** (1942): the entanglement began in this case, when Douglas basically invented the fundamental rights strand of equal protection. The Court invalidated a State statute which called for sterilization of habitual criminals after 3-felony offenses, with certain exceptions.

1. Court classified procreation as a fundamental right which enabled them to apply strict scrutiny
the real issue was whether procreation is a constitutionally protected liberty
2. **HELD**: the Oklahoma statute violated Equal protection clause.
3. The Court relied on the equal protection clause rather than substantive or procedural Due Process clause because: the Court did not want to be perceived as "Lochnering" (using the DP clause as the vehicle to substitute the judge's judgment for the legislature's); in other words, the court did not want to be perceived as a super legislature just after denouncing Lochner.
4. Started a new line of "substantive rights" equal protection cases; Douglas invented the fundamental rights strand of the Equal protection clause.

B. **G/R:** Important rights that are NOT considered fundamental Under the Equal Protection Clause:

1. deprivation of welfare
2. liberty of unmarried persons to enjoy sexual freedom and assisted suicide (rational basis test applies)
3. deprivation of education, housing, clothing, medical care

C. **G/R:** Fundamental rights that ARE protected by EP clause:

1. voting;
2. access to the judicial process: the Court has held that no one has a Due Process right to appeal and yet the Court said it is guaranteed by Equal Protection clause when a poor person cannot afford to pay for an attorney;
3. interstate travel.

D. **Boddie v. Connecticut** (1971): the Court held unconstitutional, as applied to indigents, a filing fee requirement for a divorce. Court relied on due process clause of the 14th Amend to hold that it did not provide indigents access to the judicial system. The concurrences would have relied on the new equal protection approach.

E. **Shapiro v. Thompson** (1969): Right to travel case. The court held unconstitutional state statutes that denied welfare benefits to residents who have not resided within their jurisdictions for at least one year; a *durational residency requirements case*.

1. The court used/invented the fundamental right (the right of an indigent person not to be penalized when he or she migrates to a new state, even though welfare is not a fundamental right) approach.
2. This approach allowed the Court to apply **strict scrutiny** as it found some of the stated governmental objectives *impermissible* and others not compelling. The tight fit requirement of strict scrutiny was satisfied because it was underinclusive.
3. **Held:** Strict scrutiny applies WHENEVER a durational residency requirement penalizes newly arrived indigents by denying them the very means to subsist—food, shelter, and other necessities of life.

F. **Zobel v. Williams:** Court held Alaska statute that distribute income from natural resources to adult citizens in varying amounts depending on the length of residence violated equal protection clause.

G. **Dunn v. Blumstien:** Court held State's one-year residence requirement for voting violated equal protection clause.

H. **Memorial Hospital v. Maricopa County:** Court held Arizona statute that required a year's residence in the county as a condition to receiving non-emergency medical care at county expense violated the equal protection clause.

I. **Sonsa v. Iowa:** court upheld a one-year residence requirement for bringing a divorce action against a non-resident. NO violation of the equal protection clause. *Residency Requirement Justified because:* of major consequences of divorce decree on property rights, marital status, and children. Iowa may reasonably decide it does not want to become a divorce mill.

III. <u>RIGHT TO TRAVEL, WELFARE, AND THE RESURRECTION OF 14TH AMEND PRIVILEGES AND IMMUNITIES CLS.</u>

A. **G/R:** <u>Right to Travel:</u> there is no enumerated right to travel in the Constitution – although it has been protected by most states the majority of the time.

1. *Durational Residency Requirements:* durational residency requirements = disqualifies newly arrived residents from receiving certain benefits until they have resided in the state for a period specified by law
2. The Right to Travel has three components:
   a. **the right of a citizen of one state to enter and leave another state;**
      i. This particular component does not have a source in the text of the Constitution.
      ii. *Limitations:* this right of interstate travel is not absolutely protected; in *Jones v. Helms*, the Court upheld a law making child abandonment a misdemeanor, but which also made it felony to leave the state after child abandonment; the Court observed the right is not absolute (since there are several situations in which a state may prevent a citizen from leaving the jurisdiction);
      iii. *Strict Scrutiny:* strict scrutiny is not always applied in these Due Process cases therefore THE RIGHT TO TRAVEL IS A <u>CONSTITUTIONALLY SIGNIFICANT LIBERTY</u>; rather than a fundamental right because the BALANCING TEST IS USED IN Due Process CASES INSTEAD OF THE STRICT SCRUTINY USED IN *SHAPIRO V. THOMPSON.*
   b. **the right explicitly protected by Article IV, section 2 [Privileges and Immunities Clause]:**
      i. A citizen of one state who travels in other states, intending to return at the end of his journey, is entitled to enjoy the privileges and immunities of citizens of the several states he visits

ii. this provision does not provide absolute protection; the test used is an *intermediate balancing test.*

c. **right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state**

i. *Shapiro v. Thompson:* the Court held that durational residency requirements in welfare cases violated the EP clause; **strict scrutiny** was applied; must be judged whether it promoted a compelling state interest; **Judge Brennan invented a bran-new fundamental right that triggers strict scrutiny in EP cases – the right of an indigent not to be penalized when he or she migrates to a new state**

A(1). Right to Travel: As of today, the Court applied **strict scrutiny** in Equal Protection cases *involving durational residency requirements* in cases involving the right to vote and the right to receive welfare, and the right to obtain low cost or free medical care; the Court has used the fundamental rights strand of the Equal Protection clause.

