

### Equal Protection

#### 1. What is the Classification?

To prove existence of classification:

1. **Exists on its face of the law**
2. **Demonstrate that a facially neutral law has a discriminatory impact and discriminatory purpose** (only to race)

### Equal Protection (cont)

#### Suspect Class

Immutable characteristic, based on race, national origin, or another 'discrete and insular minority'

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### Equal Protection (cont)

#### Race

*Korematsu*-

-All restrictions which curtail the civil rights of a single racial group are immediately suspect subject to the most rigid scrutiny.

-Temporary exclusion upheld b/c national security, wartime and hardships are part of war

*Loving*- Miscengenation statutes rely solely on distinctions drawn according to race.

Based on assumptions of inferiority of blacks to whites.

### Equal Protection (cont)

#### Gender

*Feeney*- Veterans preference for civil jobs over non-verterans: Law not passed w/ intention to keeping women from jobs:

Purpose- in spite of the effects on women not b/c of the effects

*Rokseter v. Goldberg*- draft for men only okay, defer to military judgments;

### Equal Protection (cont)

#### Sexual Orientation

*Bowers*

*Romer v. Evans* (repealed all gay protection laws)

*Obergefell* -Relies on fundamental right to marry

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### Equal Protection (cont)

#### Mental Ill

*Cleburne*- law reflects an irrational prejudice against them; justifications city put forth were either not legitimate purposes or the ordinance was not a reasonable way of accomplishing those goals

### Equal Protection (cont)

#### Ex-Felons

Not suspect, lack of immutability b/c person chooses to commit crimes (but is it truly voluntary or necessary/positive law limits ex-cons cannot vote to help themselves)  
-Laws classifying them are often upheld, not a classically protected group

### Equal Protection (cont)

#### Undocumented immigrant children

*Plyer v. Doe*  
*Richardson*  
Preemption-

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### Equal Protection (cont)

#### Elderly

*Murgia* No history of unequal treatment of elderly, thus rational basis

### Equal Protection (cont)

#### Poverty

*Rodriguez*- Not a suspect classification.  
There is no actionable equal protection issue based on low-income status.

### Equal Protection (cont)

#### Segregation

**De Jure** violates 14th amdt-  
*Brown*- Explicit segregation  
*Keyes*- Inferred from numerous racially targeted actions by school officials

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### Equal Protection (cont)

#### Affirmative Action

See below (Voluntary desegregation measures)

### Equal Protection (cont)

#### Right to Marry

\*Zablocki v. Redhail (child support): Even if state has substantial state interest, the law must be sufficiently related to that end to not violate EP.

### Equal Protection (cont)

#### Discrete and Insular Minorities

*Carolene Products fn. 4* Discrete and insular minorities require additional protection from the courts.

#### Not Poverty

*Dandridge v. Williams*- Wealth distinctions are decided on a rational basis only

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### Equal Protection (cont)

#### Facially Neutral

Laws that are facially neutral as to race and national origin will receive more than rational basis review only if there is proof of discriminatory intent or purpose

### Equal Protection (cont)

#### Disparate Impact

*Washington v. Davis* (black cops): Refused to raise scrutiny b/c discriminatory impact is not enough, must show explicit evidence of discriminatory intent.

-Argument that prior discrimination disadvantaging race fails b/c its a slippery slope calling into Q other too many other statutes

### Equal Protection (cont)

#### Discriminatory Intent/Purpose

*Arlington Heights* (racial permit denial)- Proof of discriminatory intent could be shown through:

1. **History of discrimination**
2. **Evidence that the creators of the law intended that it be implemented in a discriminatory way**
3. **Discriminatory Implementation**

*Yick Wo* (chinese laundry)- Not about the purpose of the policy itself but rather about whether the facts of the implementation are as troubling and extreme enough in comparison to *Yick Wo* to be unconstitutional

*Gomillion/Yick Wo*: very rare but court can

#### **Infer intent from implementation**

*McCleskey v. Kemp* (death row): Even with statistics, def must prove that the decisionmakers (prosecutor/jury bias) in *his* case acted with discriminatory purpose, or else no EP violation. (Each jury is a sep. decisionmaker, unlike same *Yick Wo* where same body decides all of the cases)



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### Equal Protection (cont)

#### Disparate Impact + Discriminatory Intent

##### Evidence of Discriminatory Purpose

##### Burden Shifts: *Hunter v. Underwood*

(vote/crime MT)

-If a law is racially neutral, a challenger must show a discriminatory purpose and a discriminatory effect.

