

Exam Outline -- Individual Rights

★ Always state the constitutional source of power upfront!

I. Equal Protection

A. Introduction

i. Constitutional Grant

- a. **14th A.** -- "No state shall ... deny to any person within its jurisdiction the equal protection of the laws."
- b. **The 5th Amendment** -- 14th = only the states. Supreme court --> 5th = federal 14th (*Bolling*)

ii. Classification

- a. **What is the Classification** -- The 14th amendment prohibits **invidious** discrimination. The first step in analysis is to **identify** the classification.
  - 1. **Facial** -- The law by its terms distinguishes btw people based on a certain characteristic.
  - 2. **Discriminatory Impact/Purpose** -- The law is neutral on its face but has some discriminatory impact that results from its **administration**.

B. Standards of Review

*Note: Where you apply heightened scrutiny, also apply rational basis in case an element is not established!*

i. Three Levels of Scrutiny

- a. **Strict Scrutiny** -- A law is upheld if it is proved **necessary** to achieve a **compelling** government purpose. The government must have a significant reason for discriminating, and must show that it cannot achieve its objective through any **less discriminatory alternative**. The **government** has the burden of proof.
  - 1. **The Test** -- Government must show 1) an extremely important reason for its action **and** 2) that the purpose cannot be accomplished through any less discriminatory means.
- b. **Intermediate Scrutiny** -- A law is upheld if it is **substantially related** to an **important** government purpose (*Craig*). The means used need not be necessary, but must have a "substantial relationship" to the end being sought. The **government** has the burden of proof.
- c. **Rational Basis** -- A law will be upheld if it is **rationaly related** to a **legitimate** government purpose (*Beazer*). The government's purpose need not be compelling or important, but just something that the government may legitimately do. The **challenger** has the burden of proof.
  - 1. **The Test** -- Challenger must prove 1) the government has **no legitimate purpose** or that 2) the means used are not a **reasonable** way to **accomplish** the goal.
  - 2. **Legitimate Purpose** -- Traditional legitimate purposes are public safety, public health, and public morals. Virtually any goal that is not forbidden by the constitution will be deemed sufficient to meet the rational basis test. Animus at politically unpopular group cannot be a legitimate government purpose (*Moreno* -- Hippy food stamp rule unconstitutional).
  - 3. **Establishing Purpose** -- The court gives deference to law makers. It does not search for the true purpose of the law. Any conceivable legit purpose that the gov. can advance is sufficient.
  - 4. **Reasonable Relationship** -- There must be a **reasonable relationship** between the purpose and the means used by the law (*Railway Express* -- AD truck case).
    - a) **Incremental Steps** -- To state may combat one evil at a time. In other words, it may solve its problems incrementally under rational basis (*Lee Optical*).
- d. **Rational Basis w/ Bite** -- When there is evidence of animus (or singling out a politically unpopular group, e.g., gays, retards) the court will apply a more searching version of rational basis review where it may question the states asserted purpose.

ii. Chart: Levels of Scrutiny

	Level of Scrutiny			
	Rational Basis	Rational Basis w/ Bite	Intermediate	Strict
Ends (Government Interest)	<b>Legitimate</b> 1. Need not be actual purpose 2. Presume facts to support	<b>Legitimate</b> 1. May be limited to stated or actual purpose 2. Court may second-guess purpose	<b>Important</b> 1. Some legitimate purposes insufficient 2. Support for factual basis required	<b>Compelling</b> 1. Proportional to individual rights interest 2. Strong support for factual basis required
Means (Fit w/ Government Interest)	<b>Reasonable</b> 1. Rational basis for belief that purpose will be achieved 2. Over and under inclusiveness tolerated 3. Less restrictive or discriminatory alternatives are not required	<b>Reasonable</b> 1. May inquire into whether purpose will be achieved 2. Severe over or under inclusiveness may show pretext 3. Obvious less restrictive alternatives may show pretext	<b>Substantial Relation</b> 1. May doubt achievement of purpose 2. Over or under inclusiveness serious problem but some may be accepted 3. Unclear whether less restrictive or discrim. alternatives are fatal	<b>Necessary</b> 1. Strong support for achievement of purpose 2. No over or under inclusiveness permitted 3. Less restrictive alternatives are fatal
Application	Baseline test unless there is a reason to elevate scrutiny	Unclear; maybe cases where Court suspects animus; often where court avoids elevated scrutiny	Gender and legitimacy classifications, commercial speech, and some other areas	Race discrimination, fundamental rights, restrictions on speech, and religious discrimination