A(2). Exceptions to the Right to Travel: the right to travel is NOT absolute and the court has carved out some exceptions to it:

1. **Caveat #1:** Bona Fide Residency Requirements: it is important to distinguish bona fide residency requirements not involving durational residency requirements; a pure bona fide residency requirement not complicated by a durational residency requirement is always upheld under minimum rationality; bona fide residency requirements do not discriminate on the basis of travel but, rather, upon whether the claimant has established residence
2. **Caveat #2:** the waiting period for divorces was upheld; triggered a balancing test which intensified but not strict scrutiny; the burden was not severe enough [*Sonsa v. Iowa*].
3. *Memorial Hospital v. Maricopa County:* the Court invalidated a one year durational residency requirement; the benefit denied was medical care at the county's expense; applied **strict scrutiny** – the state did not show that the requirement was necessary to advance a compelling governmental interest
VOTING RIGHTS CASES: durational residency requirements have been deemed unconstitutional

B. **Saenz v. Roe** (1999): Court held that a State *durational residency requirement* that required newly arrived indigents to accept lower welfare benefits for one year violated the 14th Amendment.

1. The Court identified three components of the Right to Travel:
   a. Right of a citizen to leave one state and enter another;
      i. protected by the word "liberty" in the 14th Amendment.
   b. Right to be treated as a welcome visitor instead of an unfriendly alien; and
      i. protected by the Art. IV, §2
   c. For those who elect to become permanent residents, right to be treated like other residents of the state.
      i. this is the *new* one based on the Privileges and Immunities Clause (the one that was gutted in the *Slaugher-House Cases*); this revived the privileges and immunities clause. It was also noted that this was probably protected by the equal protection clause as well.

C. **HORNBOOK RULES IN RIGHT TO MIGRATE CASES**:

1. If the purpose of the law is to deter in-state migration, that purpose is impermissible and the law is invalid [*Shapiro*]

2. Even if the challenged durational residency law state law has the effect (but not the purpose) of deterring migration, that law will most likely be held invalid [*Shapiro and Saenz*],
3, If the gov't creates any fixed permanent distinctions btwn classes of concededly bona fide residents, based on how long they have been in the state, that action is per se invalid.
4. If the gov't action rewards bona fide residents on the basis of their past contributions, that action is per se invalid [*Zobel and Hooper*]
5. A pure bona fide residency requirement is permissible.

§3.4: FUNDAMENTAL RIGHTS, CONSTITUTIONALLY SIGNIFICANT LIBERTIES, ORDINARY LIBERTIES AND NON-LIBERTIES.

A. **Voting Rights:**
1. Strict scrutiny is not always applied in every case burdening a persons voting rights
   a. Many restrictions on the right to vote trigger a balancing test (involve Equal Protection clause);
   b. One person, one vote principle is unique to Equal Protection clause;
   c. Political gerrymandering is unconstitutional only if Plaintiff proves that district lines were drawn to suppress the voting power of a political party and that the districting system consistently diluted the voting power of a particular group of voters (involves Equal Protection clause)
   d. Racial gerrymandering is unconstitutional if face is the predominate factor in drawing the boundaries of a voting district unless the district plan can survive strict scrutiny (involve Equal Protection clause)
2. Wealth classifications that deny poor persons the right to vote or run for office and have access to the ballot have been deemed violations of the Equal Protection clause.

B. **Meaningful Access to the Criminal Justice System:**
1. Wealth classifications that deny a person meaningful access are violations of Equal Protection clause;
2. The Constitution does not in its text protect the right to appeal and no one has a right to appeal their conviction, but if appeals are allowed as of right, poor persons must be given at least one appeal; otherwise they are denied meaningful access.

C. **First Amendment Rights:**
1. Such as freedom of speech and freedom of press and political association are incorporated by the 14th Amend. and may be properly called fundamental rights
2. The free exercise of religion is no longer a fundamental right triggering strict scrutiny; however, religions cannot be targeted or discriminated against unless the discriminatory law survives strict scrutiny under the First Amendment Analysis.

D. **Privacy Rights:**
1. marriage – very few regulations trigger strict scrutiny
2. divorce – does not trigger strict scrutiny although a substantial burden might trigger balancing test
3. the right to live with close relatives including grandchildren
4. the right to procreate and the right to terminate a pregnancy (protected by undue burdens which has replaced strict scrutiny) are considered at least in some contexts fundamental
5. the right to read obscene literature is not fundamental unless it is read in the privacy of one's own home, but there is no liberty to sell or obtain child pornography
   a. *caveat:* the gov't, however, does have the power to prohibit the sale, the purchase, the receipt and the transportation of obscene material

6. the right to refuse medical treatment is not a fundamental right but it is assumed to be constitutionally significant liberty that is given heightened scrutiny
7. the right to use and have access to contraceptives is fully protected against any state prohibitions
8. the right of a parent to educate their children is a constitutionally significant liberty but it is subject to the gov't's power to prescribe reasonable educational standards

E. **Right of International/State Travel:**
1. has not yet been declared a fundamental right but it is a constitutionally significant liberty protected by the 5th Amend. and the Court will balance competing interests
2. the right to travel to another state is another constitutionally protected liberty protected by the 5th and it also triggers a balancing test
3. the liberty protected the right to migrate into a new state is a fundamental right for purposes of the EP clause and Privileges and Immunities clause of the 14th Amend.
4. the right to enjoy the privileges and immunities of persons in the state where one is visiting is protected by a special test under Article IV, section 2

F. **Ordinary (Non)-Liberties Not Deemed Fundamental:**
1. right of same sex sodomy is not fundamental nor is sexual intercourse btwn persons not married
2. the Court has never recognized any protected liberty of a person to do with his or her body (or someone else's) whatever he or she pleases
3. the Court has not recognized a right to disregard dress regulations of the gov't
4. there is no constitutionally significant liberty to ride a motorcycle without a helmet
5. economic liberties are not fundamental, nor constitutionally significant
6. the right to have the gov't provide welfare, clothing, housing, medical care and other benefits is not guaranteed.
    a. *caveat:* in certain Equal Protection cases involving durational residency requirements
7. property is not fundamental although the gov't may not take it without just compensation.

