# Con. Law II Outline

**Miller Moreau**
**Campbell Law School**
**Professor Wallace**
**2020**

## Chapter 3. Federalism:

### -Article IV Federalism

-Provisions that bind the states to another as one union

- **Section One: Full Faith and Credit**: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state"
  - Final judicial decrees of other states are recognized and enforced, but not the laws in themselves
  - A state is free to apply its own laws to any matter in its courts as long as some connection to that state means it would not be fundamentally unfair for that state to apply its own laws
    - Example-Marriage in NC but divorce in VA, NC still recognizes VA divorce judgment
  - *Lemmon v. The People*
    - Slave-owners from VA try to travel to Texas, go through NY (free state) with their slaves, owners then get writ of habeas corpus
  - Issue 1) Was NY bound to honor the Lemmons' claim to dominion over their slaves as a matter of the FF&C Clause? (see note 4)
    - No, FF&C enforces judgments, not laws of slave state → but slaves become free based on NY judgment
    - Owners can't carry laws of VA into NY with them
  - Issue 2) Was NY bound to honor the Lemmons' claimed rights of property under the Privileges and Immunities Clause?
    - No, NY must only treat slaves/owners same as they would their own citizens' fundamental rights, which is exactly what they did (slavery was outlawed there)
      - Right to slavery not a fundamental right
  - Since Lemmons took slaves voluntarily → fugitive slave clause didn't apply
    - If owners had already returned slaves back to VA → probs wouldn't have been freed

- **Section Two, cl. One: Privileges AND Immunities**: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states"
  - Different than 14A Privileges or immunity clause
  - Rule : State must accord out-of-staters the same fundamental privileges and immunities that it gives to its own citizens
    - Example- cannot discriminate against out of stators w/ respect to civil rights, must give out of stators rights it gives to its OWN citizens
      - Can still discriminate against out of stators w/ respect to political rights and state resources jointly-owned by state citizens
        - Right to vote, stand for elective office, and serve on juries
  - What are "privileges and immunities"?
    - See pg. 710, 719-20

        - Natural/common rights
    - *Lemmon v. The People*
    - Issue 2) Was NY bound to honor the Lemmons' claimed rights of property under the Privileges and Immunities Clause?
        - No, NY must only treat slaves/owners same as they would their own citizens' fundamental rights, which is exactly what they did (slavery was outlawed there)
            - Right to slavery not a fundamental right
    - Since Lemmons took slaves voluntarily → fugitive slave clause didn't apply
        - If owners had already returned slaves back to VA → probs wouldn't have been freed
- **<u>Section Two, cl. Two: Extradition Clause</u>**:
    - Slaves who escape to another state "shall be delivered up" on claim of the person to whom that service may be due

- **<u>Section Two, cl. Three: Fugitive Slave Clause</u>**: " No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due. "
    - *Prigg v. PA*
        - PA anti-kidnapping law prohibited self-help to retrieve fugitive slaves and required legal proceedings to retain slaves
            - Fugitive Slave clause invalidates PA law affecting fugitives
            - Yet it provides Congress the power to pass legislation for rendition of fugitive slaves
                - Thus → this power preempts state power even if Congress has not exercised its legislative power in a manner preempting these state laws
            - Likely that textualist approach would not have struck down state law seen in Prigg

- **<u>Section Three: Admission of New States</u>**:

- **<u>Section Four: Guarantee Clause</u>**: Guarantees every state a republican form of government

- **<u>Territories Clause, New States Admission Clause, and citizenship</u>**
- *Dred Scott*
    - Scott was slave in VA, owners sell him to Emerson
        - Emerson brings Scott to areas that barred slavery by national legislation, lets Scott marry in WS (free state), Emerson later dies in LS and his wife inherits Scott.
        - Scott sues wife in MS fed court trying to get his freedom → MS state law (diversity jurisdiction) didn't recognize him as citizen based on MS P&I
    - What "citizenship" rights each state may confer that are binding on other states?
        - 1) Court: African Americans are "inferior race", can't sue or be part of relevant political community
            - i) Invents national citizenship requirement. At the time, state citizenship provided platform for national citizenship (before 14A)
            - ii) Even though "foreign citizens" still have the right to sue

- 2) Whether one state (MO) must apply another state's law (IL) to adjudicate the legal status—slave or free—of someone before its courts?
- 3) Whether Congress has plenary legislative power for territories under the Territory Clause?
- 4) Whether the Missouri Compromise is unconstitutional? (substantive due process)
  - a) Unconstitutional because it deprives slave owners of their property without due process
  - b) Since Scott is not a citizen, court didn't actually have jurisdiction → proceeded anyways to invalidate Missouri compromise for political reasons
  - c) Court says territories clause is limited to territories existing at the time of its adoption
- Scott probs would have won if he brought suit in IL or WS, but didn't have that judgment from the free
  - If Scott would have sued in Illinois, would have been similar to *Lemmon v. The People*
    - Gained freedom in Illinois, and if Missouri tried to make him a slave, would have violated the Full Faith and Credit Clause

<u>**Chapter 6. Reconstruction Amendments**</u>:

- **Thirteenth Amendment** (1865)
  - Forbids slavery and involuntary servitude (repudiates Missouri Compromise Holding of Dred Scott → owning slaves is not a right)
  - Regulates private conduct as well as government action
  - Grants congress power to regulate
- **Fourteenth Amendment** (1868)
  - Establishes substantive protections (citizenship, privileges or immunities, Due Process, Equal Protection) which can be enforced by courts against state action
    - Not federal or private
  - Grants Congress the power to legislate these types of acts
  - **Requires State Action!**
  - Repealed ⅗ compromise
    - But reduces representation for states that wouldn't let blacks vote
  - *Slaughter House Cases*: Soon after 14A, NOLA monopolized the butcher industry to abate an ongoing nuisance problem, butchers association sued alleging that the law violated the servitude substantive due process, Privileges & Immunities Clause, and the EP Clause
    - Due Process: Fundamentally unfair
      - Arg.- law strips butchers of life, liberty
      - Dismissed quickly
    - Equal Protection?
      - Court limits EP to race
    - Privileges <u>or</u> Immunities?
      - Court focused on race issues 14A was meant for, N/A here
      - P or I Clause only protects narrow range of rights related to national citizenship
        - Federal rights: assert claims, free access to seaports, pursuit of LLP, peaceably assemble, redress grievances, habeas corpus, use of waters of the U.S.
        - But – Did not explicitly hold BOR doesn't apply to the states

            - *OG understanding of P or I seems to include BOR, court was just trying to preserve discriminatory practices in this case
            - Modern view incorporates BOR through Due Process Clause

-**Equal Protection Clause**

- *Strauder v. WV*, blacks not able to serve on jury
    - 14A prohibits states from enacting laws that deny any of its citizens equal protection under the law based on rights
        - Purpose of amendment was for race, but court did not expressly hold that it was limited to that
        - 14A prohibits government racial discrimination in ANY form
    - Decision would/should have been same if D was white

- **Enforcing Reconstruction Amendments**
    - 13A: Congress can enforce prohibition of slavery and involuntary servitude even by private actors
    - 14A: Congress can enforce state action based on broader prohibitions of discrimination and denial of civil rights
- *Civil Rights Cases*: Challenge to Civil Rights Act of 1875 (illegal for railroads, inns, places of public accommodation or amusement to discriminate—why these places?)
    - Held:
        - (1) 13th A prohibits "badges and incidents of slavery," but not individual discrimination;
            - Court found these laws not to be "badges & incidents of slavery"
        - (2) 14th A did not authorize Congress to forbid discrimination by private persons—limited to "state action"
            - Problem: Ignored "state inaction" to protect civil rights of the black freedmen and white Republicans
                - i.e., unequal enforcement of laws already on the books that protect against private violence (see note 4, pp. 1320-21)
    - Better view: 14th A does not apply to private action per se, but to state action that discriminates and state inaction that fails to protect person's civil and property rights from private violence

- **State Action Doctrine**
    - Can Congress regulate *private action* under Reconstruction Amendments?
        - Answer: Generally YES under 13th Am (see note 1, p. 1321), but generally NO under 14th Am (see *Civil Rights Cases* and note 2, p. 1321)
    - What constitutes "state action" under 14th Am?
        - Easy: Law, regulation, court decision, government act
        - Hard: Private actor harms someone in way that would constitute a constitutional violation if done by government actor and there is reason to impute private harm to the government
    - Repeated themes in Supreme
    - **Amendment 14, Section 5.** The Congress shall have power to enforce, by appropriate legislation, the provisions of this article
        - Example: Deputy Sherriff, off-duty, chases friend with his cop car. Beats and handcuffs the man. Court will look to see if perpetrators actions are fairly attributable to state of action

- **14A Brief Review of Early SCOTUS Cases**
  - 14th A does NOT apply Bill of Rights to the states
    - *Slaughterhouse Cases*, *Cruikshank*
  - 14th A applies to state action, not private action
    - *Civil Rights Cases*
  - 14th A applies ONLY to those whose rights have been violated on account of race
    - inferred from *Cruikshank*
  - BUT 14th A prohibits governmental racial discrimination in any form
    - *Strauder*

- **Segregation Cases**
  - *Cummings*: "Separate but equal" satisfies 14th Am when it is reasonable
    - (e.g., when state is merely redistributing scarce resources)
  - *Giles*: Black disenfranchisement—Supreme Court says federal courts are powerless to effect change in southern practices
  - *Berea College*: Supreme Court upholds KY's mandatory segregation law, as applied to private schools organized as corporations, on ground that states have plenary power to amend corporate charters they have granted
    - *Plessy* reasoned that social equality is not the same as the political equality protected under 14A
      - Upholds "reasonableness" test