### iii. Application

- 1) **Determining the Level of Scrutiny** -- The Court has emphasized several criteria for determining the level of scrutiny.
  - a) Immutable Characteristics -- Immutable characteristics like race, national origin and gender have led to heightened scrutiny.
  - b) Access to the Political Process -- The ability of a group to represent itself through the political process is a factor that the court has considered. Women, for example, represent over 50% of the population but have historically been severely underrepresented in political offices.
  - c) History of Discrimination -- Past discrimination against a group not only makes the court more likely to give increased scrutiny but also increases the likelihood that the purpose of the law was to discriminate rather than advance a legitimate government purpose.
  - d) Fundamental or Significant Right -- The Court has applied strict scrutiny when a fundamental or otherwise significant right was involved (e.g., *Bush* -- Voting; *Shapiro* -- Right to travel).
- 2) **Determining Whether the Law Meets the Level of Scrutiny** -- The Court looks to the **relationship** between the means of the law and its purpose.
  - a) Degree of Under/Over Inclusiveness -- The Court often considers how over/under inclusive the law is in achieving its apparent purpose. The higher level of scrutiny applied the greater a fit between means and purpose the Court requires.

## C. Specific Groups/Situations

### i. Classifications Based on Race

- a. **Level of Scrutiny** -- All racial classifications -- whether **disadvantaging or helping** minorities -- must meet strict scrutiny (*Korematsu*).

📌 **Note:** A classification is **not** based on race if it is only makes the classification in effect (without purpose). A classification in effect must also have purpose --> **See below.**

1. **Rationale** -- The long history of racial discrimination makes it very likely that racial classifications will be based on stereotypes and prejudices. Racial minorities as a group are relatively politically powerless. **Prejudice against a discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities** (*Carolene Products*).

- a. **Establishing a Classification Based on Race**

1. Facial Classification -- A classification that on its terms draws a distinction among people based on racial characteristics. Three major types:
  - a) *Disadvantage Racial Minorities* -- A classification that expressly singles out and disadvantages racial minorities (e.g., *Strauder* -- West Va. Law limited jury service to white males only).
  - b) *Burden Both Whites and Minorities* -- Generally statutes that prohibit interracial cohabitation and marriage applicable to this category (*Loving* -- struck down law that made it a crime for a white to marry outside the Caucasian race).
  - c) *Separation of Races* -- Laws mandating segregation in public accommodations, transportation and schools (*Plessy*).
- ★ 2. Discriminatory Impact/Administration -- Laws that are neutral on their face but are administered in a manner that discriminates against minorities or has a disproportionate impact against them.
  - a) *Discriminatory Purpose* -- Discriminatory impact alone is not enough. Must prove discriminatory purpose to establish a racial classification (*Davis, McCleskey*).
  - b) *Proof of Discriminatory Effect* -- Both discriminatory purpose and effect must be shown to establish a racial classification (*Palmer* -- City closed down public pool rather than desegregate, *Armstrong* -- Selective prosecution claim).
  - c) *Proving Discriminatory Purpose* -- The court has articulated several ways for proving:
    - ▶ Law may be so clearly discriminatory as to allow no other explanation (*Yick Wo, Gomillion* -- 28 sided city boundary).
    - ▶ History surrounding the government's actions provides proof of discriminatory purpose.
    - ▶ The legislative or administrative history of law.
  - d) *Evidentiary Effect of Proving Discriminatory Purpose* -- Once a discriminatory purpose is proven the burden of proof shifts to the government to prove that no such purpose existed (*Hunter*).

### ii. Affirmative Action

- a. **General Rule** -- Affirmative action cases examine the legitimacy of using **race, ethnicity, or gender** as criteria for preferring one candidate for a school over another. Race-conscious affirmative action is subject to **strict scrutiny**.
- b. **Compelling State Interests**
  1. Diversity in Education -- The educational benefits that flow from an ethnically diverse student body is a compelling government interest (*Grutter*).
  2. Past Discrimination -- Eradication of past discrimination by the government. This rationale was rejected in *Parents Involved*.
  3. Present Day Discrimination -- Preventing present day discrimination that is covert (there is some precedent to support in *Parents Involved*).