§3.5: NEW FUNDAMENTAL RIGHT TO PRIVACY

A. **Generally:** the right to privacy has expanded incrementally throughout the years, the Court has used both Equal protection, and substantive due process to expand this "new" right to privacy:
1. *Offspring:* the right to have offspring was recognized in an Equal Protection case [*Skinner, an equal protection case*]; then
2. *Contraceptives:* expanded into a use of contraceptive case by married couples [*Griswold, a pure substantive due process case*]; then
3. *Abortion:* into a fundamental right of abortion [*Roe v. Wade, a pure substantive due process case*] and most recently;
4. *Partial Abortion:* into the fundamental right to obtain a partial birth abortion

B. **Griswold v. Connecticut**: resuscitated the substantive rights component of the Due Process Clause (it had been dormant for three decades):
1. The Court identifies a new substantive liberty (a new fundamental constitutional right); the new fundamental right (narrowly construed) is the liberty of a married couple to USE contraceptives in their own bedroom.

2. For the first time since the early 1930s, the Court did not apply the rational basis test in a pure substantive due process case; applying **strict scrutiny**, the Court invalidated the Connecticut statute that authorized intrusive governmental invasions of a zone of marital privacy (the bedroom).
3. *Burden:* the Court placed the burden of persuasion on the State, and the State was unable to demonstrate the rationality of its law.
4. *Double Standard:* illustrates the Court's double standard: strict scrutiny for a selected group of rights that were different from and more protected than economic liberties and other liberties that lacked special status zone of privacy recognized is not implied from any single provision but from a conglomeration of implied rights from several different provisions (provisions in the Bill of Rights); tried to make opinion look like it was based on the Bill of Rights rather than upon the very general, non-specific and open-ended language of the 14 Amend's Due Process clause.
5. *Inconsistencies in the Opion:* there were two major faults with Court's (Douglas') reasoning:
   a. not every right protected by the Bill of Rights triggers strict scrutiny
   b. not every right in the Bill of Rights is incorporated by the 14th Amend.
6. Dissent: argues there is no general right of privacy in the Bill of Rights or elsewhere in the Constitution
7. Concurrence: Harlan argued the law invades the private realm of family life in the home; the details of the intimate sexual relationship btwn husband and wife cannot be regulated by the State simply b/c the State has a rational basis for doing so.
   a. *Due Process Clause Continuum:* There must be a stronger justification, a closer connection between the law and some important and legitimate state objective; Harlan says **Due Process clause is a continuum.**
      i. The continuum analogy means as the burden on a fundamental right explicitly, implicitly or traditionally protected by the Supreme Court increases, the Court's level of scrutiny should increase to the same extent;
      ii. The opinion did NOT open the door for the Court to protect as fundamental every kind of sexual conduct, merely said that IF the married couple have contraceptives THEN they MAY USE them

C. **Eisenstadt v. Baird:** Equal Protection case that expanded the right of a married couple to use contraceptives to the right of single persons and married persons to have the right to purchase as well as use contraceptives.
1. The opinion contained dictum, which became the bridge to *Roe v. Wade*: "if the right of privacy means anything it is the right of the individual, married and single, to be free of unwarranted governmental intrusion into matters so fundamentally affecting a person as the DECISION WHETHER TO BEAR OR BEGET A CHILD."
2. Court did not apply strict scrutiny

D. **G/R:** Theories of Interpretation:
1. Can *Griswold* be justified as a political process failure; do heterosexual married couples lack the political strength to overturn the law; are married couples a discrete and insular class with a long history of political prosecution
2. Are sex and procreation more intrinsic to personhood and personal liberty than liberty of Contract – if so, should that fact justify a double standard that induces the Court to apply a rational basis test to government regulation of Ks but heightened scrutiny to regulations of procreation and sexual conduct.
3. If the 9th Amend. protects rights reserved to the people, what right in 1791 is applicable to the right protected in *Griswold* – does the prohibition of the Connecticut law directly violate the 1st, 3rd, 4th and 5th Amends – is the right of a married couple to have privacy peripheral to the right of persons not to have

soldiers reside in their home, or is that a stretch – what formula justifies incorporation of right protected by the Bill of Rights into the 14th Amend.

§3.6: FUNDAMENTAL RIGHT TO AN ABORTION

I. RIGHT TO AN ABORTION

A. **G/R:** Substantive Due Process: the right to an abortion is protected by substantive due process.

B. **Roe v. Wade** (1973): the Court declared that the 14th Amend. protects a woman's "fundamental right" to terminate her pregnancy before the fetus is viable; the right of privacy (no matter where it is found) is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The Court struck down a Texas law prohibiting abortions and **recognized abortion as a fundamental right.**