-If such proof is provided, the govt has the oppty to demonstrate that it would have taken the same action regardless of race. If Court accepts govt's justification, then

##### rational basis review.

-If Ct. believes that there is a discr. purpose, the law is treated as a race classification, and will be invalidated

-Strict scrutiny is unnecessary b/c persuading the Ct. that purpose behind law is discriminatory forecloses the govt's ability to show a compelling purpose for it.

### Equal Protection (cont)

#### 2. What is the appropriate level of scrutiny

Once classification is id'd, the next step is to id the level of scrutiny to be applied. SC has made clear that the differing levels of scrutiny will be applied depending on discrimination.

### Equal Protection (cont)

#### Strict Scrutiny

The law is upheld if it is proved necessary to achieve a compelling government purpose.

-The govt must have a truly significant reason for discriminating, and it must show that it cannot achieve its objective through any less discriminatory alternative.

-The govt has the burden of proof under strict scrutiny, and the law will be upheld only if hte govt pershuades the ct that it is necessary to achieve a compelling purpose.

-Strict scrutiny is virtually always fatal to the challenged law

##### 1. Discrimination based on race or national origin

2. Discrimination against aliens (several exceptions exist)



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### Equal Protection (cont)

#### Intermediate Scrutiny

Law is upheld if it is substantially related (important, need not be necessary) to an important govt purpose.

-Govt has the burden of proof

1. **Discrimination based on gender**
2. **Discrimination against nonmarital children**

### Equal Protection (cont)

#### Rational Basis

Law will be upheld if it is rationally related to a legitimate govt purpose.

Need not be compelling, important or necessary. The means chosen only need be a rational way to accomplish the end.

-Challenger has the burden of proof under rational basis review

-Minimum level of scrutiny that all laws challenged under EP must meet.

### Animus

Doesn't pass rational basis

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### Animus (cont)

*Moreno, Romer v. Evans*- Law motivated by animus against a particular identifiable group is unconstitutional.

### Animus (cont)

#### *Romer v. Evans*

-Repealed all gay protection laws

### Affirmative Action

Voluntary desegregation measures are a form of affirmative action

Current case law supports the notion that the board may freely revoke such measures. *Crawford*-CA const amendment overriding CA ct. demanding districts with de jure segregation take reasonable steps, was permissible b/c law was not a racial classification and states could say they would do no more than the 14th amdt. requires (only limited if school board when actions were greater than those required to comply w/ 14th amdt).

*Hunter v. Washington*-limited the powers of the school board in all instances from using race unless ct. ordered.

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### Affirmative Action (cont)

#### Parents Involved

Achieving racial diversity as a compelling interest in the context of elementary and high schools.

-*Kennedy Concurrence*: race could be taken into account as a means of ensuring equal opportunity or combatting racial isolation. If high degree of de facto segregation, achieving racial diversity should be regarded as a compelling interest.

-Social and educational benefits that accrue from a diverse student body.

Possible alternatives-

1. Strategic site selection
2. Drawing attendance zones with general recognition of the demographics of neighborhoods;
3. Allocating resources for special programs;
4. Recruiting students and faculty in a targeted fashion;
5. Tracking enrollments, performance, and other statistics by race

### Affirmative Action (cont)

#### Bakke

1. Diversity is a compelling interest in education and universities may use race as a factor to ensure diversity
2. But quotas or numerical quantification of benefits is impermissible. (Set aside quota of 16 students)

### Affirmative Action (cont)

#### Grutter

-Colleges have a compelling interest in creating a diverse student body, and they may use **Race, as one factor, among many** to benefit minorities and enhance diversity, strict scrutiny.

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### Affirmative Action (cont)

#### *Adarand*

Gave GC's on govt projects a financial incentive to hire minority businesses, strict scrutiny should apply

### Affirmative Action (cont)

#### *Fischer II*

1. Strict scrutiny of affirmative action admissions processes,
  2. Judicial deference to reasoned explanations of the decision to pursue student body diversity, and
  3. No judicial deference for the determination of whether the use of race in admissions processes is narrowly tailored. It then noted that the University of Texas' combined Top Ten Percent-holistic admission policy is unique and data on resulting diversity was limited; however, it noted that the university should regularly evaluate available data and "tailor its approach in light of changing circumstances, ensuring that race plays no greater role than is necessary to meet its compelling interest."
- University has an ongoing obligation to use available data "to assess whether changing demographics have undermined the need for a race-conscious policy; and to identify the effects, both positive and negative, of the affirmative-action measures it deems necessary."