- c. **Narrow Tailoring** -- Programs that are used to obtain a critical mass of minority students can be narrowly tailored. They must not be permanent and must be a plus factor in holistically evaluating the individual candidate (*Grutter*).
  - 1. **Quotas** -- A quota system based on race is unconstitutional because it is not narrowly tailored enough to the compelling government interest of achieving the benefits that flow from an ethnically diverse student body (*Bakke*).
    - i) *Establishing a Quota* -- Setting aside a specific number of seats for minorities is a quota. A plus factor that does not insulate the individual from comparison with all other candidates, on the other hand, may not be a quota (*Bakke*).
  - 2. **Point System** -- A point system that automatically awards a large amount of points for being a minority without giving **individualized consideration** is not narrowly tailored (*Gratz*).
  - 3. **Holistic Review** -- A process that includes a highly individualized, holistic review of each applicant are more likely to be narrowly tailored. On the other hand, **mechanical predetermined diversity "bonuses"** based on race or ethnicity are less likely to be narrowly tailored (*Grutter*).
  - 4. **Race Neutral Alternatives** -- Narrow tailoring requires serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity sought by the university. On the other hand, it does not require exhaustion of every conceivable race-neutral alternative, only those alternatives that would serve the governmental interest about as well.
- d. **Integration** -- Issues usually come up in the area of pupil-assignment plans for public elementary or high schools. Any plan that classifies each student's race, and makes any pupil assignment based on whether the student's presence would improve or worsen the target school's racial imbalance, will almost certainly fail under strict scrutiny (*Parents Involved*).
- e. **Justices in the Court** -- It is important to note that O'Connor was the swing vote *Grutter*. Since its decision, O'Connor has been replaced by Alito. Because of this, the law may change moving forward. *Parents Involved* is indicative of this possible shift because now Kennedy is the swing vote with regards to the issue of affirmative action.

### iii. Classifications Based on Gender

- a. **Level of Scrutiny** -- Intermediate scrutiny is applied to classifications that intentionally discriminate based on gender (*Craig*).
  - 1. **Rationale** -- There are sometimes legitimate reasons to treat men and women differently because there are real biological differences between the two. Conversely, race is always an illegitimate reason to treat people differently.
  - ★2. **Modified Test** -- In the *VMI Case* the Court applied a tougher form of intermediate scrutiny -- The state must provide an **exceedingly persuasive justification** for any classification based on gender.
- b. **Benign/Invidious and Male/Female** -- Intermediate scrutiny applies whether the classification discriminates against males or females. Similarly, intermediate scrutiny applies whether the classification is invidious (intended to harm women) or benign (intended to help women) (*Craig*).
- c. **Purpose** -- Gender based classifications will only be subjected to intermediate scrutiny if the legislature **intentionally** discriminates against one gender in favor of the other (*Feeney*).
- d. **Stereotypes** -- If a law makes a classification based on gender that seems to **reinforce** stereotypes about the "proper place" of women, it probably cannot survive intermediate scrutiny (*VMI Case*).

### iv. Classifications Based on Sexual Orientation

- a. **Level of Scrutiny** -- The Court in *Romer* claimed to apply **rational basis**. In effect it applied a heightened level of scrutiny or **rational basis with bite**. The law was irrational because it was based upon **moral disapproval**.
  - 1. **Test** -- Still must have a rational relationship to a legitimate state interest. However, the Court gives much less deference to the legislature and will even enquire into the purpose and whether it is the actual purpose or will actually be accomplished by the law (*Romer*).

## D. Fundamental Rights Under Equal Protection

### i. Right to Travel

- a. **General Rule** -- The right to change one's state of residence or employment is a fundamental right and is therefore subject to strict scrutiny under equal protection (*Shapiro*).
  - 1. **Duration of Residence** -- A law that imposes a substantial waiting period on newly-arrived residents, before they can receive some **vital government benefit** will be strictly scrutinized (*Shapiro*).
    - a) *Vital Government Benefit* -- The benefit must be vital or the law will not be subjected to strict scrutiny. If it is not vital then the right is less fundamental (e.g., a one year waiting period to receive in-state tuition is certainly not fundamental).