- **Desegregation Cases**
  - *Korematsu*: developed strict scrutiny standard for race-based classifications
  - *Brown I*: Separate but equal is inherently unequal, segregation violates EP clause
    - Based on social science, bad reasoning
    - Wallace: 14A was meant to protect against this type of segregation
      - This case should have overruled Plessy but didn't explicitly
  - *Loving v. VA*: interracial marriage barred, but equally applied to both races
    - Court: doesn't matter if law is equally applied, racial classification per se violates EP
  - *Brown* and *Loving* establish the **modern rule**: The government may not discriminate on the basis of explicit racial classifications

- **Modern Equal Protection Clause**
  - 14A: No state shall deny "equal protection of the laws"
  - *Bolling v. Sharpe*: Fifth Amendment Due Process Clause includes "equal protection"
  - Clause is implicated by laws or regulations that improperly classify or draw distinctions (discriminate) by imposing special burdens on OR granting special benefits to some persons but not others
    - Discrimination must be against member of protected class based on personal characteristic (e.g., race, sex, religion, national origin, etc)
  - *Yick Wo* (1886): facially-neutral laws still can be racially discriminatory if they have a racially-discriminatory motive.
    - Here, SCOTUS infers motive from application
  - Two strands of EP analysis:
    - 1) laws that discriminate against persons;
    - 2) laws that discriminate against exercise of fundamental rights

- Proper ways to "discriminate" (ie- drivers license age) still exist as long as not "invidiously"

- Types of invidious discrimination:
    - 1. Facial—classification made on face of law (typically classification or distinction made on basis of protected characteristic)
    - 2. Underlying motivation or purpose (*Griffin*)
        - often inferred from discriminatory application of law (*Yick Wo* not granting laundry licenses to Japanese people)
    - NOT Impact or effect (de facto)

- *Washington v Davis*: Black applicants to be cops often failed test. Neutral legal rule or requirement that simply happens to produce a disparate impact on different races does not necessarily violate the EP Clause
    - 1. Discriminatory treatment (intended) vs. discriminatory impact (unintended consequence)
    - 2. Must show discriminatory intent (purpose or motive)
        - Bottom line is that EP requires purposeful discrimination
            - Difference between discriminatory treatment and discriminatory impact
                - "Impact" does not violate EP without showing intent

- Modern Equal Protection Analysis
    - 1. What is the classification, member of protected class?
        - a. Race, gender, age, sexual orientation, etc.
    - 2. Appropriate level of scrutiny? (purpose → means/end) Typically:
        - a. Strict for suspect classifications: race, national origin, religion, alienage, marital v. nonmarital (exceptions for aliens l8r)
            - i. Gov. must have compelling reason for classification and no less discriminatory means to achieve that purpose (gov. burden)
                - 1. If any other less discriminatory way to do it → government fails
        - b. Intermediate semi-suspect classifications: sex, non-marital children .
            - i. Gov. must have significant or important purpose and means must be substantially related to achieve that purpose (narrowly tailored)
                - 1. Significant/important interest is slightly more allowing than compelling, very little over-inclusiveness is tolerated
        - c. Rational basis: Age, economic status, disability, sexual orientation . every other law, just must be "rationally related to government purpose"
            - i. Not what is "actual purpose" of the law, just if any conceivable purpose
    - "Under-inclusive" laws are fine because they are a "step" towards achieving the desired purpose
        - But- can point to if government purpose is actually legitimate

- **Affirmative Action**
    - Racial classification to benefit minorities, thus → Strict scrutiny triggered
    - OG justification: AA helps offset disadvantages resulting from history of racial discrimination
        - Education: creates diversity

        - Contracting: Remedying economic disadvantages from history of racial discrimination
    - *Regents of UCA v. Bakke*: dumbass liberal school had "quota" for number of minorities it had to accept each year, Court struck down
        - Rejected racial balancing (i.e., quotas) as sufficient justification for race discrimination— consideration of race permissible only as modest "plus" factor only
            - Racial balancing has changed to be more permissible as titled "achieving diversity" through this modest plus factor
        - Rejected justifying minority racial preferences on ground of general societal race discrimination
            - This "remedying" justification maybe could have been effective if this specific school had a bad history of discrimination in its history
    - *Gratz & Grutter*
        - Gratz (high amount of points) struck down because race factor "put thumb on the scale too much" as it helped minorities overwhelmingly → unconstitutional
            - Gave each minority a number
        - *Grutter*: Race preferences in law school admissions program constitutional. Program justified because not about remedying, but achieving the actual government interest while not using a quota system
            - Was individualized approach
            - Always think- any less discriminatory means to achieve diversity?
    - Other Race Preference Cases
        - *Parents Involved in Community Schools v Seattle School District* (2007): Race preferences in public school student assignments held unconstitutional (distinguish Grutter?)
        - *Schuette v. BAMN* (2014): Upholds Michigan's Prop 2 (amending state constitution), which was adopted after Grutter and prohibits use of race-based preferences in admissions for state universities
        - *Adarand Constructors v. Pena* (1995): Affirmative action in federal contracting and licensing—pp. 1414-30
            - First case outside of educational context
            - Limits AA, in this context, to remedying effects of racial discrimination
                - Here, economic disparities
        - Wallace: thinks AA is unconstitutional because it stigmatizes minorities as inferior
            - But thinks it is constitutional in context of remedying past discrimination
            - "The way to stop discriminating on the basis of race is to stop discriminating on the basis of race."

- **Sex Discrimination**
    - Key to applying EP here is to sort out respects in which men and women are alike from the aspects in which they are truly, necessarily different based on biological manner
        - When they are inherently different → tightly limit government sex-based classification to those circumstances
    - Level of scrutiny? Used to be analyzed under rational basis until *Craig v. Boren*, law that barred men from buying 3.2% beer until they were 21 but allowed women to do so at 18 was unconstitutional

        - Intermediate scrutiny applied: gov. Interest was safe roads, men were 10x more likely to drink and drive
            - Problem here was that the age group was barely any different in bad driving rates
            - Over-inclusive as it kept many law-abiding beer drinkers from purchasing the beer
                - Under-inclusive as it didn't prohibit the consumption of alcohol among 18-20 y/o men
                    - (didn't satisfy the end)
    - U.S. v. VA, when sex discrimination is unconstitutional → same-sex education
        - Essentially outlaws higher education same sex education programs if there are major differences between the sexes and someone of the opposite sex applies
            - Much of this was based on physical demands of the military institute
        - Appears to shift scrutiny analysis for sex classifications closer to SS
            - Government burden was raised to "exceedingly persuasive justification"
            - Wallace doesn't think that's right
                - Also doesn't think this would apply at lower level institutes
    - Biological differences?
        - Scotus has upheld laws against EP challenges based on biological differences
            - Example – pregnancy, sex-specific statutory rape laws (ie-only men get charged)
    - Other cases (based on differences of capabilities)
        - Only men pay alimony upon divorce? Unconstitutional
        - Property tax exemptions for widows? Constitutional

- <u>Rational Basis Review</u>
    - Basic test: Law must be rationally related to a legitimate government purpose (presumption of rationality)
    - Applies to social and economic legislation that does not employ suspect/semi-suspect classifications or impinge on fundamental rights—
        - e.g., *Railway Express Agency v New York* (public safety); *Williamson v. Lee Optical* (public health)
    - "Legitimate purpose" is any conceivable legitimate government purpose, even if not the actual purpose of the law
        - Unlike intermediate and strict, this is about any potential purpose
            - Intermediate and strict are actual purpose
    - "Rationally-related" means: over- and under-inclusiveness irrelevant
    - Deferential review assumes that correction of socio-economic legislation is best left to political process, where gains and losses can be expected to even out over time
    - Exception: Heightened rational basis scrutiny (rational basis "with a bite") RARE
    - When RB would otherwise be appropriate, but factors are present that warrant a higher level of scrutiny: animus, indicia of suspectness, or an important right is affected
        - Wallace: Apply if law can't be explained by anything other than bare desire to harm
            - Look for other government purpose
        - Burden shifts to government, does not allow over/under-inclusiveness
        - Looking for when government acts with some sort of animosity towards someone

        - Difficult to apply b/c requires court to infer motive without evidence of real hostility
            - Never really direct evidence
    - *Romer v. Evans*: (before gay marriage was fundamental right)
        - Anti-discrimination laws repealed based on vote
        - Court avoids whether or not sexual orientation deserves heightened scrutiny → strikes down based on animus doctrine
            - Hostility towards gays, motivation of amendment is just to harm them
            - Equates sincere religious or secular moral opposition with hatred
        - How court inferred animus here
            - Text expressly singled out "homosexuals, lesbians, bisexuals" and withdrew protection from them but no others •
            - CO amendment barred all government action (legislative, executive, & judicial) at any level that protected gays •
            - CO amendment permitted citizens to obtain nondiscrimination protections at local level, except for gays who were forced to see constitutional amendment by supermajority vote to gain same protections
            - SCOTUS described CO amendment as "unprecedented in our jurisprudence"—no similar laws passed anywhere else •
            - SCOTUS held that the CO amendment swept so broadly that it did not serve any legitimate purpose