### Affirmative Action (cont)

#### Narrowly tailored

No workable/less restrictive race-neutral alternatives would produce the educational benefits of diversity.



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### Affirmative Action (cont)

What if affirmative action measures are revoked?

**Can violate the 14th amendment** if new measures

1. Resulted in some **De Facto** racial segregation
2. Revocation is unconstitutional if that action shows itself to be *motivated by discriminatory intent*

*Keys:* absent laws requiring school segregation, plaintiffs must prove intentional segregative acts affecting a substantial part of the school system.

#### Restricts Affirmative Action

*Schuetz:* Upheld St. law that prohibited state action from discriminating or giving preferences based on race or gender in education, contracting, or employment.

*Hunter v. Erickson*-Ordinance is unconstitutional b/c it req'd laws regulating real estate transactions "on the basis of race, color, religion, national origin, or ancestry must first be approved by a majority of the electors voting on the question at a regular election before ordinance shall be effective

- upheld Amdt barred preferential treatment by ordinary legislative action to certain suspect classes
- Gov't attempts to make it more difficult to enact legislation or policies that would benefit racial minorities.
- The political process doctrine has little left after Schuetz.

### Political Process Doctrine

*Narrowed by Schuetz*

Manner in which statute was adopted was financed, injury or animus toward a particular group, can cause the statute to be invalid because of the way in which it was promulgated.

### Right to Contract

#### Economic Substantive Due Process

- Deprive one of right to pursue trade/contract w/ others
- Court has made it clear that economic regulations, laws regulating business and employment practices, will be upheld when challenged under DP clause so long as they are rationally related to serve a legit gov't purpose.



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### Right to Contract (cont)

#### *Lee Optical*

-State requirement that new prescriptions to fit lenses into new frames, but ready to wear sellers were exempt. If law had some rational purpose (law protected health and encouraged people to get eyes checked), the court would be extremely deferential.

### Right to Contract (cont)

#### *Skrupe*

- Upheld law prohibiting a person to engage in debt adjusting business, except incident to the practice of law even though effect put out debt adjusters who were not lawyers out of business. Lochner doctrine has been discarded. DP clause does not protect a right to practice trade/contract even if anticompetitive, gives deference to legislature.

### Right to Contract (cont)

#### Equal Protection

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### Right to Contract (cont)

#### Privileges and Immunities

No state "shall abridge the privileges or immunities of citizens of the US.

- Argued this is appropriate place for safeguarding substantive rights.

*Slaughterhouse Cases*- However, Ct gave the clause an extremely narrow interpretation that has prevented it from being used to safeguard individual liberties. Thus Ct turned to DP clause to protect substantive rights beyond navigating waters and traveling state to state.

-Thus, the Privileges and Immunities Clause of the Constitution protected only those rights guaranteed by the United States, not individual states.

### Right to Contract (cont)

#### 9th Amendment

-Ct has rarely invoked. Justifies the court's decisions for safeguarding unenumerated liberties. *Griswold v. Connecticut*-

Goldberg's concurrence, relied upon to justify invalidating a law prohibiting use of contraceptives

### Right to Contract (cont)

#### Takings Clause

Regulation go too far, it can look like a gov't taking.

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### Right to Contract (cont)

Discussion:

Should extreme deference be overruled b/c it goes too far? Should there rational basis with bite (look to alternatives b/c overinclusive/underinclusive)?

### Fundamental Right

#### Equal Protection

If right is protected under EP, issue is whether the gov't's discrimination as to who can exercise that right is justified by a sufficient purpose

-If law denies the right to some, while allowing it to others, the discrimination can be challenged as offending ep or the violation can be objected to under due process

-Gov't distinguishes among people based on specific characteristics, or exercising right to procreate, vote, access to judicial process, and interstate travel

### Fundamental Right (cont)

#### Due Process

If right is safeguarded under due process, the constitutional issue is whether the gov't's interference is justified by a sufficient purpose.

-If law denies right to everyone, then due process would be best grounds for analysis.