1. The State's interest in protecting the potentiality of life does not become compelling until the fetus is viable; the State's interest in safeguarding a woman's health does not become sufficiently compelling "until approximately the end of the first trimester of gestation"; and the Court held that a fetus is not a person who is protected by the 14th Amend.
    a. Measured by these strict standards, the Texas statute swept too broadly and was unconstitutional.
2. *Strict Scrutiny:* The Court made it clear that **strict scrutiny** applies to any statute prohibiting or regulating abortion; justification for use of strict scrutiny was the Court relying on precedent and on the fact that a law denying a woman a right to terminate her pregnancy may force upon the woman a distressful life and future.
3. Determining the viability is the responsibility of each woman's physician.
    a. **Compelling Interests:** the only two compelling interests are health of the mother (after the first trimester) and the protection of potential human life, after viability.
    b. A woman still retains the constitutional right to obtain a third trimester abortion, so long as she finds a cooperative doctor who believes she is unable to *psychologically or physically* cope with or care for a child.
4. **G/R:** the right to choose to have an abortion, if performed by a physician, is a fundamental right, and a State law prohibiting abortions is **per se unconstitutional** if the woman's physician agrees that one should be performed. A state cannot prohibit an abortion in the second trimester either.
    a. The state has the burden to prove that regulations required before an abortion is obtained are not unduly burdensome.
4. *Other Arguments:* Arguments discussing the holding in *Roe v. Wade:* the cases of *Loving, Skinner, Griswold, Meyer* have in common that the claimants' choices in each case (marriage, procreation, contraception, child rearing) involve the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy; if this decision is based on morality, isn't it the state legislature the institution that should decide moral questions so long as its moral judgment does not conflict with traditions in our culture [*Griswold*].
    a. Justice Blackmun justified on the ground that pregnancy, labor and delivery forces women to endure invasions of their bodily integrity; moreover a state restriction on abortion deprives a woman of the right to make her own decision about reproduction and family planning; the women's desire to choose abortion over childbirth has affinity to the Court's cases dealing with a person's autonomy to make decisions to obtain or refuse medical treatment

C. **Maher v. Roe:** Abortion Funding: the Government has no affirmative obligation to pay for abortions of women who can't afford to pay for medical care. Even if medical care is necessary to protect her life; the government may deny her the funds she needs to obtain it [*Harris v. McCrae*].

1. The government does not violate equal protection principles if it pays for the medical expenses of pregnant women who desire to have children, even when it discriminates against women who want to have an abortion.
2. The government's refusal to pay for abortions is not a substantial burden on her constitutional right to choose abortion over childbearth. Therefore, ***heightened scrutiny is inapplicable*** in these cases.
    a. The government has placed no obstacle in the path of women seeking to have an abortion, their lack of funds is not the government's fault.
3. It is not unconstitutional for a state to provide financial assistance to women seeking first trimester abortions only if the abortion is medically necessary; the women could not afford an abortion before the state enacted its financial aid program, so the women are no worse off now than she would be if the state offered no financial aid to anyone.
    a. As to the Equal Protection clause, the Court applied its usual approach – it noted that the classification of the state was not suspect and since no fundamental right was abridged, it applied the rational basis test
4. *Roe does not prevent the gov't from encouraging childbirth over abortion for reasons based solely on morality; Roe did not impose an affirmative obligation on the gov't*
5. CAVEAT: if the gov't refuses to deny a pregnant woman who seeks an abortion ALL medical care, which she would be entitled to were it not for her decision to have an abortion, the law would be deemed a penalty and an unconstitutional condition, but so long as the gov't merely denies her the medical care that is associated with her pregnancy, the law is not considered a penalty.

C. **Steinberg v. Carhart:** (2000): Partial Birth Abortions: where substantial medical authority supports the proposition that banning a particular abortion procedure (partial birth) could endanger a woman's health, the statute MUST *include a health exception when the procedure is necessary* in appropriate medical judgment for the preservation of the life or health of the mother.

1. Otherwise, the statute is unconstitutional.

D. **Webster v. Reproductive Services:** the Court upheld a law requiring viability testing for fetuses in existence for 20 or more weeks if the test indicated in the physicians reasonable judgment—so long as the procedure is likely to determine viability and not dangerous to the mother or fetus.

E. **Planned Parenthood v. Casey:** the Court after abandoning the trimester framework adopted three principles governing when and how a State may regulate abortion procedures:

1. Reaffirmed *Roe* that a woman has the right to choose to terminate her pregnancy before viability;
2. Subsequent to viability, the state in promoting its interest in the potentiality of human life, may, if it choose, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother
3. **Undue Burden Standard:** in place of the trimester framework, new **"undue burden" standard** that precludes the enactment of a law that has the purpose or effect (even if the gov't does not intend to create a substantial obstacle, a regulation that has the effect of placing a substantial obstacle in the path of a woman seeking an abortion is an unconstitutional undue burden) of placing a substantial obstacle in the path of a woman seeking an abortion
4. *Legitimate governmental ends that could justify state laws regulating abortion:*

a. safeguarding the potentiality of human life;
b. ensuring that woman was well informed and her decision was voluntary
c. ensuring teenagers are mature enough to make the decision without parental consent
d. encouraging childbirth over abortion
e. determining whether the fetus is viable
f. protecting and strengthening family life
g. preserving health of mother

5. **Impermissible Purpose***: if its purpose is to interfere with a woman's decision to terminate her pregnancy or to place a substantial obstacle in the path of a woman seeking an abortion rules distinguishing between valid and invalid restrictions:*

a. attending physicians must obey the gov't's reasonable reporting requirements; ordinarily this requirement should not be an unduly burden on either the woman or her physician; the confidentiality of the woman's situation must be kept private
b. certain informed consent and waiting period requirements are valid; such requirements might be unconstitutional, as applied in certain unusual situations, if they impose a substantial obstacle in the path of a woman seeking an abortion
c. spousal notification requirements are **per se invalid**
d. **Parental notification and parental consent requirements for minors **are NOT per se invalid**; they are valid if the law requires one parent (not two) to be notified so long as the state provides a **BYPASS** procedure authorizing a judge to determine whether the pregnant minor possesses sufficient maturity to make an informed choice and/or whether parental notification or consent is or is not in her best interests.

F. **Generally:** What Remains of Roe v. Wade: the core holding of *Roe* is still intact:

1. A state may not prohibit abortions before viability;
2. The state may regulate and even proscribe abortion after viability except where it is necessary in appropriate medical judgment for the preservation of the life and health of the mother
3. Changes after *Casey*:
   1. the trimester framework is abandoned; the state does not have to show a compelling interest to protect the woman's health before the first trimester
   2. the state can enact laws designed to protect its substantial interest in preserving potential life before viability, so long as abortions are not prohibited
   3. a spousal notification requirement is unconstitutional
   4. Parental notification and parental consent requirements are not per se invalid.
      a. They are valid if the law requires one parent, not two, to be notified, so long as the State provides a bypass procedure authorizing the judge to determine whether the pregnant minor possesses sufficient maturity to make an informed choice.