- <u>Other EP Classifications</u>
    - Ethnicity, national origin, alienage all get strict scrutiny
        - Alienage exception: RB is used if:
            - Classification is related to government or political functions;
                - Citizens may retain right to govern and carry on a government function
                    - Example – state can only allow citizens to be cops or teachers
            - Federal laws discriminating against aliens; and
            - Discrimination against illegal aliens
    - Illegitimacy (nonmarital children): strict scrutiny for marital vs nonmarital children (Levy) and intermediate scrutiny among nonmarital children
    - Sexual orientation: Rational basis
        - But- often gets treated as Heightened (animus doctrine)
        - Age, socio-economic status also not suspect classes
    - *Kotch v. Board of River Pilot Port Commissioners*: EP doesn't ban discrimination on basis of birth & blood (i.e., nepotism)
        - Man had only been hiring his family members pretty much

- <u>Factors that Make a Classification Appropriate for Heightened Scrutiny under EP</u>:
    - 1. History of invidious discrimination?
    - 2. Immutable (unchangeable) characteristic?
    - 3. Exclusion from Political Process?
        - a. People with no power in political process
    - Not dispositive
        - Heightened scrutiny usually only applied when all three boxes are checked

- **<u>Due Process</u>**:
  - Procedural v. Substantive Due Process
    - Procedural = right to notice of hearing
    - Substantive = fairness to what the government is doing
- <u>Procedural Due Process</u>
  - 5A and 14A require "due process of law" before a state may deprive a person of "life, liberty, or property"
  - Two Question Approach
    - First- has there been a deprivation?
      - Liberty = make one's own choices and be free from restraint.
      - Property = a legitimate claim of entitlement, court usually looks to state law
        - Except for federal government benefits- ask, does the law create a reasonable expectation to receipt of benefit?
      - Life is generally applied to criminal context
    - Second Q- Was that deprivation without due process of law?
      - Process due → minimum is notice and hearing, two approaches:
        - Old: Process must be consistent with constitutional text and traditional common law procedural protections
        - New: Matthews -style balancing factors, consider: 1) private interest affected by the deprivation; 2) the risk of an erroneous deprivation of this interest through the procedures used and the value of any additional procedural safeguards; and 3) the government's interest, including fiscal and administrative burdens that additional safeguards will impose
      - Yet this doesn't always mean hearing must happen before the deprivation!!!!!
        - Example: bail hearings are AFTER you've been in jail
          - Just must be adequate notice and hearing, reasonable in circumstances
- <u>Substantive Due Process</u>
  - Based on substantive fairness of all legal rules
    - Protects "unenumerated fundamental rights", based on fairness of the law in itself not really how these rights have been deprived
      - "Legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation"
  - <u>Natural rights theory</u>: Individuals possess pre-political rights that antedate positive law—rights embedded in the Anglo-American legal tradition (Lockean)
    - See Field and Bradley dissents in Slaughter House: Rights which "belong to the citizens of all free governments" (SDP rejected by Slaughter House majority)
    - lower courts later came to recognize that these rights include liberty of
    - contract

- **Lochner Era**

- Liberty to enter Contracts : Lochner , Court struck down law that limited amount of hours bakers could work per week b/c violated liberty of contract (fundamental right)
  - Right isn't absolute, but the law is evaluated w/ heightened scrutiny
    - Court treats "health law" as pretextual, was really objective-driven political decision
- *Meyer v. Nebraska* (1923): Court invalidates law that makes it a crime to teach foreign languages to a child under eighth grade
  - Right involved?
    - Teachers: "economic right" to teach German (weak)
    - Parents to employ person to teach their children: control upbringing of child →
    - *Pierce v. Society of Sisters* (1925): Court invalidates state's compulsory education law that prohibits parents from choosing to send their children to private religious school ➞
      - Right involved? "liberty of parents and guardians to direct the upbringing and education of children under their control
      - Wallace: this would be 1A case now that it has been incorporated
  - At this point, FDR starts being a bitch and the Court starts upholding economic type legislation
    - Abandons textual approach that presumes liberty over constitutionality, begins treating these laws with RB scrutiny
      - Presumes constitutionality of social and economic legislation
      - Leads to federal government becoming huge
  - Court stays silent about substantive due process for a long ass time

- **Modern Revival of SDP**
  - Begins in 1960s, focusing on noneconomic fundamental rights not enumerated in constitution
    - Basis? 9A- Enumeration of bill of rights does not deny or disparage rights retained by the people
      - Unenumerated rights exist and are just as important as the bill of rights
  - Griswold v. CT , law prevented prescriptions and use of contraceptives for married couples → court strikes down based on implicit fundamental right to marital "privacy "
    - How they get there? → looking to "shadows" "penumbras" of other amendments
      - ie – 1A, 4A, amendments based on zones of certain privacy interests
      - Scope isn't limited to marital privacy, also right of individual privacy
        - Extended to unmarried persons in *Eisenstadt*
    - Wallace: "privacy right" is too general, could have struck down law by RB test
      - Catholic legislature proposed this ban based on animus

- <u>Unenumerated Fundamental Rights</u>
  - This begs the question- how do we know what is a "fundamental right"? And what level of generality should they be defined? Approaches:
    - Rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"
      - *Snyder v. Massachusetts* (1934) ‣
    - Rights "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if sacrificed"—
      - *Palko v. Connecticut* (1937) ‣

        - Rights "deeply rooted in nation's history and tradition"—
            - *Moore v. East Cleveland* (1977) (cited in Glucksberg, p. 1610)
    - Three views about unenumerated fundamental rights:
        - 1. No unenumerated fundament rights—the only constitutional rights are enumerated
        - 2. Non-enumerated fundamental rights exist, but they are consensus rights deeply rooted in our nation's history and tradition
            - Wallace's view
                - Wallace says 9th Amendment "deny" and "disparage" is a place where these unemurated rights can be found
            - Not 100% agreement but deeply rooted general consensus
        - 3. Non-enumerated fundament rights exist, but they originate in concepts of personal autonomy and dignity as defined by current culture and declared by SCOTUS

- <u>Analytical Framework for Substantive Due Process</u>
    - 1. Identify the right/liberty interest involved
        - a. Be specific!!! Not just "right to privacy"
    - 2. Is the right/interest infringed?
    - 3. Determine level of scrutiny
        - a. Enumerated right
            - i. (warrants own analysis, fundamental right analysis applies only to analysis of incorporating BOR)
        - b. Unenumerated right (from common law, tradition, penumbras, etc.)
            - i. If fundamental right → apply strict scrutiny
                - 1. Marital privacy, raising children, abortion
            - ii. Non-fundamental → apply minimal scrutiny
            - 1. Property and economic regulations
            - 2. Will probs be upheld
    - 4. Is there a sufficient justification for the government's infringement of the right?
        - a. Fundamental = compelling
        - b. Non-fundamental = legitimate
    - 5. Is the means sufficiently related to the end?
        - a. Fundamental = least restrictive means
        - b. Non-fundamental = rational relationship between means and end

- **Abortion**
    - *Roe v. Wade*: Court shifts from "privacy" to "liberty" and personal autonomy interest
        - If Court followed "deeply rooted consensus" view → would have probably upheld the abortion ban
            - Abortions have been banned for a long time, 50/50 controversy is not consensus
            - No other right subordinates one's life in favor of another
                - Except maybe self defense
        - Holding at the time:
            - States can't regulate during first trimester
            - Second trimester- States can regulate to protect mother's health
                - But not life of the unborn!

- Third trimester- State CAN regulate to protect POTENTIAL LIFE OF UNBORN, except when necessary to protect LIFE and HEALTH of mother
  - Broad in what "health of mother" entailed
  - Essentially large enough health exception that this is constitutional right to abortion at any point
- Issues with substantive due process?
  - Undermines democratic process
  - Legislature is best position to decide these types of matters
- *Planned Parenthood v. Casey*: Court upholds 24 hour waiting period and parental consent ( w/ judicial bypass ) provisions; but strikes down spousal consent/notification requirement
  - Liberty interest of 14A once again linked to personal dignity and autonomy
  - Replaces Roe's trimester framework with straight pre-/post-viability line and moves when viability occurs
    - State regulations BEFORE viability line are reviewed under strict scrutiny if they cause an "undue burden" or "substantial obstacle"
      - But woman's health exception for post-viability abortions still in effect
  - Even under the third trimester, Court has carved out an exception that swallows the rule
- Updates in modern court
  - *Whole Women's Health v. Hellerstedt* (2016) Challenge to TX laws that (1) required physicians to have admitting privileges at nearby hospital and (2) required abortion clinics to have facilities comparable to ambulatory surgical clinics
    - Holding: Unconstitutional. Laws placed substantial obstacle in path of women seeking abortion and, therefore, constitute an undue burden on abortion access
    - Significance: Harder for states to enact medical regulations covering pre-viability abortions unless they can point to evidence that such regulations demonstrably protect the health of the mother

- **Substantive Due Process and other Purported Rights**
  - Right to Die?
    - Cruzan v. Missouri Dep't of Health
      - Court assumed there may be a "liberty interest" to refuse medical care, but that is not violated by state law requiring "clear and convincing" evidence that a patient in a coma would actually have wished to refuse treatment
        - Not actual "right to die" just allows competent persons a protected right to refuse lifesaving hydration and nutrition
    - Glucksberg , state prohibits physician assisted suicide → constitutional 14A doesn't guarantee this right
      - Returns to " deeply rooted in this nation's history and tradition with specific formulation of that right " and "implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they are sacrificed"

        - This does not extend to physician assisted suicide, no "guideposts" here so this is matter best left for the legislature
            - Right must be identified at most specific level
                - (e.g., right to physician-assisted suicide)