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### Fundamental Right (cont)

Fundamental Right

Strict Scrutiny

### Fundamental Right (cont)

Not a fundamental right

Rational Basis

### Fundamental Right (cont)

**Right to Procreate**

*Skinner*- Struck down criminal 3 strikes, sterilization law. (exception for white collar crime: EP violation)

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### Fundamental Right (cont)

#### Right to Marry

*Loving v. Virginia (interracial):*  
*Zablocki v. Redhail (child support):* Decision to marry is "placed on the same level of importance as decisions relating to procreation, childbrith, child rearing, and family relationships"  
*Obergefell*

### Fundamental Right (cont)

#### No Right to Education

*Rodriguez-* education itself is not a fundamental right; (But see Plyer-EP argument quasi-suspect class)

### Fundamental Right (cont)

#### Right to Vote (Participate in political process)

*Harper-* Poll tax;  
*Dunn-* 1 yr residency  
*Davis v. Bandemer-* political question upheld  
*City of Mobile v. Bolden-* No right to gete your candidate elected (But See, *Rogers/Gomillion*)

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### Fundamental Right (cont)

#### Right to Privacy

### Right of Privacy

Under SDP, there is a gen. right to privacy

Within this right to privacy is the right to decide matters that are very personal: reproduction, sexual orientation, how to raise a family, refusing medical treatment.  
-If a court finds a fundamental right, the regulation is subject to strict scrutiny.  
Otherwise it is subject to rational basis.

### Right of Privacy (cont)

Individual must be free from unwarranted gov'tl intrusion into matters fundamentally affecting his/her person.

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### Right of Privacy (cont)

#### *Griswold*

-Marital Privacy (contraception): privacy in such a relationship was fundamental, state could not impose regulations to interfere with it.

### Right of Privacy (cont)

#### *Eisenstadt*

-Sale of bc pills to unmarried people; Individual's right, married or single, to control reproduction as a fundamental right, EP- treats marrieds and unmarrieds differently: RB- no legit purpose, unreasonable to prescribe pregnancy and birth of unwanted child as punishment for sex; not valid health measure

### Right of Privacy (cont)

#### *Roe v. Wade*

- Right to privacy also encompasses a woman's decision about what to do with her own body

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### Right of Privacy (cont)

Right to direct upbringing and education of children

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### Right of Privacy (cont)

#### *Washington v. Glucksberg*

No fundamental right to assisted suicide or right to self-destructive medical treatment b/c no history supporting such a right. Govt has a legit interest in preservation of life;  
-No right to access assistance to medical treatment that the state forbids

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### Right of Privacy (cont)

#### *Cruzan*

Right to refuse medical treatment (but not fundamental.): legit seeking to safeguard the personal element of this choice through the imposition of heightened evidentiary req't. (But smallpox, anti-psychotic inmates is okay)

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### Abortion

One current running through many of the important abortion decision is how dependent the analysis is upon changes in medical technology.

### Abortion (cont)

#### *Roe*

Original trimester framework was tied to the fact that at earlier stages of the pregnancy- especially the 1st trimester- the fetus was not viable, and therefore the gov'ts interest in the fetus' life was lower.

### Abortion (cont)

#### *Casey* (joint plurality)

In part due to medical advances, focus is on viability whenever it occurs during the pregnancy instead of the rigid trimester framework.

-At viability, the state's interest in the life of the fetus are much greater.

-Established the "undue burden" std. for measuring whether restrictions on abortion are constitutional.

-Any restrictions which are found to impose an undue burden on a pregnant woman will be struck down.

-Gov't has a compelling interest in preserving/protecting the fetus post-viability.

Facts: Upheld a requirement for women who seeking abortions must wait 24 hours after receiving brochures of non-misleading info to get the procedure (like the profound respect for human life), not that the woman must read the brochures to receive treatment..

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### Abortion (cont)

#### *Hellerstedt*

law with the **purpose or effect** of placing a substantial obstacle in the path of a woman seeking an abortion imposes an undue burden on a woman's right to have an abortion and is unconstitutional.

Facts: Texas law requiring doctors to have admitting privileges to give abortions and for abortion clinics to have ambulatory surgical centers b/c the regulation only impacted the health of less than .25% of all abortions but closed most abortion clinics.

### Abortion (cont)

#### *Zauderer*

State can compel factual speech that is reasonably related to a legitimate state interest.