§3.7: SUBSTANTIVE DUE PROCESS AND FAMILY LIVING ARRANGEMENTS

A. **Belle Terre v. Boraas:** six unrelated university students wanted to continue to live in a house near the university but zoning ordinance prohibited more than two persons living together unless blood or lawful marriage

1**. HELD**: the ordinance is constitutional; this case involved economic and social legislation where courts have, since 1937, respected lines drawn by the legislature; the issue resolved by the Court was based on the Equal Protection clause.

2. Analysis of case that will help distinguish the **differences btwn substantive Due Process and Equal Protection:**

a. **Substantive Due Process:**
i. the **rational basis test** applies
ii. the P's interest is not a liberty protected by the 1st Amend. right of association, and the Court has not yet held that the liberty of unrelated persons to live in the same dwelling is constitutionally significant

b. **Equal Protection Clause:**
i. the statutory classification, on its face, was **not** suspect or quasi-suspect
ii. the record **did not indicate any impermissible purposes; so the ordinance easily survives the rational basis test**
iii. the Court did not discuss whether the classification was over or underinclusive, and it was rubber-stamped as a line-drawing matter solely for legislative discretion

B. **Moore v. City of East Cleveland**: the challenged ordinance interfered with a family's living arrangement (distinguish from *Belle Terre*); the ordinance, as applied, made it a crime for a grandmother to live with her own grandchild; the object of the ordinance was to ease traffic congestion and to limit the number of students in the public schools

1. **HELD**: the ordinance violated the Due Process clause;
2. There are certain aspects within the realm of "private family life" that are insulated from laws that deny a person's freedom of choice
3. this constitutionally protected realm of family life includes the extended family, not just the nuclear family
4. the Court did not apply the rational basis test, did not apply strict scrutiny; instead applied **balancing test** (therefore constitutionally significant liberty):
   a. the Court examined the importance of the city objectives and the extent to which these objectives were advanced by the ordinance
   b. held that the state objectives were not advanced to any significant extent
5. **G/R:** freedom of personal choice in matters of marriage and family is **one of the liberties protected by the due process clause of the 14th Amendment.**
6. THERE IS A DIFFERENCE IN THE WAY YOU ANALYZE THIS CASE DEPENDING ON WHETHER YOU EVALUATE IT AS A DP CASE OR AN EP CASE:
   a. with DP, you ask merely if the state objectives are advanced by the statute
   b. with EP, you focus on the exclusion of grandmothers and ask if their total exclusion is overinclusive.

§3.8: FUNDAMENTAL RIGHT TO MARRY

A. **Zablocki v. Redhail**: D was denied a marriage license b/c of his failure to comply with a state statute that denies marriage licenses to persons who are behind in their child support payments

1. Court applied the fundamental rights strand of the Equal protection clause;
2. Strict scrutiny is inappropriate for each and every regulation of marriage – even regulations that totally deny a person the right to marry (although basically this is strict scrutiny)
3. **Balancing test** focusing on the following factors:
   a. *nature* of individual interest affected (is it a constit. significant liberty)

b. the *extent* to which it is affected (directly or substantially burdened)
c. the *rationality* of the connection btwn legislative means and purpose (is state's legitimate purpose substantially advanced)
d. the existence of *alternative means* for effectuating the purpose
e. the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen (is purpose a *pretext* concealing an illegitimate purpose)

4. THE FUNDAMENTAL RIGHTS AS THOSE THAT TRIGGER STRICT SCRUTINY AND THOSE RIGHTS THAT CALL FOR A LESS RIGOROUS SCRUTINY CONSTITUTIONALLY SIGNIFICANT LIBERTIES

B. **Califano v. Jobst:** the challenged statutory provision did not significantly burden a person's right to marry; reasonable regulations that do not <u>significantly interfere</u> with the decision to enter into the marriage relationships will be upheld; the financial burden on him was an indirect consequence of the statute – which did NOT disqualify him as a person with the legal capacity to marry

1. In *Zablocki,* the poor person was denied the right marry and so the gov't's interference with his fundamental right to marry was **direct** and substantial; the law absolutely prohibited his marriage; in *Jobst,* the law did not prohibit; it so happened that he would social security benefits if he got married but that was not the intent of the law; so the financial burden on him was an **indirect** consequence of the statute.
2. Thus, *reasonable regulations* that make it disadvantageous to get married are usually upheld.

POSSIBLE EXAM QUESTION:
Are blood tests constitutional if they are prereqs to marriage? Why or why not?
ANSWER: if everyone is treated alike a reasonable basis test or balancing test would apply if challenged on substantive due process grounds

§3.9: LIMITS ON THE RIGHT OF PRIVACY

A. **Bowers v. Hardwick:** <u>Sexually Intimate Associations:</u> the Supreme Court held that adults have no fundamental right to engage in homosexual sodomy, and the state may therefore not only ban, but criminally punish, such activity.

1. Since there was no reason to apply heightened scrutiny, the Court applied the **rational basis test**
2. The statute is rationally justified by majority sentiments about the morality of homosexuality
3. Outside of the marriage relationship, there is probably no kind of sexual activity the practice of which is a "fundamental right"; thus the state can almost certainly prohibit, and punish, adultery and fornication.
   a. *Caveat:* where the parties are married, there probably is a fundamental right to have even "deviant" sex, so long as it's not physically dangerous and is consensual; for instance, the state probably may not prohibit oral sex in marriage, since that would fall within the marriage area of the right to privacy

B. **Cruzan v. Dir., Missouri Dept. of Public Health:** <u>Right to Die:</u> Court used the **"clear and convincing evidence"** standard: in the case of a now-incompetent patient, the state's interest in preserving life entitles it to say that it won't allow the plug to be pulled *unless there is clear and convincing evidence that the patient would have voluntarily declined the life-sustaining measures.*

1. Parents did not have power of attorney and were not duly appointed as surrogates
2. No right to commit suicide: terminally-ill patients do not have a general liberty interest in "committing suicide"; nor do they have the constitutional right to recruit a third person to help them commit suicide.