- **Gay Marriage**
    - *Lawrence v. Texas*: fundamental right to engage in homosexual conduct is not deeply rooted but Court bases its holding to strike down law outlawing homosexual sex based on sexual autonomy
        - Vague approach, Wallace hates it
        - Court doesn't even ID level of scrutiny, but seems to apply strict
    - *Windsor*: ( EQUAL PROTECTION ANIMUS) ballot vote (Defense of Marriage Act) repealed gay aniti-discrimination laws → held unconstitutional
        - Initially invoked federalism (states prerogative to define marriage) but ultimately did not base decision on it ➞
        - Applied heightened scrutiny, but did not find fundamental right to marry for same-sex couples ➞
        - Suggested that DOMA was motivated by animus—a "bare desire to harm" gays; held that the purpose of DOMA was to "disparage" and "injure" those in lawful same-sex marriages
        - Essentially tees up issue of gay marriage
    - Post-Windsor: 3 ways to argue against same sex marriage laws
        - Substantive due process (find fundamental right to same sex marriage, apply strict scrutiny)
            - *Loving* and fundamental right to marry
            - But, could be to general in defining the fundamental right (right to marry who?) right to marry someone of same sex
            - Same sex marriage deeply rooted in history and tradition?
                - No
        - Equal Protection
            - Classification: sex or sexual orientation
            - Scrutiny: Apply heightened or rational basis
            - State's interest?
                - Encouraging the raising of children in stable family environments
            - Problems?
                - Scotus unwilling (so far) to give strict scrutiny to sexual orientation discrimination
            - Hold that state interests do not justify discrimination by bans on same sex marriage
                - State interest is not about religious concepts → about stable family environment raising children
        - Animus: overturn bans on same sex marriage as motivated by unconstitutional animus
            - Animus is adjunct to rational basis scrutiny…under E.P. doctrine, one way to prove law fails rational basis is to prove that it is motivated by animus
            - *Romer* and *Windsor*
            - If there is "animus," the law fails

            - Need to look toward the actual motivations of the law, and not give reasons
- *Obergefell*
    - Due process- Gay marriage as fundamental right? Court finds fundamental right to dignity (includes fund. Right to gay marriage)
    - Problems:
        - *Loving* was fundamental right to marry another regardless of race
        - But *Glucksberg* specificity rule → right to marry vs. right to marry person of same sex? Court dodges this, creates alternative path (seems like fund. Rights can change)
            - Right to gay marriage is definitely not rooted in history and tradition
                - Note: No proponent of SSM argues that people who adopted the 14th Am understood it to require states to change the definition of traditional marriage
            - Broad fundamental right to marriage is problematic
                - Think polygamy, etc.
        - Why fundamental right to marry applies to same sex couples:
            - Choice to marry is inherent in individual autonomy and dignity
                - Liberty to "define and express one's identity"
            - Marriage is "two person" union unique in its importance
            - Protects children of gay couples from thinking stigma of their families are somehow lesser
            - Demeans gays to be locked out of keystone institution of our nation's social order
            - (in sum- denying gay couples right to marry would "disparage their choices" and "diminish their personhood")
        - Where do we draw line when deducing a fundamental right from abstract concepts of personal autonomy and dignity rather than anchoring it to constitutional text, history, and traditions concerning marriage
    - Equal Protection? (main holding)
        - Classification is sexual orientation (not sex) → should just apply RB
            - State interests are
                - 1. Encouraging the raising of children in stable family environments by steering biologically procreative relationships into enduring marriage relationships
                - 2. Preserving the stability, uniformity, and continuity of laws and social norms linked to the historical and "deeply rooted" meaning of marriage in the face of ongoing public and political debate and social experimentation on the nature and role of marriage
                - 3. Moral disapproval of non-traditional forms of marriage
        - Court still says irrational under RB (even though traditional structure of marriage has survived for millenia -Wallace)
            - Mainly based on animus, ANIMUS IS ONLY FOR EP!!!
            - Animus now found in
                - (1) wide-ranging and novel deprivation upon disfavored group (*Romer*) or

            - (2) laws that deviate from traditional territory of lawmaking body to deny privileges to disfavored group (Windsor)

- <u>EP and SDP Summary</u>
    - Equal Protection
        - 1. Analysis: Determine classification (e.g., race, gender) and apply appropriate level of scrutiny (e.g., strict, intermediate, rational basis)
        - 2. Know: How SCOTUS has treated past classifications, including rational basis "with a bite" and when strict scrutiny has been satisfied, and the animus exception
        - 3. Problems: Higher scrutiny for existing classifications, new classifications (sexual orientation, gender identity), applying animus doctrine
        - a. (animus does not require suspect class)

- <u>SUBSTANTIVE DUE PROCESS</u> (see chart):
    - 1. Analysis: Determine if right infringed is fundamental (test?) and apply appropriate level of scrutiny (e.g., strict or rational basis)
        - a. 1) what is the right?
            - i. Fundamental? Apply both strands
        - b. 2) has it been infringed?
        - c. 3) apply level of scrutiny
    - 2. Know: What unenumerated fundamental rights SCOTUS already has identified (e.g., right to parental control over children's education, contraceptives, abortion, private sexual conduct) and its expansion of fundamental rights to include dignitary harm (gay marriage)
    - 3. Problems: How to identify a "fundamental right," justices using SDP to impose own political or social views
    - Be able to apply both strands of SDP for exam
        - Glucksberg: (1) define the right specifically and (2) determine if right is "deeply rooted" in nation's history and tradition
        - Obergefell: Liberty includes the right to dignity, protecting one's right to personal autonomy to define and express their identity.
            - No set formula

- <u>**FIRST AMENDMENT**</u>
- **Freedom of Speech**
    - "Congress shall make no law … abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble …. "
- Courts have applied to all branches of government
    - Extends to state and local as well
- Issues
    - Protected vs unprotected speech
    - Content-based vs content neutral regulations
    - Freedom not to speak: "compelled speech"
    - Freedom of group speech: "expressive association"
- Two major approaches
    - 1) Making categorical exceptions to the Free Speech Clause (typically defined by content)

- 2) Distinguishing content-based restrictions on speech (almost never upheld) from content neutral restrictions (often upheld)
  - Core axiom : Government may not regulate, punish, or discriminate against speech because of its content
  - Types of content-based restrictions: subject matter , viewpoint
    - Subject matter : Application of the law depends on the topic of the speech
    - Viewpoint : Application of the law depends on the ideology of the message
  - Content-based restrictions trigger strict scrutiny:
    - *Police Dep't of Chicago v. Mosely*

- If government 1A does not protect speech → government can outlaw without 1A implications
  - If it is protected speech → attempt to regulate it/punish it triggers either intermediate or strict scrutiny

- 1. Categorical Exceptions (not protected)
  - a. Fighting Words
    - i. Direct personal insult likely to provoke a violent response— *Chaplinsky*
  - b. True Threats:
    - i. Threats of violence directed at person(s) with intent to cause fear of serious bodily harm or death— *Virginia v. Black*
  - c. False and Misleading commercial advertising or advertising about unlawful activities
    - i. (commercial speech IS otherwise protected, but LESS SO than other kinds of speech)
  - d. Speech directed to inciting or producing imminent lawless action and is likely to produce such action — Brandenburg
  - e. Obscenity and child pornography -- Williams, Miller, Ferber
    - i. Obscenity elements:
      - 1. Appeals to prurient interest
        - a. Beyond ordinary, shameful interest, or excites lustful or lascivious thoughts
      - 2. Work depicts sexual conduct in a patently offensive way
      - 3. Has no artistic, scientific, literary, or political value
    - ii. BUT protected-
      - 1. Non-obsence sexually explicit speech (pornography and "expressive" nudity)
      - 2. Virtual child pornography
        - a. Careful here- look at notes
      - 3. Possession of obscene speech at home
        - a. But not child porn
  - f. Crime facilitating speech --speech integral to criminal conduct
    - i. Ie- conspiracy
  - g. False statements of fact --if said with sufficiently culpable mental state
    - i. Ie- defamation, false light, perjury, etc.
      - 1. But no general exception for false statements

- **Protected Speech Examples**
  - Inflammatory speech to which there is a violent response, but is neither a direct personal insult nor directed at inciting imminent violence
  - Insulting, offensive, outrageous, or insensitive speech

- Hate speech
- Pornography that depicts adults and is not obscene
- Violent video games and animal snuff videos
- *Brown v. Entertainment Merchants*: State law that prohibits the sale of violent video games to minors must be narrowly tailored to serve a legitimate government interest
  - Video games, like books, convey a message that deserves 1A protection
  - Government interest found weak b/c (at the time) was sufficient evidence of adverse consequences based on research
    - (causal link b/t video games and violence not strong enough)
  - Under-Inclusive b/c excludes portrayals other than video games and allows parents to purchase the games
    - Over-inclusive b/c abridges 1A rights of young people whose parents and guardians think video games are a harmless past time
  - *with newer social science evidence this may be a different decision
    - Seems like some Wallace type thinking

- **A. <u>Fighting Words</u>**
  - a) *Chaplinsky*: D arrested for yelling at the Marshal "you're a god damn fascist/racketeer" etc. face to face. Statute prohibited speech "directed at a person on public speech that derides, offends, or annoys others.
    - i) As applied here, fighting words exception made this statute constitutional
      - (1) Reason for such an exception? Balancing test: exposition of ideas vs. society's interest of morality
      - (2) Focus is on words that tend to incite immediate breach of peace, must be DIRECT insult (face to face)
  - b) Modern rule : " direct personal insult likely to provoke a violent response"
    - i) Rarely applied, almost never applied to "one to many" type scenarios
      - (1) Ie- Brother Ross would be good to act under this
    - ii) Does not extend to merely insulting/demeaning words