### Abortion (cont)

#### *Stenberg*

Making the woman wait before terminating her pregnancy without any health exceptions is unconstitutional

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### Abortion (cont)

#### Issues:

- Other serious obligations (vague/broad).
- Interest the woman has in not being forced to see a pregnancy brought to term if conception was the result of rape or incest.

### Abortion (cont)

#### **Cruzan**

- Constitutional due process right to refuse unwanted medical treatment.

### Abortion (cont)

#### Equal Protection

- Gender-based laws since only women get pregnant.
- Intermediate Scrutiny (Craig): whether the gov't has an important interest, and whether the means are substantially related to the ends it seeks.
- Courts have stayed away from this mode of analysis in abortion cases, instead sticking to the viability/undue burden framework

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### Abortion (cont)

#### *Gonzales*

Respect for human life is legit. gov't interest.

### Abortion (cont)

#### *Maier v. Roe*

Gov't can favor childbirth over abortion

### Abortion (cont)

#### *13th Amendment*

Level of intrusion over bodily integrity, concerning both privacy and liberty prongs of substantive due process, is akin to being in slavery. More broadly, women's right is invaded. Should have the right to matters of childrearing and when to raise a family (Eisenstadt; Carey). Even narrowly, then it is equally clear that women have the right not to be an incubator.

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### Religion

#### Free Exercise

*Smith*: Free exercise does not relieve an individual's from the obligation to comply with a "valid an neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion proscribes (or proscribes)

### Religion (cont)

#### Mandatory Accomodation

**State Law** - Unless state has RFRA-type statute, mandated accomodation claims would lose.

**Fed'l Law**-RFRA is applicable, necessitating a strict-scrutiny like analysis of the imposition

### Religion (cont)

#### Permissible Accomodation

-States are free to enact statutes that voluntarily (as a permissible accomodation) raise the level of scrutuiny to be utilized in apply laws of general applicability to persons making free speech claims. That is what Congress has done with RFRA w/ regard to federal law, and has been upheld by S.C.

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### Religion (cont)

#### **Hobby Lobby**

RFRA violated when CHCs provide insurance coverage for contraceptives that violates its owners' religious beliefs.

- Corporations can claim to have religious beliefs and religious free exercise, there were less restrictive alternatives--congress could pay, or allow to opt out.

### Religion (cont)

#### Religious Establishment

*Town of Greece*- Govt cannot act as an arbiter of religious speech;

*Lemon test*- Lacks any clear secular purpose

Note: Endorsement of particular religion can interfere with the free exercise of everyone else's religion

*McGowan v. Maryland*- Sunday laws have been upheld by the court, so long as administered w/ secular purpose and effect (providing a uniform day of rest)

*Braunfeld v. Brown*- even disadvantaging Jewish people's business, general law and does not impose a burden any more than possible

-**Gov't Display**-Would a reasonable observer seeing the display conclude that the gov't was endorsing a religion in general or in particular

**Impermissible Display**

*Lynch v. Donnelly*- mere recognition of a holiday

*Van Orden v. Perry*- Surrounded by other items reflecting a wider array of faiths and cultures and serves an obvious civic purpose

**Permissible display**

*McCreary County*- display gives special and permanent prominence to a religious symbol of a particular sect

### Speech

Under 1st amdt. jurisprudence,

When the gov't regulates speech, it must be determined if it was content based or content neutral



### Speech (cont)

#### Content Based

Gov't restricts the communicative impact of the speech. (doesn't like what ad contains, could place ad w/ different content)

*Reed v. Town of Gilbert*

### Speech (cont)

#### Content Neutral

### Speech (cont)

#### Time, Place, Manner Restrictions

Ability of the gov't to regulate speech in a public forum in a manner that minimizes disruption of a public place while still protecting freedom of speech.

#### Buffer Zones -

*Madsen* - fixed amt. of feet, noise restrictions, struck down sign bans

*Schenck* - buffer zones cannot be "floating" following people leaving.

*Hill* - unlawful to "knowingly approach" w/o that person's consent

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### Speech (cont)

#### Viewpoint Discrimination

Allowing similar type of content, but regulating it b/c it conflicts with own views

### Speech (cont)

What is speech?

Chaplinsky: Unprotected under dangerous ideas or low-value speech

If Protected: Regulation must advance a compelling strong interest and it is narrowly tailored to that interest. It must show that there are no less restrictive means to advance the interest and this ban is necessary to achieve that objective.