3. The Court did not apply strict scrutiny in this substantive due process case.
4. **Held:** Constitution doesn't forbid state from establishing a clear and convincing standard, *but assumed* that the competent person has a liberty to refuse unwanted medical treatment.

B(1). Right To Die: court held a statute prohibiting assisted suicide was NOT a violation of the 14th Amendment. Substantive due process, **NO fundamental right to assisted suicide** [*Washington v. Glucksberg*].

C. OTHER POSSIBLE PLACES WHERE THERE MIGHT BE A FUNDAMENTAL RIGHT:
1. you probably have a fundamental right to read what you want
2. you may have a fundamental right to control your personal appearance

D. SUMMARY OF LEVEL'S OF SCRUTINY:
1. 99% of the cases do not involve fundamental rights or constitutionally significant liberties so a **deferential rational basis test applies**;
2. REMEMBER THIS: if the constitutionally significant liberty or fundamental right is not directly and substantially burdened, the Court will not heighten its scrutiny
3. Deciding whether the right in question is "fundamental" is the key to substantive due process analysis
4. If you decide the right is "fundamental" – you have to do the strict scrutiny analysis, which means you must decide if the state's interest is indeed "compelling" and the means chosen is "necessary" to achieve that interest
5. If the right is "non-fundamental" then apply the rational basis test.

§4: FIRST AMENDMENT RIGHTS

§4.1: Subversive Advocacy

A. **G/R:** Not all speech is protected, broad categories of fully protected speech today include: scientific, educational, commercial, and literary speech.
1. *Unprotected Speech:* includes, libel and slander, obscenity, incitement of unlawful activity and fighting words.

II. EARLY CASES DEALING WITH FREEDOM OF EXPRESSION AND SUBVERSIVE ADVOCACY

A. **Schenck v. U.S.**: (1919) formulated an early test for determining whether speech is protected or not. Schneck was charged and convicted for distributing leaflets and circulars, that were viewed as causing insubordination and obstruction of recruiting.
1. Court upheld is conviction, formulated the following test:
a. Whether the defendant's words are used in such circumstances and are of such a nature as to create a *clear and present danger.*
b. If so, then the speech could be regulated.
2. The test is whether the D's words:
a. *are used in such circumstances*;
b. *are of such a nature as to create a clear (probability of harm); and*
c. *present (imminent) danger (of obstruction of recruiting and insubordination)*

**focuses not merely on the words uttered by the speaker but also takes the context into account (e.g. wartime)

B. **Masses Publishing v. US:** (1917): in an opinion by Learned Hand, the court of appeals focused on the specific content of the speech—solely on the words uttered by the speaker, ignoring the context in which they were used.

1. The court enjoined the postmaster from preventing publishers to use the mails to transport one of their issues of magazines.
2. The test was an objective test, but it takes the matter from the jury because the judge has the duty of determining whether the actual words and publications were direct incitements of to action.

C. **Abrams v. US:** (1919): Russian immigrants were convicted for distributing communist leaflets.

1. The majority relied on *Schenck* to uphold the convictions.
2. *Revised Clear and Present Danger Test:* there must be solid evidence of a casual connection between the words and the evil that Congress seeks to prevent, as well as an imminent danger.
    a. This added a causation element to the test.
3.*Market Place of Ideas*: Dissent: gives everyone the right to express his or her beliefs and opinion, however seditious or subversive, so long as the message does not threaten immediate interference w/the war effort.
4. Focuses solely on the words uttered by the speaker though it totally ignores the context in which they uttered
5. Argues that words that merely criticize the gov't may never be criminalized, regardless of their "bad" tendency to cause a clear and present danger of criminal activity

D. **Gitlow Case:** (1925): State statute in NY outlawed criminal anarchy, which included, speech or writing that advocates overthrowing the government by force or violence. Gitlow published a manifesto and violated the statute. There was no evidence that Gitlow's words were likely to cause an *immanent* attempt to overthrow the government.

1. Court applied **rational basis test**, very deferential and did not apply clear and present danger test because it held the legislature had the authority to prohibit the advocacy of the overthrow the government without waiting until there was a present and imminent danger.
2. held that a case-by-case application of the clear and present danger test is not necessary if the legislature – at the time the legislation was enacted – had a rational basis for finding that the prohibited WORDS posed a clear and present danger of an overthrow of the gov't; courts should not second-guess legislatures; the majority applied a rational basis test that was very deferential.

E. **Whitney v. California:** (1927) right of political association case, Whitney was convicted for violating California Statute that made it a crime to advocate the commission of crimes. The court upheld her conviction finding her guilty of joining the revolutionary party that advocated terrorism.

1. Today she would be protected by right of political association. **Modern Test for Political Association:** today a person must be proven to
    a. know of the group's illegal aims, and
    b. actively participate with
    c. specific intent to achieve the groups illegal aims.

F. **Dennis v. US**, (1951): The petitioners were convicted of conspiracy to advocate overthrowing the government. The court affirmed and used the clear and present danger test.