- 2) Content-Based vs. Content Neutral Restrictions
  - a) Two types of content-based Restrictions
    - i) Subject matter
      - (1) Ie- no political signs can be placed in yard
      - (2) Rarely upheld
    - ii) Viewpoint- only letting one side of controversy express its view
      - (1) Ie- only Clinton political signs can be placed in yard
      - (2) Types of laws are never upheld
  - b) *Police Dep't v. Mosley*
    - i) Law banned picketing near school unless it was protesting labor dispute (Subject matter)
      - (1) Unconstitutional (after S.S.)- allows/disallows speech on the basis of what they are protesting
        - (a) Gov. interest weak b/c restriction didn't apply to everyone across the board
  - c) *Reed v. Town of Gilbert*: Ordinance regulated size and duration of placement of outdoor signs. Different rules applied to temporary directional signs as opposed to all other signs

            - i) Ie- different set of rules for campaign signs that church organization directional signs
                - (1) Signs were treated differently based on type of sign as determined by the message in the sign itself (content)
            - ii) Even with innocent justification for the regulation, doesn't matter → S.S. is applied
            - iii) (subject matter regulation)
            -

- <u>Expressive Conduct</u>
    - Analysis
        - 1. Determine if "pure conduct" or "expressive conduct"
            - a. If pure conduct → 1A doesn't apply
        - 2. Protected speech or unprotected speech?
        - 3. Content based? (S.S.) or Content Neutral (I.S.)?
    - *United States v. O'Brien*: D burns draft card on courtyard steps, convicted of knowingly mutilating/destroying draft card
        - DA: burning the card was speech in protest of war
            - If not speech (pure conduct) → 1A not implicated
        - Is burning a draft card (conduct) speech? → Spence Test (when conduct is speech (expressive))
            - 1) Is there intent to convey a particular message
                - Subjective
            - 2) and the likelihood the message would be understood by those who viewed it
                - Objective
        - Here, D was clearly engaged in expressive conduct → Court employs O'Brien Test (what to do w/ regulations that restrict expressive conduct)
            - 1) Does law further an important or substantial government interest?
                - (intermediate scrutiny)
            - 2) Is government's interest unrelated to the suppression of free speech ?
                - Is government regulating conduct for non speech reasons or speech purposes?
                    - If it was for speech purposes → strict scrutiny would apply
                    - Conduct purposes → intermediate (when this test applies)
                - Gov. int. Strong here b/c have to keep up with draft information etc. (legit non-speech purpose, no computers back then)
                    - But Wallace- looks at legislative timing, conveniently placed right during Vietnam protests
                        - "Gov. can always make a non-speech purpose"
            - Is law (means) substantially related to furtherance of that interest (end)?
                - Can't be too over or under-inclusive
    - *Texas v. Johnson*: D burns American flag in public, convicted of statute reading "in a way that would offend someone else"
        - Spence test, is this speech?
            - Intent- yes, D did this to protest Reagan
            - Objective? Yes, obvious
        - Can gov. Regulate it?

            - O'Brien test? No, statute and prosecution was aimed at expressive component of the conduct itself → O'brien doesn't apply, APPLY STRICT SCRUTINY b/c content based
                - Fails part two of O'brien (unrelated to the suppression of free speech)
                - (ie- could burn in backyard and be ok)
                - If charged with arson? Prosecutor would have been fine
            - Government Interest: preventing breach of peace
                - Court: no, no threat of physical violence etc.
                    - Also not fighting words
                - Gov. interest in protecting unity and nationhood through preservation of flag is also regulating speech itself

- **<u>Time, Place, Manner Regulations</u>**
    - *Clark v. CCNV*: CCNV were trying to demonstrate plight of homeless in community. Wanted to do asleep overnight in tents in Lafayette Park (across from main entrance of White House). National Park Service had regulation that didn't allow people to camp out in that park overnight.
        - Is sleeping in the park speech? Maybe, but Court treats this as TPM regulation
        - Court upholds the regulation, TPM Analysis:
            - 1) Law must be content-neutral
                - Same as saying must be aimed at "conduct" component from O'Brien
                - If not content neutral → Strict Scrutiny applies
                - Here, was content-neutral b/c applied no matter why people were wanting to sleep in the park → universally applied
                    - Time: at night
                    - Place: at the park
                    - Manner: Sleeping
            - 2) Narrowly tailored to further a substantial government interest
            - 3) And leaves open ample alternative channels for communication
    - Other TPM Example Cases
        - *Kovacs* (sound trucks)
            - Banned trucks with loud sound ads on them at night in certain neighborhoods. → Court upheld restriction bc applied to ALL sound trucks
        - *Heffron* (pamphlets v booth at state fair);
            - Minnesota state fair case. Man wanted to pass out pamphlets at fair. Fair had regulation on specific area within fair where pamphlets could be passed out. → Court held law was constitutional regulation on place
        - *Grayned* (anti-noise law);
        - *Frisby* (residential picketing);
        - *Ward* (rock concert);
        - *Hill* (abortion picketing);
        - but see *Gilleo* (striking down ban on most yard signs)

- <u>Secondary Effects (type of TPM Restriction)</u>
    - *Renton v. Playtime Theaters*: law banned porn theatres from being within certain distance of any residential zone, school, church, etc.
        - Is law content based or neutral?

                - Ordinance only applies to certain type of content, but purpose of ordinance is not about restraining content itself (communicative effect)
                    - Certain effects come with the location of these theatres
                        - Property values in these residential zones plummet, safety threats for having perverts near schools
            - Thus, law IS content based on its face, but is aimed at secondary effects of the speech (content neutral in its purpose) → apply intermediate scrutiny (ONE EXCEPTION TO GENERAL RULE THAT CONTENT BASED LAWS TRIGGER STRICT SCRUTINY)
                - 1) gov. Int. in protecting property values and school kids etc.
                    - Secondary effects here are significant
                - 2) (aimed at secondary effects, not speech itself)
                    - Ask- is justification for the restriction unrelated to the communicative impact of the speech?
                - 3) still allows for reasonable alternative avenues of communication
                    - Even though only 5% of city was left available here!!!!

- **Summary of Content Based vs. Content Neutral**
    - Content-based Restrictions Summary
        - Core axiom: Government may not regulate, punish, or discriminate against speech because of its content
        - Content-based restrictions trigger strict scrutiny (w/ few exceptions):
            - a. *Johnson*: expressive conduct, but regulation aimed at speech component
            - b. *Police Dep't of Chicago v. Mosely*: law made exception based on content (p. 885)
            - c. *Reed v. Town of Gilbert*: content-based outdoor sign law— reconcile with Renton??
        - Content-based that doesn't trigger SS (Exceptions)
            - a. Content-based categories of unprotected speech (but not VP)
            - b. Content-based regulations aimed at "secondary effects" of speech
            - c. Content-based regulations based on speaker identity or subject matter (not viewpoint) in limited public forums
            - d. Content-based regulations on commercial speech
        - Types of content-based restrictions:
            - a. subject matter
            - b. viewpoint
    - Content-neutral Restrictions Summary
        - Content-neutral regulations trigger intermediate scrutiny:
            - 1. Regulation on conduct component of expressive conduct —O'Brien
            - 2. Content-neutral time, place, manner restrictions—Clark and cases/examples
            - 3. Content-based regulations that are aimed at secondary effects of speech (not primary communicative effects)— Renton ➞ Law was content-based on its face, BUT content neutral in its purpose

- <u>**Government Regulations on Certain Types of Speech**</u>
    - *Protected or Not Protected Cont.*
    - <u>Speech that Incites Violence or Illegal Action</u>

- Doctrinal development goes on for awhile, not recording that bs on the powerpoint
- *Brandenburg v. Ohio*: Klan member gets on TV to announce a rally, says "if these things don't change in this country we'll be violent". Convicted under statute barring "advertising sabotage, violence, or unlawful methods of terrorism"
  - Court develops modern standard, incitement test: Government may prohibit/punish advocacy that is directed to inciting / producing imminent lawless action AND is likely to produce such action.
    - Since this test was not met, speech is protected and goes under S.S.
    - "Imminent" is key word
      - This is why D gets off, rally talked about on TV wasn't for months and wasn't indicating the march would be violent
        - Ie- Wallace says Government needs to be overturned →protected speech
          - Wallace says same but then says to go home and get guns, we're about to storm into the Capitol in Raleigh → sufficiently imminent (just might fail on likely to incite part)
    - "Likely to incite" ie- protects crazy person passing out pamphlets that nobody would take seriously
    - Words have to actually be directed towards inciting or producing such lawless action
  - *Holder v. Humanitarian Law Project*: upheld law barring supporting terrorism groups under this theory
    - Based on strong government interest in combatting terrorism
    - Statute was content based but still overcame strict scrutiny