### ii. Voting Rights

- a. **The Right to Vote** -- The right to vote in state and local elections is fundamental, so any classification that burdens the right to vote will be strictly scrutinized.
  - 1. **Example** -- A requirement that the voter own property or have some special interest in order to vote will generally burden the fundamental right to vote and be struck down (*Kramer*).
- b. **Ballot Access** -- Individual votes should be treated the same but the practical reality is that some differences must be allowed for. The question is where the line is drawn. In *Bush* the line was drawn at **arbitrary discrimination**.
  - 1. **Voter Identification** -- In *Crawford* the Court did **not** apply strict scrutiny to a voter identification law and found it constitutional. The challenge was a facial challenge. The Court noted that an as applied challenge could be different.

## II. Privileges or Immunities Clause

### A. General

- i. **Constitutional Grant** -- The 14th amendment provides: No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the united states.
- ii. **Purpose** -- The privileges or immunities clause could be argued to allow the bill of rights to be applied to the states. The slaughterhouse cases, however, reject this view.
- iii. **Modern Privileges or Immunities** -- Mostly powerless today. Though some justices (Thomas) argue for it to come back.

### B. Incorporation Doctrine

- i. **Definition** -- Incorporation is the process by which the Court has applied portions of the **Bill of Rights** to the states. Under incorporation, most provisions of the Bill of Rights now apply to the state and local governments by virtue of the **due process clause** of the 14th amendment.
- ii. **Selective Incorporation** -- Any right in the bill of rights that a majority of the justices believe to be fundamental. Gives rise to the possibility of implied rights.
- iii. **Total Incorporation** -- The belief that all (and only) of the bill of rights should be incorporated by the due process clause.
  - a. **Rationale** -- The elimination of any arbitrariness or caprice in deciding what the 14th amendment ought to protect by sticking to the words of the constitution.

## III. Substantive Due Process

### A. Introduction

#### i. Constitutional Basis

- a. **14th A.** -- The due process clause of the 14th amendment provides: No state shall make or enforce any law which shall...deprive any person of life, liberty, or property, without **due process** of law.

#### ii. Two Tiered Approach

##### a. Economic Rights

1. **Lochner Era Approach** -- The court during the *Lochner* era protected economic rights under the constitution through the due process clause under the theory that the limiting of freedom to contract was equivalent to the deprivation of liberty.
2. **Modern Approach** -- The Court does **not** consider freedom of K a fundamental right (*Parrish*). Thus, the regulation of economic rights is constitutional provided the regulations are reasonable (e.g., economic rights are **presumed constitutional** and subject to **rational basis** review -- see *Carolene Products* (prohibition on interstate shipment of "filled" milk constitutional)).

- b. **Fundamental Rights** -- Certain rights that relate to social welfare or personal rights are protected under the constitution. All rights that are not fundamental are subject to **rational basis** review while rights that are fundamental are subject to **strict scrutiny**.

1. **Establishing a Fundamental Right** -- Generally consist of rights loosely related to the right to **privacy** or the right to **autonomy**. A fundamental right generally invokes a person's right to make her own decisions about highly personal matters.

### B. Fundamental Rights

#### i. The Right to Privacy (*Griswold*)

- a. **Penumbras and Emanations** -- A theory of substantive due process advanced in *Griswold* that has since been abandoned. Various amendments within the bill of rights (1,3,5) create penumbras (mists of implied rights) that protect privacy.
  1. **Example** -- In *Griswold* the right to privacy gave married couples the fundamental right to protection from government intrusion into the bedroom.
- b. **Lochner Approach** -- Finding a right to privacy under the due process clause seems more direct and is the modern approach. Under this approach, if the government violates the right to privacy it infringes upon liberty protected by the due process clause of the 14th amendment.