1. **G/R**: Must ask whether the gravity of evil, discounted by its improbability justifies such invasion of free speech, as is necessary to avoid the danger.
2. The question in each case is "whether the gravity of the evil discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger"
3. In other words, if there is a serious danger, the gov't does not need to show the "evil" is very likely to occur, and the imminence requirement is deleted from the Court's test

G. **Kingsley International Pictures Corp. v. Regents of NY**, (1959): The court held uncon. a NY statute which prohibited the issuance of a license to exhibit nonobscene motion pictures that portray acts of sexual immorality as desirable or acceptable.

II. MODERN TEST

H. **Brandenburg v. Ohio,** 1969: The court reversed the conviction of P for allowing a TV camera to the KKK meeting and getting convicted under the Ohio criminal syndicalism statute. The court also found the statute unconstitutional.

1. **G/R**: Constitutional guarantees of free speech and free press do not permit a state to forbid or prescribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.
2. The First Amend applies to all governmental officials, not just Congress, freedom of speech is incorporated by the 14th Amend so it applies to all state and local.
3. The Test is **stricter than strict scrutiny** and balancing:
4. A conviction for speech advocating lawless action depends on whether the prosecutor can demonstrate the following **four elements:**
    1. The speaker must have an intent to cause imminent illegal action;
    2. A likelihood (high or at least a reasonable probability) of producing illegal action;
    3. in the imminent future; AND
    4. the words used must be unambiguously inciting (action producing rather than ideal producing).

    **IF ALL FOUR ELEMENTS ARE NOT SATISFIED THEN the person is protected by the First Amendment.
5. **Categorization Approach**:
    1. has been called definitional balancing b/c the right balance is supposedly struck by the test that draws the line btwn fully protected and completely unprotected speech
    2. is intended to be stricter than strict scrutiny b/c no compelling interest can outweigh the speech absolutely protected by carefully crafted category
    3. it is designed to eliminate ad hoc balancing; designed to eliminate, to the greatest degree practicable, the discretion of the judge (and eliminate the jury)

§4.2: DEFAMATION

A. **G/R:** Definition: a false statement of fact that diminishes a living person's reputation.

1. *Libel:* if the false statement is communicated to a person other than the one it defames and if it is written, it is LIBEL
2. If the defamation is spoken, it is SLANDER.

A(1). **Analysis:** categorize the figure and the matter to determine what standard applies:
1. Public Plaintiff/ Public Concern: *NY Times* Rule of Actual malice applies. P has the burden of proof and must demonstrate by **clear and convincing evidence** that the statement was false, and made with actual malice.
2. Public Plaintiff/ Private Concern: not clear what standard applies, but most likely actual malice rule will apply only if the plaintiff seeks presumed or punitive damages.
3. Private Plaintiff/ Public Concern: [*Gertz*]: plaintiff must show fault (at least negligence) for compensatory damages. Actual malice would be applied if P seeks presumed or punitive damages.

B. **New York Times v. Sullivan: (1964)** Court held that a public official cannot recover damages for defamatory falsehood unless he proves the statement was made w/actual malice, actual malice is when the speaker or writer knows the statement is false, or w/reckless.
1. **Rule**: it prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with "actual malice" – that is with knowledge that it was false or with reckless disregard of whether it was false or not
2. *Actual Malice:* the "actual malice" rule is a test that turns in part on the state of mind of the D who publishes the libel; this test requires the P (public official or public figure) to prove by **clear and convincing evidence** that the D (reporter) in fact entertained serious doubts as to the truth or falsity of his publication.
3. When appellate courts apply this rule, they must engage in an independent review of the evidence supporting the facts underlying the jury's verdict, and a judgment in favor of the P must be reversed if the evidence in the trial record does not clearly and convincingly show "actual malice"
4. *Public Official:* a public official is any person who has responsibility or control over the conduct of public affairs.

B. **Curtis Publishing v. Butts & Associated Press:** Extension of *New York Times:* a P can also be deemed a public figure if she voluntarily thrusts herself into the public spotlight in order to influence the outcome of specific public controversy.
1. All libel P's INVOLVED IN MATTERS OF PUBLIC CONCERN MUST PROVE (if they want damages) THAT THE D WAS AT FAULT
2. the "actual malice" rule applies only when they seek general or punitive (as opposed to special) damages (Leedes' opinion)
3. Private figure Ps must comply with the *NY Times* "actual malice" rule before they may recover presumed or punitive damages
4. IN A CASE NOT INVOLVING A MATTER OF PUBLIC CONCERN, the private figure P does not need to show any fault before he recovers presumed, compensatory or punitive damages in a defamation case.
5. The *New York Times* actual malice rule was extended to **public figures** (someone who as achieved fame and notoriety, or who has pervasively involved himself in public affairs)—not just *public officials.*
6. A **Public Figure** can also be just "public" to the community.

C. **Gertz v. Welch** (1974): P was a lawyer, in a high profile case with lots of publicity, he did not discuss the case with the press, and was subsequently defamed.

1. **Held:** Gertz was neither a public official nor a public figure, he was merely a private figure, so he did not have to prove actual malice—even if the defamatory statements related to a matter of public concern.
2. **G/R:** All plaintiffs involved in matter of public concern must prove that the defendant was at fault (or at least negligent) if they want damages. This is the real importance of the holding: **the plaintiff must prove negligence or intentional fault—**not strict liability common law rule because that would violate the first amendment.

D. **Dun & Bradstreet v. Greenmoss Builders:** Case involved a purely private P involved a in a matter of purely private concern (reporting of financial conditions).

1. **G/R:** in cases involving purely private persons, in purely private matters, the actual malice RULE DOES NOT APPLY—common law rule of strict liability applies. P can most likely recover compensatory and punitive damages, in such cases without a showing fault in part of the defendant.

E. **Hustler Magazine v. Farwell:** Actual malice standard applies when a suit is brought **by a public figure,** the power of speech to generate severe emotional disturbance is never enough standing alone to justify abridgment of that speech—even when infliction of emotional distress intentional.