- <u>True Threats vs. Hate Speech</u>
  - *R.A.V. v. St. Paul*: D burns cross in black people front yard, convicted under ordinance that outlawed racist conduct that reasonably leads to anger, alarm, or resentment of others (fighting words)
    - Thus, ordinance punished communicative act, even though category unprotected speech → viewpoint content based
      - Law banned racist fighting words but not other types
        - Can't punish some fighting words but not others b/c of viewpoint
    - No Gov. int. b/c compelling interest could have been achieved without viewpoint distinctions (no government interest in viewpoint discrimination)
      - Gov. doesn't have to outlaw ALL fighting words, just can't single some out based on viewpoint expressed by those words
      - Note- D should have been prosecuted for trespass, arson, threats, etc.
    - Note- Penalty enhancement at sentencing for racial hatred is fine if based on conduct being racially motivated
      - *Wisconsin v. Mitchell*: Enhanced punishment in OK for bias-motivated conduct. Black guys jumped a white boy after seeing Mississippi Burning. D intentionally selected white victim bc of his

race. → Court held that the statute allowing for increased punishment due to racially motivated conduct was Constitutional

- Rule : Gov. allowed to punish for CONDUCT that's hateful/racially motivated as opposed to hateful SPEECH which gov. cannot punish for.
  - **Hateful speech (protected) v. hateful conduct (not protected)**

- *VA v. Black*: consolidated cased: 1) cross burned in black family's yard; 2) cross burned at klan meeting
  - VA argues that law outlawing cross burning is per se true threat exception
  - Court: No, not per se true threat
    - States may ban cross burning with intent to intimidate
  - True Threat Rule = Threat of violence directed at person(s) with intent to cause fear of serious bodily harm or death
    - Cross burning is not always a true threat, context matters
      - When done in private klan meeting isolated from all others → probs not a threat → protected under 1A
        - No doubt that burning a cross on a black family's yard is a true threat → not protected under 1A
    - True threats are typically directed at certain people or groups of people

- <u>**Speech and Violence Summary**</u>
  - Speech that threatens violence: NOT protected under "true threat" exception—Virginia v. Black
  - Speech that incites violence toward others: NOT protected if it meets the Brandenburg test
  - Speech that provokes violent response to speaker:
    - NOT protected if fighting words (Chaplinsky) or incitement to riot against speaker (Feiner)
      - Feiner: Speaker incited riot against himself (not general riot). Cops must try to protect speaker from crowd but if they cannot do so they can shut down the speech
    - Generally protected otherwise (see Terminello, Cantewell, Edwards, Cox, Gregory) Cops can only stop speaker only if crowd control is impossible and breach of peace is imminent
      - Heckler's veto case: When crowd wants to get speech shut down b/c they know about Feiner
        - People threaten/heckle speaker to point where violence seems imminent and it should be shut down
      - Bible Believers v. Wayne County , 805 F.3d 228 (6th Cir. 2015)—see Volokh handout
  - Speech that provokes violent reaction elsewhere or by third parties?

- <u>Offensive, Outrageous, and Hateful Speech</u>
  - *Cohen v. CA*: man wears "fuck the draft" type jacket in courthouse. Convicted under statute that prohibited "maliciously and willfully disturbing the peace/quiet of anyone through offensive conduct"

            - Wearing jacket as speech?
                - Spence Test → intent and likelihood sufficient →
                - O'Brien Test → 1) Gov. interest in not letting people see "fuck" is pretty weak; 2) law is specifically aimed at speech component of conduct → content based
                    - Not fighting words (directed at US, not individual people), obscene, etc.
            - Captive Audience: When people are trapped/forced to be in area so the gov. Is able to regulate speech bc they have no option to protect themselves from it. The courthouse was not a captive audience situation
                - Best government argument here (ie- protecting children that have no choice but to see it)
                    - When in public- default goes to speaker (people can avert their eyes, look away)
                        - Privacy interests change analysis at home, etc.
                - Should we protect unwilling hearers/viewers from messages they prefer to avoid? → Wallace: No because then gov. will be deciding what is offensive & what is not
                    - Gov. likely to say things that are bad are those that are about gov.
        - *American Booksellers v. Hudnut*: Porn that is demeaning on the basis of race, gender, sexual orientation?
            - Still protected as long as not obscene
        - *Snyder v. Phelps*: Westboro Baptist would show up at military funerals w/ awful signs. Claimed that soldier died as part of us paying for condoning gays in society. Family burying their soldier son. Westboro could NOT be seen from church or graveside, but family had to pass them when driving. Family sued for IIED.
            - SCOTUS in favor of Westboro.
                - Westboro complied with TPM restrictions imposed by state
                    - Doesn't matter how outrageous the speech is → protected
        - *Nazis in Skokie*: Nazis wanted to & did march through Skokie, IL (largest number of Holocaust survivors in US.) → Does this incite violence?
            - Brandenburg Incitement Test: Speech has to be directed at inciting imminent lawless action & be likely to produce such action.
                - This doesn't apply because speech wasn't inviting that action. Just had Swastikas.
                - Feiner: Were they inciting violence against themselves as speakers?
                    - Doesn't meet immanency requirement
                        - Ie- people not on porches with shotguns
            - Fighting words?
                - Not directed at one person
                    - True threat? Debatable
                        - Maybe b/c of these people's experience in the holocaust, how seeing that first hand conveys a reasonable threat of fear to them
                        - Maybe not b/c difference of seeing swastika here and in Germany
                            - Nazis taking over unlikely to happen here
            - INTIMIDATION is protected unless it incites violence/is a true threat
            - Hate speech is protected

        - *Tans*: Asian American band wanted to trademark band name "Slants" to reclaim the word. (Referred to their eyes)
            - Gov. denied them the trademark → SCOTUS struck that down.

- <u>Group Protests</u>
    - *NAACP v. Clairborne*: NAACP starts boycott of white businesses to pressure town board to change policies. If blacks violated boycott, NAACP would publicy condemn them. Some acts of violence took place, speech had members stake out the stores so blacks that violate the boycott could be publicly condemned.
        - Businesses sue NAACP under tort law → Court:
            - i. Free Speech Clause protects collective advocacy (freedom of association for expressive purposes)
            - ii. Boycott = protected expressive conduct; violence = unprotected non-speech conduct
                - Boycott in itself is protected
            - iii. Speech does not lose protection because it is "coercive," "intimidating," "vilifying," or "socially ostracizing"(p. 1041); Evers' speech also protected (p. 1042-43)
                - Walked right up to the edge with true threats based on speech
            - iv. FSC does not protect VIOLENCE, but forbids holding group responsible for actions of individual members not authorized or ratified
                - Mere fact that some NAACP members took violent measures does not implicate NAACP as a whole
- Abortion Protests
    - Dilemma: How to regulate abortion protests without triggering strict scrutiny
    - *Hill v. CO*: Court upheld a law prohibiting persons from "knowingly" approaching w/in 8feet of another person, in order to present a handbill/leaflet, counsel, or protest, in front of hospital or medical facility
        - Court said it was content - neutral & therefore intermediate scrutiny is applied.
        - Wallace thinks content-based b/c only criminalizes specific speech that "counsels or protests" → Clearly aimed at abortion protestors
        - Extends "captive audience" beyond home to public streets and sidewalks as well
    - Often, TPM used as pretext for these content-based restrictions: *McCullen v. Coakley*: Mass. law that prohibits protests at abortion clinics. Exempted people who worked at clinic.
        - TPM restriction. → Court upheld law.
            - Wallace not sure this law was viewpoint neutral
                - EX) What if law restricted protest in front of police station that shot Trayvon Martin?
    - Change government interest at hand
        - Legitimate state interest to provide for safety of abortion
            - Rationalizes TPM approach, etc.
            - Ie- if abortions are dangerous when women are hearing protests from inside

- <u>**Free Speech Rules in Special Contexts**</u>
    - Implicated when government isn't regulating as sovereign, but as
        - property owner, educator, employer, librarian, arts patron, military commander, or prison warden.

- Public Forum Doctrine
  - Private speech on government property, facilities, programs
    - Many different types of government property, extends past real property (ie- money)
  - Two main issues are access and regulation
    - Access: how can gov keep you from being there?
    - Regulation: once you have access → traditional 1A rules apply
  - Three types of forums
    - 1) Traditional public forum : public streets, sidewalks, parks
      - Total bans unconstitutional
      - Same general 1A rules apply
        - Ie- content based vs. content neutral
      - Basis: right of assembly, public trust
    - 2) Designated (Limited) Public forum : Government has opened place/program for private expression
      - **Access** can be restricted by speaker ID OR subject matter if exclusion is 1) reasonable in view of forum's purpose ; AND 2) viewpoint neutral
        - Ie- open mic @ school board for people to come and express views for education in the area → guy from NY coming in to talk about how Epstein didn't kill himself can be properly excluded b/c both ID and subject matter do not apply
          - But- school board can't just exclude people if they aren't going to speak in favor of them (viewpoint)
        - Looking to reason for having forum
          - Ask: Does speech pertain to that reason?
      - Once you have access → typical regulation rules apply
    - 3) Nonpublic forum = whatever is not traditional or designated:
      - 1. Regulation must be reasonable and viewpoint neutral
        - Examples: school mail system (*Perry*), military bases (*Spock*)
      - Ie- can't just go in IRS office raising hell
  - UVA v. Rosenberger , UVA not funding christian publication b/c "can't use $ for religious newspaper b/c violates establishment clause. (est. cl. Argument struck down, reassess later)
    - UVA was designated public forum open to student organizations → can't discriminate based on content
      - UVA allowed other religious organizations to become published through school but not religious organizations → this was probably viewpoint

- Government as Educator
  - College speech is usually evaluated under typical public forum doctrine
  - *Student Speech Cases*:
    - Student speech for these rules only apply to non-higher education facilities such as high school, middle school(colleges, etc. should be treated same as adults)
      - When gov. Is acting as educator → can generally restrict speech more
    - *Tinker*: Court struck down rule as applied that banned students from wearing armbands to protest the Vietnam war