#### ii. Abortion (*Roe*, *Casey*)

- a. **General Rule** -- Generally, the right to abortion is protected as a fundamental right under the constitution. This right is not absolute and is subject to some limitations.
- b. **Limitations**
  1. **Viability Approach** (*Casey*) -- A woman has a constitutionally protected **privacy interest** in choosing to have an abortion before viability. However, after the state has a somewhat countervailing interest in protecting **potential life** even before viability.
    - a) **Outright Bans** -- The state may not ban all pre-viability nontherapeutic abortions.
    - b) **Level of Scrutiny** -- Abortion is not a fundamental right where restrictions are subject to strict scrutiny. The state action must be **necessary** to pursue a **compelling** objective (*Casey*).
  2. **Regulation** -- The state may regulate only if it does not place an **undue burden** on the woman's right to choose a pre-viability abortion.
    - a) **Undue Burden** -- A regulation will constitute an undue burden if the regulation has the purpose or effect of placing a **substantial obstacle** in the path of the woman seeking a pre-viability abortion.
    - b) **Partial Birth Abortion** (*Carhart*) -- A facial challenge to a ban on a particular procedure was held to not be a **substantial burden** under *Carhart*. The ban protects the fetus' life and the (mental) health of the mother. It was okay that it lacked an exception for the health of the mother because the congress (questionably) concluded that it was unnecessary.

### iii. Family and Sexual Orientation

**Note:** A lot of the issues that come up in this area can also be argued under equal protection.

- a. **Living Arrangements** -- The Court recognizes the right to keep family together as **fundamental** (e.g., living together). Therefore, to deprive a person of that right would invade the protection of liberty under the 14th amendment (**Moore**).
  1. *Relatives* -- Individuals must be related by blood to one another to be considered family.
  2. *Level of Scrutiny* -- The *Moore* court did not specify, though it appeared to apply some form of heightened scrutiny.
- b. **Sodomy Laws** -- Sodomy laws are now unconstitutional (**Lawrence**). But they were not always unconstitutional. **Lawrence** overruled **Bowers** to find sodomy laws unconstitutional. The difference between the two cases is an illustration is a good illustration of two parallel frameworks of analysis in the supreme court.
  1. **Precedent Compared**
    - a) *Bowers* -- *Bowers* characterized the issue of sodomy very narrowly as basically gay sex.
    - b) *Lawrence* -- *Lawrence* defined the right much differently as something closer to a right of privacy or freedom of intimate association. The issue with this approach is when a right is defined broadly it opens the door for other rights and leads to difficulties drawing lines.
  2. **Level of Scrutiny Applied** -- *Lawrence* did not expressly say what level of scrutiny applied, though it seemed like **rational basis with bite**.
  3. **Is there a Fundamental Right?** -- Since heightened scrutiny wasn't used, its **not clear** whether the right defined by *Lawrence* is a fundamental one.
- c. **Right to Marry** -- The Court recognizes the right to marry as fundamental (**Loving, Zablocki**).
- d. **Same-Sex Marriage** -- A area that is presently developing. There are two questions that need answered:
  1. **Level of Scrutiny** -- What is the appropriate level of scrutiny?
  2. **State Justification** -- Is the state justifications for opposing/banning same sex marriage legitimate?
    - a) *State Justifications* -- 1) societies interest in responsible pro-creation and child rearing, 2) state may make incremental social changes, 3) not motivated by animus

**Note:** Civil unions (or gender discrimination theory) brings up equal protection issues.

### iv. The Right to Die

- a. **Unwanted Medical Procedures** -- There is a 14th amendment liberty interest in not being forced to undergo unwanted medical procedures, including life-sustaining measures. Not clear if this is a fundamental right (**Cruzan**). Note this is not some abstract right rooted in autonomy. It has a basis in common law battery.
  1. **State Interest in Preserving Life** -- The state has a countervailing interest in preserving life.
  2. **Clear and Convincing Evidence Standard** -- In the case of a **incompetent patient** the state's interest in preserving life entitles it to say that it won't allow the plug to be pulled unless there is **clear and convincing evidence** that the patient would have voluntarily declined the life-sustaining measure (**Cruzan**).
    - a) *Living Wills or Health-Care Proxies* -- The states must honor a living will or health-care proxy.
- b. **No Right to Suicide** -- Terminally-ill patients do not have a general liberty interest in committing suicide. Nor do they have the constitutional right to recruit a third person to help them commit suicide (**Glucksberg**).