### Speech (cont)

Categories of Unprotected speech

Can be regulated: fighting words, libel, private info, commercial advertising, obscenity, lewd/offensive speech, hate speech, or child porn

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### Speech (cont)

#### Incitement

*Brandenburg Test*: Unprotected speech if

- 1. Express advocacy of a law violation;**
- 2. Advocacy must call for an immediate law violation**
- 3. Law violation must be likely to occur**

*Holder v. Humanitarian*-Statute at issue prohibited providing "material support" to organizations classified as terrorists.

Material support does not encompass speech, so no 1st amdt violation.

*Dennis*-exception (plurality/communism):

Probability material, imminence not required:

Balancing approach if the gravity of the potential evil/harm enough (overthrow of govt), speech advocating it can be punished w/o any showing of likelihood or imminence

### Speech (cont)

#### True Threat

*Virginia v. Black*- particularly O'Connor's concurrence, state may punish true threats even if in doing so the state is distinguishing b/w different types of intimidating acts.

*9th circuit planned parenthood*- state may punish statements which would be objectively seen as a threat and which would be understood as a serious intent to harm or assault, whether or not the party intended the harm to actually occur

*Elonis*-More than negligence

### Speech (cont)

#### Provokes a hostile audience reaction

*Skokie*- Speech must anger people to the point that it would create a clear and present danger (imminence) of a riot.

-Audience must be controlled before the speaker

*Feiner*- Only once held that speaker could be stopped, every other case has been distinguished as "far cry from *Feiner*"

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### Speech (cont)

#### Fighting Words

*Cohen*- Must be directed at a person, not able to avert their eyes; Must rise to the level of words that by their very utterance would inflict injury or tend to incite an immediate breach of the peace or provoke an avg person to retaliate

### Speech (cont)

#### Hate speech

R.A.V. - burning a cross on someone's lawn

### Speech (cont)

#### Discloses classified info

**Prior Restraint** *NYT*- Gov't has a heavy burden against prior restraint and it has to cause grave and irreparable danger. Prior restraints are much more restrictive b/c speech never get disseminated at all, so courts are very weary so subject it to very high level of scrutiny

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### Speech (cont)

Disclosure of private info

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### Speech (cont)

#### Obscenity

*Miller Test:*

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

### Speech (cont)

Lewd/Offensive

Zoning Ordinances- *Renton*

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### Speech (cont)

#### Captive Audience

*Cohen*- "Fuck the Draft" - will be protected unless people cannot avert their eyes

### Speech (cont)

#### Vague and Overbroad

- Must have a limiting principle (tied to a specific crime, or specific description of category)

### Speech (cont)

#### Public Forum

*Perry*- the constitutionality of a regulation of speech depends on the place and the nature of the govts action.

#### Which forum?

##### 1. Traditional Public Forum:

-Public Streets and parks are the quintessential public forum;

-Govt may not prohibit all communicative activity

1. If state enforces a content-based exclusion, must show that regulation is necessary to serve a compelling govt interest and is narrowly drawn to achieve that end

2. If regulating speech based on time, place, manner must survive strict scrutiny and be content neutral and narrowly drawn.

*Schneider* (blocking traffic)- legit gov't interest in preventing littering was not enough to close off public to speech

*Mosley* (picketing race disc. labor exception)- Different treatment violated EP (must treat labor/race picketing equally) and 1st amdt as unconstitutional subject matter restriction on public sidewalks

*Grayned*- no picketing during school hours served a compelling interest narrowly drawn

##### 2. Designated Public Forum

-Gov't must be both subject matter and viewpoint neutral and must have an important interest in regulating speech

-*Cornelius*- creation of a designated forum has to be intentional. Cases are inconsistent. Whether is a designated forum ought to be based on how wide the entity involved opens up for speech. -Speech restrictions are subject to the same strict scrutiny as restrictions in a traditional public forum

##### 3. Limited Public Forum:

*Christian Legal*- Choices on subject matter and speaker id must extend access to the limited forum "only to other entities of similar character"

-Regulation allowed as long as it was reasonable and viewpoint neutral

**4. Non-Public Forum:** Collapsed nonpublic into limited public forum since the test for both would be the same: Govt regulation is allowed if it is reasonable and viewpoint neutral.