            - General Rule: When speech creates material & substantial disruption of school operations (must be "reason to believe" disruption will occur) school can stop it. (see Morse Exception)
                - Standard not met here, was based on speculation
        - *Bethel School Dist. v. Fraser*: Fraser gave sexually suggestive speech at school assembly to intro friend running for class president. Punished (3 day suspension) & wasn't allowed to speak at graduation.
            - Court upheld Fraser's punishment: When speech is vulgar, lewd, & offensive because of wording (but not viewpoint) and part of school-endorsed events, school can intervene bc school has interest in not being associated w/ speech
        - *Kuhlmeier* (school newspaper): When speech is "school sponsored" (i.e., has school's imprimatur) regulation must be " reasonably related to legitimate pedagogical concerns " (alternate view: government-as-speaker case)
            - Students are speaking on behalf of school itself (was published in journalism class)
                - Since government speech → no 1A restriction (unless VP)
                    - (non-public forum treatment it seems?)
        - *Morse v. Frederick*: (exception to Tinker rule) "Bong hits for Jesus" hung up outside of school at school-sponsored event → court upholds rule punishing the students b/c reasonably understood to promote illegal drug use
            - Doesn't matter if speech causes a material & substantial disruption
            - If they were doing political speech? Ie- "legalize marijuana" → school can't punish that
        - Can schools punish off-campus speech?
            - Wallace: Generally no, only if it creates a material & substantial disruption on campus (basic Tinker)

- <u>Commercial Speech</u>
    - Commercial speech: speech that proposes a commercial transaction
        - Ads, references to specific product, things stemmed by economic motivation
            - EX) Nike was object of protest for child labor factories. Nike responded w/ ad saying that they didn't employ child labor. Sued. Nike said they weren't trying to sell a product, but rather, clear up misconceptions and respond to false allegations. State court held that Nike's response ads were commercial speech
    - Central Hudson Test : Intermediate scrutiny for restrictions on commercial speech EVEN IF content based
        - 1) Whether expression is protected by 1A (ie- not misleading)
        - 2) Whether asserted government interest is substantial (intermediate)
        - 3) Whether regulation directly advances that interest
        - 4) Whether regulation is not more extensive than necessary to further that interest
        - Still can't be viewpoint based. Looking for if attempt is to regulate commercial aspect of speech rather than political speech.
    - *44 Liquor Mart v. Rhode Island*: law regulated "advertising in any manner" the price of alcohol except for on price tags and signs in liquor stores
        - Court held this was unconstitutional (why?)
    - Campaign finance and Compelled speech

        - Basically: Contribution (supporting candidate) → intermediate scrutiny
            - Independent expenditures (speaking for or against candidate) → strict scrutiny
                - Think- core of 1A protection is expressing political views
        - Corporations are expressive associations but are still prohibited from directly giving to political candidates
            - But- PAC spends $ on advertisement saying Hillary sucks? → expenditure that is fairly protected

- **<u>Rights Implicit in Free Speech</u>**
    - 1. Right not to Speak
    - 2. Right to Expressive Association

- <u>Expressive Association</u>
    - Expressive association focuses on if message group wants to send gets compromised because of inclusion of others. Different from compelled speech where they make you say something
    - *Democratic Party vs. Wisconsin*: state law said political parties can't limit who participates in the primary, democrats sue → law was unconstitutional b/c forced democratic party to associate w/ people who have ideas different than their own
    - *Roberts v. US Jaycees*: USJ was an all-male/male only group. Law forced them to accept women. USJs included women in all of organization activities except being voting members. USJs went to court & said that admitting women would compromise the message they wanted to send. Record showed their claim wasn't plausible for expressive association violation (already had limited membership for women → shows their message wouldn't be compromised.
        - Wallace thinks if it would've won w/ legitimately compromised purpose
            - Ie- USJ's didn't allow women at all/ever—then USJ would've won
    - *Boy Scouts v. Dale*: Dale openly gay & wanted to urge Scouts to change policy on gay people. Message of Scouts at time was that it was incompatible w/ their "morally straight" mission. (Morally straight defined as sexually straight.) Would forced inclusion of Dale have altered that message? Yes because would be allowing someone in as Scout master that didn't align with their message of moral straightness. Scouts have right to choose who they associate w/ & don't have to compromise their message. For purpose of defining group's message who gets to decide? Policy-making body of organization. No requirement that you have to have a long-standing position/policy in place
        - Rule: Right to associate & protect message of association is protected.
            - **Association** gets to decide what their message is because they have protected right to control it.
                - No requirement that you have to have a long-standing position/policy in place.
            - Association can also decide to change that message.
                - Which Scouts did.
            - If state is forcing Scouts to associate w/ someone that compromises their message In violation of free association. → Strict scrutiny triggered.

            - Does state have compelling gov. interest in eliminating discrimination against gays?
                - This same Q was seen in Hurley → Does state have compelling gov. interest in eradicating discrimination against gays?
                - Spectrum of Gov. Activities → Public Accommodations → Private Associations
                    - Gov. activities: State has compelling interest in eliminating discrimination here
                    - Public Accomodations: State has compelling interest in eradicating discrimination as long as not violating someone's rights
                    - Private Association: No compelling interest
                        - Ie- dinner party, women's bible study
            - In order to violate expressive association, not required that person advocates against group's purpose, can just be inconsistent with it
                - Ie- Boy Scouts leader could have been excluded just for being openly gay, didn't have to be the big advocate he was
    - *Christian Legal Society v. Martinez*: Court upholds school rule that clubs would not be recognized if they required certain religion to become a member (still were able to attend)
        - Court "reasonable in light of forum" to promote diversity
            - Wallace: so we're going to promote diversity by making every claim the same thing?
                - This is viewpoint discrimination, not followed, court is all sorts of messed up on this one
- <u>**Free Speech Analysis**</u>
- 1. **Restriction imposed by government**?
    - a. If no government action, 1A does not apply
- 2. **Speech/expressive conduct OR pure conduct**? (see Spence test)
    - a. 1A generally does not apply to restrictions on pure conduct
        - **Spence Test** (when conduct is speech (expressive))
            - 1) Is there intent to convey a particular message
                - Subjective
            - 2) and the likelihood the message would be understood by those who viewed it
                - Objective
- 3. **Speech protected by First Amendment**?
    - a. Not protected? → restriction permissible,
        - i. unless based on viewpoint—*RAV*
- 4. **Special rules apply**? (If so, use those rules)
    - a. A. Government acting as non-sovereign
        - i. Ie- property owner, educator, employer, librarian, arts patron, military commander, or prison warden—e.g., public forum doctrine, student speech, etc. (generally more leeway to regulate)
    - b. Compelled speech
    - c. Expressive association
- 5. **Restriction Content Based or Content Neutral**?
    - a. **Content Neutral** → Intermediate Scrutiny
        - i. Expressive Conduct : O'Brien test

- O'Brien Test (what to do w/ regulations that restrict expressive conduct)
  - 1) Does law further an important or substantial government interest?
    - (intermediate scrutiny)
  - 2) Is government's interest unrelated to the suppression of free speech?
    - Is government regulating conduct for non-speech reasons or speech purposes?
      - If it was for speech purposes → strict scrutiny would apply
      - Conduct purposes → intermediate (when this test applies)
    - Gov. int. Strong here b/c have to keep up with draft information etc. (legit non-speech purpose, no computers back then)
      - But Wallace- looks at legislative timing, conveniently placed right during Vietnam protests
        - "Gov. can always make a non-speech purpose"
  - Is law (means) substantially related to furtherance of that interest (end)?
    - Can't be too over or under-inclusive
- ii. TPM Restriction: Use TPM test (*Clark*)
  - 1. Must be content neutral!
    - a. Same as saying must be aimed at conduct component under O'brien
  - TPM Analysis:
    - 1) Law must be content-neutral
      - Same as saying must be aimed at "conduct" component from O'Brien
      - If not content neutral → Strict Scrutiny applies
      - *Clark*, was content-neutral b/c applied no matter why people were wanting to sleep in the park → universally applied
        - Time: at night
        - Place: at the park
        - Manner: Sleeping
    - 2) Narrowly tailored to further a substantial government interest
    - 3) And leaves open ample alternative channels for communication
- b. **Content Based** → Strict Scrutiny unless:
  - i. Content based but aimed at secondary effects: Renton test
  - ii. Content based commercial speech: Central Hudson test

…

-**Freedom of Religion**

- **Free Exercise Clause Analysis**:
  - 1. Does the law significantly burden a sincerely-held religious belief?
    - a. Looking for dilemma of people having to choose between religion and obeying the government
      - i. Ie- red lights on way to church probably not a substantial burden
    - b. Courts can inquire as to whether or not the religion is sincerely held by the claimant