### ★ v. Framework of Analysis

- a. **Is there a Fundamental Right?** -- Some things to consider:
    1. **How the Right is Defined** -- Many of the substantive due process cases turn on how broadly or narrowly the court defines the right (compare: **Bowers** to **Lawrence**). Generally, the broader the right is defined the more discretion is given to judges (thus invoking separation of powers/role of judiciary questions). Therefore, it is important to describe how the court might define the right. Look to **originalist/non-originalist** perspectives.
    2. **History/Tradition** -- Look to the history or tradition. How narrowly or broadly you view tradition can also be important (e.g., Gay law cases --> history of laws against sodomy but history of personal autonomy). There is an interplay here with how the right is defined because that will impact your view of history.
    3. **Nature of Issue** -- Look to if the right is involving bodily integrity or personal, intimate life decisions.
    4. **Reasoned Judgment** -- Look to reasoned judgment if necessary.
      - i) *Justifications for Finding a Right*
        - ▶ Personal rights are important
        - ▶ Political process is more effective at protecting economic rights than personal rights
        - ▶ Courts are better situated to protect personal rights
    5. **Compare/Analogize to Precedent** -- Consider past cases. Which are similar, which are different. The court has found fundamental rights in the area: **sex-marriage-child-bearing-childrearing**.
- NOTE:** The right for **unmarried** couples to engage in sexual acts has **not been expressly** recognized by the court as fundamental. Therefore, you should apply rational basis w/ bite (consistent with *Lawrence*) and strict scrutiny (consistent with possible future action). It will still be unconstitutional -- but unconstitutional because it is based on **irrational moral disapproval**.
- b. **Has the Right Been Infringed?**
    1. **Fundamental Right** -- If the court finds a fundamental right, it will analyze it under a form of heightened scrutiny:
      - i) *Compelling Interest* -- The states interest must be **compelling** not merely legitimate.
      - ii) *Means-End Fit* -- The relationship between the objective and the means must be very close (very low over/under inclusiveness) -- means must be **necessary** to achieve the particular end.

2. Non-Fundamental Right -- If the court finds no fundamental right, it will analyze under a form of rational basis:
  - i) Legitimate Interest -- any conceivable government purpose. The Court is **extremely deferential** in this context -- almost to the point where there is no scrutiny at all.
  - ii) Means-End Fit -- Must be a rational relationship between the means chosen and the objective. Again the **deference** to legislative judgment is **extreme**.

## IV. Enforcement of the 14th Amendment

### A. Constitutional Grant

- i. **14th Amendment, §5** -- The 14th amendment provides that "the congress shall have power to enforce, by appropriate legislation, the provisions of this article."

### B. Cases

- i. **Katzenbach(Old Law)** -- Voting Rights Act provided that no person who successfully completed the sixth primary grade in an accredited school in Puerto Rico in which the language of instruction was other than English shall be denied the right to vote in any election because of an inability to read or write.
  - a. Holding -- Congress may enact laws stemming from its 14th Amendment enforcement power that increase the rights of citizens beyond what the judiciary has recognized.
- ii. **Flores** -- Free Exercise Clause claim brought by members of the Native American Church who were denied unemployment benefits when they lost their jobs because they had used peyote. Previous case *Smith* held, applicable laws may be applied to religious practices even when not supported by a compelling governmental interest [neutral application]. Religious Freedom Restoration Act sought to require any application that substantially burdened the free exercise of religion to fall under strict scrutiny.
  - a. Holding -- Because it was the Court that had the sole power of defining the substantive rights guaranteed by the Fourteenth Amendment—a definition to which Congress could not add and from which it could not subtract—and because RFRA was not legislation designed to have "congruence and proportionality" with the substantive rights that the Court had defined, Congress could not constitutionally enact RFRA. Although Congress could enact "remedial" or "prophylactic" legislation that guaranteed rights not exactly congruent with those defined by the Court, it could only do so in order to more effectively prevent, deter or correct violations of those rights actually guaranteed by the Court. RFRA was seen disproportionate in its effects compared to its objective.
- iii. **Bottom Line** -- Congress will exceed its power when it over protects a constitutional right because it is the role of the court to define what the 14th amendment is.

## V. First Amendment

### A. Freedom of Expression

#### i. Introduction

- a. **Constitutional Grant** --The 1st amendment provides: "Congress shall make no law abridging the freedom of speech."
- b. **State Action** -- The supreme court has interpreted the first amendment to apply to the states (*Getlow*).
- c. **Three Important Questions**
  - ◆ What is speech?
  - ◆ Does the language limit the 1st amendment only to congress?
  - ◆ What does it mean to abridge?