1. **Held:** that the cartoon was a political satire or parody and no one could believe that they were true.

F. **SUMMARY** of P's burden of persuasion which depends in part on the kind of damages sought by the P:

1. *Fault:* Fault (negligence) must be shown to get compensatory damages in a private figure case involving a matter of public concern, and the P has the burden of proof to show fault; moreover, actual malice must be established in such cases before presumed and punitive damages are awarded
2. Ps who are public officials or public figures must establish actual malice before they can get compensatory damages, punitive damages and presumed damages
3. Private figure plaintiffs don't have to worry about the Constitution if and only if the issue is not one of public concern; state law applies, which is usually common law; unfortunately, the Court has been very vague concerning what is a matter of public concern – whether "speech addresses a matter of public concern must be determined by the expression's content, form and context" – Leedes' view is that the statement must be related to some matter relevant to self-gov't or at least some newsworthy event relevant to matters that are being debated by the public (a speech that is solely of interest to the speaker and her audience is not a matter of public concern)
4. A majority of the Justices have never yet decided a case holding that the foregoing rules should be any different if the D is a non-media D; however, in a matter of public concern, the P must prove that the media D's story is false and that it was at fault

G. **G/R:** In libel cases, the constitutional rules articulated by the Court include some variable ingredients whose application depends on 2 key factors:

1. **whether the P is a private actor or public official or a public figure and, if the P is a private actor, the court must determine:**
2. whether the allegedly defamatory statement involves a matter of public concern

F. When you analyze a case consider whether it falls into one of these four categories:

1. public P/public concern

a. the requirement of actual malice is false PLUS falsity by clear and convincing evidence PLUS purposeful or reckless disregard for the truth
b. the defamed public P would have to prove that the D at the very least "entertained serious doubts as to the truth of the publication"

2. public P/private concern
   a. the Court has never been clear, but Leedes' guess is that the actual malice rule will apply only if P seeks presumed or punitive damages
3. private P/public concern
   a. fault (negligence) for compensatory damages
   b. actual malice for presumed and punitive damages
4. private P/private concern
   a. state law, usually state common laws, probably still apply

§4.3 COMMERCIAL SPEECH

A. **G/R:** Definition: if the motivation of a speaker is to sell a product (or a service) or if the speech tends to induce consumers to buy a product (or pay for a service), that is commercial speech.

A(1). **G/R:** with commercial speech the court applies intermediate scrutiny.

B. **Generally: u**ntil the mid-70s, commercial speech was treated just like any other economic activity; consequently legislation restricting commercial speech was rubber-stamped, since the Court applied the extremely deferential level of scrutiny (minimum rationality) applicable in economic due process cases; if any conceivable legitimate governmental end justified a restriction on commercial speech, the legislature's choice of means (i.e. the statute) was not questioned by the Court.

C. **G/R:** Commercial speech is still not treated as if it were on a par with speech that is at the core of the 1st Amendment.

D. **G/R:** Exceptions to Commercial Speech: excluded from the definition of commercial speech covered by the 1st Amend. is speech proposing (1) an illegal transaction and (2) false, misleading and overly aggressive proposals.

E. **Central Hudson Test:** is used in commercial speech cases, it can be broken into two parts:

1. First, there is the threshold inquiry whether the regulated or restricted speech concerns an illegal activity or is false, misleading, or deceptive.
   a. If so, it receives no constitutional protection
2. The second part of the test has three prongs– all of which must be satisfied if the gov't restricts truthful advertising about lawful transactions:
   a. is the interest identified by the gov't legitimate and "**substantia**l"
   b. does the restriction directly and materially advance the gov't interest; and
   c. is the restriction reasonably tailored to the gov't interest.

E(1). **Central Hudson Test** is essentially a watered-down version of the compelling interest test used in strict scrutiny; it is not strict for two reasons:

1. a substantial gov't interest may not be as important to the gov't as a compelling interest;

2. a restriction on commercial speech will survive the Court's scrutiny even if it is somewhat overbroad (even if the regulation happens to restrict some commercial speech and does not advance its objective, the regulation can survive this test)

E.(3). Summary of *Central Hudson Test:*

1. **First**, we determine whether the expression is protected by the 1st Amend.; for commercial speech to come within that provision, it at least must concern lawful activity and not be misleading;
2. **Second**, we ask whether the asserted governmental interest is substantial (rather than compelling);

If the first two inquires yield positive answers, we must determine:

3. **Third**, whether the regulation directly advances the government interest . . . and
    a. A gov't body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a practical material degree
4. **Fourth,** whether it is not more extensive than necessary to serve that interest
    a. the gov't is not required to employ the least restrictive means conceivable, but it must demonstrate
    b. narrow tailoring of the challenged regulation to the asserted interest – a fit that is not necessarily perfect but reasonable

**The gov't bears the burden of identifying a substantial interest and justifying whether it directly advances and is not more extensive than necessary to serve that interest

§4.4: OBSECENITY AND SMUT

A. **G/R:** if speech is protected by the 1st Amend, strict scrutiny applies. Otherwise, in most cases, rational basis test applies, except with commercial speech the court applies intermediate scrutiny. Obscene speech is not protected by the First Amendment (like defamation, incitement of illegal activity, or fighting words).

B. **G/R: Minimum rationality is the standard** for determining whether a statute regulating speech is obscene or not.

C. **Roth v. US:** (1957): Case resulted in an early test for defining obscenity: whether the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.

D. **G/R:** Modern Test for Defining Obscenity: [*Miller v. California*]: three prong test today, if the material fails this test then it cannot be afforded protection by the First Amendment:

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

E. **G/R:** Scienter Requirement: because obscenity laws are criminal laws, strict liability does not suffice. Scienter is required, but the defendant does not have to be aware that the material is legally obscene.