            - i. BUT not whether the religion is legit
- 2. Is the law burdening religion generally-applicable and neutral or does it single out religion for discriminatory treatment?
    - a. First think- facially neutral w/ hidden purpose to suppress religion?
        - i. Look for selective enforcement, bad motive
            - 1. Ie- Yick Wo
        - ii. *Church of the Lukumi Babalu Aye* v. *City of Hialeah*: held that ordinance prohibiting animal sacrifice was neither "neutral" nor "generally applicable"
        - iii. *Gonzales* v. *O Centro* (2006): prohibited federal government from prosecuting small religious sect for use of hallucinogenic sacramental tea
            - 1. (singled out these people)
    - b. Generally Applicable and Neutral → Generally **no Free Exercise claim**
        - i. *Smith* Indian man fired from work, doesn't get unemployment b/c was smoking peyote → neutral generally applicable unemployment law
            - 1. Court: No Free Exercise claim if burden on religion is from generally applicable, religion-neutral law
        - ii. Statutory Exceptions:
            - 1. Religious Freedom Restoration Act: Statute that restores strict scrutiny test for federal laws. Required the government to justify a burden on religious exercise by showing that imposition of the burden "on that person" was the "least restrictive means" of furthering a "compelling governmental interest"
            - 2. Religious Land Use and Institutionalized Persons Act (RLUIPA): applies RFRA standard to state and local laws regarding land use and prisoners
        - iii. Constitutional Exceptions:
            - 1. Ministerial Exception to Civil Right laws: Government **may not interfere** with church's ability to select its own ministers
                - a. *Hosanna-Tabor* church wouldn't allow women to be pastors. Woman was terminated from her position in church for disability, sues under Discrimination Act claiming the exemption for ministers is unconstitutional
                    - i. Court unanimously upholds ministerial exception
            - 2. Hybrid Cases: Exercise + Another Fundamental Right, examples:
                - a. Parental Control
                    - i. Pierce, Yoder
                - b. Religious Speech
                - c. Association
            - 3. Religious Belief: Absolute Protection
                - a. Meaningless though
                    - i. Ie- dad says to sit down and i sit down but inside my head i am standing up
            - 4. System of Secular Exceptions: When government employees exercise discretion about granting exemptions, religious groups should have access to those exceptions, or they could be discriminated against
                - a. Ie- unemployment compensation cases
                - b. Idk wtf this means
    - c. Discriminatory Treatment APPLY STRICT SCRUTINY!
        - i. 1) Q: Does government have a compelling interest?

- 1. Eliminating race discrimination
  - a. Bob Jones prohibition on interracial dating not allowed
- 2. Conducting internal government affairs
  - a. Lying government logging on its own land near Native American burial ground → fine
- 3. Functioning of social security system
  - a. Lee Amish had to pay social security

- ii. 2) Q: Least restrictive means to achieve that purpose?
  - 1. Exception: Exclusion of religion from government benefit programs (ie- Davey gov. Scholarship couldn't be given to one pursuing a degree in theology but still let him go to Christian school etc.)
    - a. But- might not be good law anymore. Trinity Lutheran v. Comer (2017): State cannot deny public funds to churches or other religious organizations if those funds are part of public benefit program that is available to wide range of secular organizations (=religious discrimination)
  - 2. Church of the Lukumi Babalu Aye v. City of Hialeah : Court held that ordinance prohibiting animal sacrifice, w/ exception for slaughterhouse, was neither "neutral" nor "generally applicable"
    - a. Singled out religion
  - 3. Look for government hostility towards religion
    - a. Ie- Masterpiece Cakeshop, commissioners statements showed that enforcement was towards the baker's religious faith, regardless of if the law was generally applicable (basically was animus doctrine)

- **<u>No Establishment Clause Analysis</u>**
  - Apply each appropriate test based on type of establishment! Only has to fail one
- **1st Q: What type of "Establishment" is at Issue**?
  - 1. Official Religious Message or Observance (most common)
    - a. Coercion Test: Government establishes religion when it coerces people to participate in or support any religion or exercise
      - i. Direct Coercion: Government demands someone partake in religious exercise
      - ii. Indirect Coercion: Government incidentally forces someone to participate
        - 1. *Lee* HS graduation where Rabbi led and told people to stand up and bow heads in prayer.
          - a. Only options for those who don't want to pray: 1) don't go at all; 2) stand out like a sore thumb; 3) participate against your conscience
            - i. Can avoid coercion by "non-participatory prayers": don't ask people to bow heads or pray with you
    - b. Lemon Test: Government action violates Establishment Clause if:
      - i. 1) Predominant purpose of law is religious rather than secular
        - 1. Secular doesn't have to be sole purpose → religion just can't be predominant

- a. Wallace: historically, prayer has been common practice on certain holidays etc. b/c of secular purpose of "things going well for the country"
- ii. 2) Primary effect of the law advances religion; or
  - 1. Ie- AL law making schools have moment of silence "for meditation and prayer"
- iii. 3) There is excessive entanglement between government and religion
  - 1. When state gives materials to schools and has to monitor what they do
    - a. Mainly comes up in financial support cases
- iv. Lynch: Gov. displayed nativity scene w/ religious & secular elements.
  - 1. Reindeer Rule: Wasn't a violation of est. clause bc there were non-religious elements to mitigate religious message.
    - a. Look for context!!!! Religious or not?
      - i. Allegheny county: Menora with no reindeer etc. but abunch of American flags → constitutional b/c promoting diversity (was under endorsement test though)
      - ii. Secular context can't be superficial
- v. Engel: Prayer said at beginning of school day written by school board → Court held it was unconstitutional.
  - 1. Wallace: this was unconstitutional but should have been b/c inherently coercive
- vi. Lemon: Teacher salary supplements offered by state to non-secular teachers. Court held as unconstitutional based on Lemon.
  - 1. EX) School read from bible every morning. Not coercive, but advanced religion → Unconstitutional

- c. Endorsement Test: Been stated two ways:
  - i. 1) Government endorses religion by sending message that certain religion is favored or preferred
  - ii. 2) Government endorses religion when it sends message to non-adherents that they are political outsiders
  - iii. Issue: "Endorsement is in the eye of the observer" – Wallace
    - 1. Supposed to be "reasonable" observer standard
  - iv. This is where context is most important!
    - 1. Ten commandment cases- still context based
      - a. When displayed on state capital among all sorts of other plaques and shit → fine, secular purpose
    - 2. Lynch: Gov. displayed nativity scene w/ religious & secular elements.
      - a. Reindeer Rule: Wasn't a violation of Establishment clause because there were non-religious elements to mitigate religious message.
        - i. Look for context!!!! Is gov. action one of endorsement or diverse celebration of religion?
          - 1. Allegheny county: Menorah with no reindeer etc. but a bunch of American flags

→ constitutional b/c promoting diversity (was under endorsement test though)

- 2. Secular context can't be superficial though

- d. Denominationally Neutral? Government can't favor one religion over another
  - i. Not based on whether law is secular or not, just can't favor one religion over another
  - ii. Kiryas Joel: Hasidic Jews got their own school district and school since their children were being bullied.
    - 1. Court held as unconstitutional because singled out particular religion for favorable treatment. Accommodation flowed to only 1 religion
- e. History and Tradition? Legislative prayer to start sessions → constitutional in Town of Greece
  - i. American Legion cross at intersection had historic background of honoring war veterans → context of history made this not about promoting religion
  - ii. Three ways to avoid constitutional dilemmas:
    - 1. 1) direct prayer towards god in general, or if addressed at specific deity → prayers should be offered by diverse set of people
      - a. Town of Greece was mainly offered by Christians but the Board had been reaching out trying to get anyone to come → that's fine
    - 2. Prayer should not be given out to favor one religion over another
    - 3. Should be non-participatory

- **2. Financial Support of Religion**
  - a. Apply Lemon test or endorsement tests as modified by Agostini
    - Two guiding principles:
  - b. 1) Neutrality (equal inclusion): Is gov. aid being applied in neutral fashion? Do benefits apply to religious and non-religious groups?
    - i. *Zobrest*: Hearing impaired student went to religious school. State program allowed hearing assistant to go with him. Court upheld program bc benefits applied to all students alike.
    - ii. *Everson*: NJ statute allowed towns to compensate parents of kids for transportation to schools; including religious schools. Court upheld law bc applied across the board to all students.
  - c. 2) Individual Choice (no state action): Do funds reach religious groups only as result of independent private choices of recipients?
    - i. *Zobrest*: Deaf student went to religious school. State program allowed hearing assistant to go with him. Court upheld program bc decision on where to attend school was made by student—not gov.
  - d. Also consider: Does funding require close monitoring to ensure no incorporation of religion? Entanglement

- **3. Religious Accommodation**
  - a. Is accommodation required by the Free Exercise clause?
    - i. Smith tells up probably not if generally applicable neutral law

- b. Q: Does Accommodation Impermissibly Advance or Endorse Religion?
  - i. Eliminate Obstacle: Does accommodation alleviate obstacle to religious exercise, or does it create incentive or inducement for making that choice?
    - 1. Kiryas Joel: Hasidic Jews got their own school district and school since their children were being bullied. → Court held as unconstitutional because incentivized people to become Hasidic Jew
    - 2. Ex- Dry county with wine exception for catholic church? → would not be incentive to join religion
  - ii. Burden on others: Does accommodation impose substantial burden on non-beneficiaries?
    - 1. TX Monthly: Tax exemption for religious publications. Struck down because would require non-religious organizations to pay more in taxes.
      - a. EX) Gov. closing mountain for Native American religious ceremony would be too big of a burden on everyone else
  - iii. Denominational neutrality : is accommodation provided to all similarly situated religions without favoritism or discrimination?
    - 1. Kiryas Jewish case re
    - 2. If available to all religions but only providing to one? → fine

- **4. Resolution of Ecclesiastical Dispute**
  - a. Rule: If a court can resolve dispute by applying neutral principles of law (ie- K law or property) then it will decide the issue.
    - i. If not, court will defer to religious body to avoid "doctrinal entanglement."
    - ii. Does this dispute involve issues of religious doctrine or policy?
      - 1. Yes → Defer to religious body
      - 2. No → Apply neutral principles of law to resolve dispute