#### ii. Content Based Regulation

- a. **Definition** -- A governmental action that burdens a person's expression is "content-based" of the government is aiming at the "**communicative impact**" of the expression. By contrast, if the government is aiming at something other than the communicative impact of the expression, the government action is "content-neutral", even though it may have the *effect* of burdening the expression.
  1. Rationale for the Distinction -- Regulations on content based speech are far more dangerous to democracy than those regulating content neutral speech.
- b. **Analysis** -- Whenever the harm feared could be averted by a further exchange of ideas, governmental suppression is conclusively deemed unnecessary.
  1. Rationale -- The **Market place of ideas**: This rule reflects the view, implicit in the first amendment, that it is not the government's place to suppress ideas because they are "wrong"; rather, there needs to be "free trade in ideas," and truth will become accepted throughout "the competition of the market." Only where the circumstances are such that there is no time to expose evil ideas (and prevent their harmful effect) through more speech may government bar expression (**Abrams** -- Holmes Dissenting).

#### iii. Unprotected Category -- Advocacy of Illegal Conduct

- a. **Generally** -- There are some exceptional circumstances where content based regulation is treated differently. These circumstances are the unprotected categories.
  1. Rationale -- The effect of these categories cannot be prevented by more speech. Moreover, most of the value of free speech comes from dialogue. In the context of the unprotected categories, there is no dialogue.

b. **Clear and Present Danger Test**

1. General Rule -- Constitutional guarantees of free speech and free press do not permit a state to forbid or proscribe advocacy of the use of force or of law violation **except** where such advocacy is directed to 1) producing 2) imminent 3) lawless action and 4) is likely to produce such action.
  2. Origins -- The test was first articulated in **Schenck** by justice Holmes. The issue was whether the words used in such circumstances are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.
    - a) *Crying Fire in a Theater* -- The famous example comes from Holmes opinion in *Schenck*, exemplifying that not all speech is constitutionally privileged.
    - b) *Holmes' Abrams Dissent* -- One of the first dissents where the clear and present danger standard was applied to anti-war speech.
  3. Criticisms
    - a) *Not Very Productive* -- In the early cases it was not very effective at giving protection to speech considering *Schenck* and *Abrams* were convicted, without showing that the words any of them used actually brought about a substantial evil.
    - b) *Opinion About Threat* -- Because it relies on the fact finders opinion about the immediacy of a specific threat, it makes political speech vulnerable to the mass hysteria which can strike during times of national crisis.
    - c) *Vague Standards* -- The test requires the jury to make a factual determination, the standards for which are so vague that the trial or appellate judges will have little ability to overturn a jury verdict resulting from such mass hysteria.
    - d) *Ineffectiveness Rewarded* -- Any type of speech seems to be permissible as long as it is ineffective.
- c. **Modern Standard** -- Speech advocating the use of force or crime can only be proscribed where 1) the advocacy is directed to inciting or producing **imminent lawless action** and 2) the advocacy is also **likely to incite or produce** such action.

1. Brandenburg -- KKK group leader was charged under Criminal Syndicalism Statute which forbade the advocacy of crime or violence as a means of accomplishing political reform. The court struck down the statute w/o considering whether defendants actual speech could have been properly proscribed.

	Imminent Danger	Future Effect
Express Advocacy	1	3
Discussing Ideas	2	4

All for old test  
 Holmes and Brandise: 1 and 2  
 New Standard: Only 1

iv. **Unprotected Category -- Libel**

- a. **General Rule (Sullivan Test)** -- The 1st amendment prohibits a **public official** from recovering damages for a defamatory falsehood relating to his **official conduct** unless he proves that the statement was made with **actual malice**.
  1. Actual Malice -- Statement made with knowledge that it was false or with reckless disregard of whether it was false or not.
  2. Public Official -- The precise definition of a public official was left open by *Sullivan*.

v. **Flag Burning**

- a. **Johnson** -- SC struck down a Texas statute that criminalized intentionally or knowingly desecrating a state or national flag. Desecrate was defined in the statute to mean physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.
  1. Holding -- The majority found that the statute was directly related to expression. The problem was the "seriously offended" language because the offense could only flow from the message accompanying the act. Because of this, the court applied strict scrutiny.
- b. **Eichman** -- After *Johnson* the fed passed a similar statute that was content neutral (e.g., no "seriously offend" language). The SC nonetheless found this statute unconstitutional.
  1. Rationale -- Although the act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's **interest** is related to the suppression of free expression and concerned with the content of such expression. --> flag is a symbol for certain national ideals.