*Adderly v. Florida*- Can prohibit speech in areas outside prisons and jails. (also not public utility poles, military bases)





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### Speech (cont)

#### Government Speech

*Rust v. Sullivan* (no fed funds for abortion):  
Dr.'s not compelled to adopt the government's speech (through activity),  
-Gov't could decide what activity to subsidize, what it believes to be in public interest. Does not infringe on a fundamental right/govt doesn't have to fund abortion  
Blackmun dissent- discriminates on the basis of viewpoint.  
Issues: mother's life in danger/gag rule on dr's credibility  
*Pleasant Grove City v. Summum* (religious statute at park)  
*Walker v. Texas*(Conf. lic. plate)  
*Matal v. Tam* (TM of slant eyes)

### Speech (cont)

#### Unconstitutional Condition

-Govt may not expressly condition a benefit (federal funds) on the req't that the recipients forgo constitutionally protected speech.  
*AID v. Open Society International*(profess specific opinion/belief about prost. goes beyond limits of fed'l funding)  
-Undermines Rust by holding speech in that case was an unconstitutional condition on Open Society's receiving a federal grant (adopt a particular view of political concern)  
*Rosenberger*- cannot condition funds if speech has religious content (viewpoint discrimination)  
*LSC v. Velasquez*- litigation is forum, all remedies must be available to clients; viewpoint discrimination

### Speech (cont)

#### Expressive/Symbolic Conduct

Regulating non-verbal conduct, with an incidental affect on speech  
-When speech and nonspeech elements are combined in same conduct, a sufficiently important gov'tl interest in regulating hte nonspeech aspect can justify incidental limits on 1st Amdt. freedoms;  
*O'Brien* (draft card burning):  
1. Must be within constitutional power of the government;  
2. It must further an important or substantial governmental interest;  
3. The governmental interest must be unrelated to the suppression of free expression; and  
4. The incidental restriction on 1st A freedoms must not be greater than is essential to the furtherance of that interest

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### Speech (cont)

#### Libel

*NYT v. Sullivan*(1) that he/she is a public official; (2) case by clear and convincing; (3) falsity of the statement; and (4) that defendant acted with "actual malice"

*Gertz*: • Gertz is not a public official or public figure because although he is well known in "some circles," he has not achieved "general fame or notoriety" in the community

*Falwell*- Exception for comedy/humor/satire

### Speech (cont)

#### IIED

*Falwell*

*Snyder v. Phelps*- speech while offensive involved a matter of public concern at the heart of 1st amdt protection.

**Public concern**- relating to any matter of political, social, or other concern to the community, or when it is of legit. news interest; not purely private concern.; lawfully present and not disruptive.

### Remedy

#### Judicial monitoring

May be appropriate and necessary where problem is a racist application of the law, so as to avoid requiring repeated lawsuits to protect everyone affected.

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### District Drawing

#### 1. Unconstitutional Racial Reasons

*Shaw*-If a districting scheme was so irrational on its face to be explainable only as an effort to segregate voters on the basis of race, strict scrutiny would be triggered

*Easley*: Not invalid for racial reasons as they stand now.

Look at shape, representation, discriminatory intent by history, technology

### District Drawing (cont)

#### 2. Unconstitutional as Political

##### Gerrymandering

*Vieth (plurality)*- rejected the view that the court could ever intervene on the basis of such an argument, believing it to be a political question unanswerable by the judiciary. Process of creating districts includes many considerations, politics and city borders, which aren't ordinarily enforceable by the ct.

-Ct. did not entirely foreclose on relief if some limited and precise rationale were found to correct an established violation of the const.

##### *Perry*

There has never been more than 4 votes for a holding that its a political questions.

### Freedom of Association

*NAACP v. Alabama*- Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of liberty assured by DP of 14th amdt., embraces freedom of speech

Integral to speech and assembly under 1st amdt.



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### Freedom of Association (cont)

Rotary club of Duarte, NY State club Assoc;  
BSA v. Dale

These cases acknowledged that the laws interfered w/ freedom of assoc.

- Although exclusions of minorities and women would cause harm, can discriminate in limited circumstances:

1. Activity is "intimate association" a small private gathering, freedom of association protects the right to discriminate.
2. Right to discriminate if discrimination is integral to expressive activity (no black people in KKK or jews in nazi party, b/c discrimination is a key aspect of their message.)

### Freedom of Association (cont)

#### *Roberts v. US Jaycees*

-Freedom to associate is not absolute and that infringements on that right may be justified by regulations adopted to serve compelling state interest, and achieved through means significantly less restrictive of associational freedoms.

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