NAILING  THE BAR

Simple CONSTITUTIONAL LAW Outline

Tim Tyler, Ph.D., Attorney at Law

NINETY PERCENT of the LAW in NINETY PAGES®

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NINETY PERCENT of the LAW in NINETY PAGES.®

It would take thousands of pages to completely explain **CONSTITUTIONAL LAW**. But, such extensive knowledge is unnecessary to succeed in law school or on bar examinations.

This eBook gives a simple explanation of **CONSTITUTIONAL LAW** for law students. The purpose of this eBook is to provide law students with an **understanding** of **basic constitutional law** without a lot of unnecessary blather.

This eBbook simply tells beginning law students the **BLACK LETTER LAW** and **BRIGHT LINE RULES** they need to know to succeed in law school. The explanation is given in **plain English** with the aid of **examples**. Case law is more important in the study of **Constitutional Law**, and you will find more case citations and explanation of case law in this outline than in other Nailing the Bar outlines. Other than that, this book has --

- **NO EXTENSIVE HISTORICAL DISCUSSION OF THE LAW**
- **NO FLOW CHARTS**
- **NO CHECK LISTS**
- **NO PRACTICE QUESTIONS**
- **NO EXAM APPROACHES**
- **NO EXTENSIVE DISCUSSION OF DETAILS**

The reason for these omissions is that they are **UNNECESSARY** and **more CONFUSING than helpful** to beginning law students trying to gain a basic understanding of the law. The purpose of this eBook is to help you **become an attorney** NOT to teach you everything you need to know to **practice as an attorney**.

YOUR PROFESSOR will probably focus on the details of the law in one or more narrow areas of personal interest. Those details are not covered here. **As you realize a need for more detailed knowledge** in a particular and narrow area of law, consult an appropriate **hornbook from your library** or some other authoritative reference source.

OTHERWISE, THIS eBOOK HAS ALL THAT YOU NEED to understand basic **Constitutional Law**.

UNDERSTANDING THE LAW IS NECESSARY BUT NOT ENOUGH to succeed in law school! You must also be able to **explain** how the law applies to fact patterns presented on examinations.

THEREFORE, after you have developed an understanding of the law of contracts using this eBook, you MUST make additional efforts to prepare for your law school exams in contracts. To do that, use Nailing the Bar's **How to Write Essays for Constitutional Law Law School and Bar Exams (Fe)**.

Details on these publications and how to obtain them in both hard copy and eBook (PDF) formats are given at the back of this book.

Case Briefs, Commercial Outlines, and Law School

Law school students are generally told to buy the latest edition of hard-bound casebooks and hornbooks that are inordinately expensive.

As part of your "law school education" you will gradually realize that you can learn the law better, faster, and much cheaper by using "commercial outlines" and "canned briefs" than by trying to read casebooks and hornbooks. These materials explain the law to you in understandable terms. And if you want to see the original case decision, why not go on the internet to see the real case decision? One excellent source for viewing federal cases and the cases of many states is **http://lp.findlaw.com.** Why not read what the justices really said instead of trying to decipher a hacked up version?

Mistakes You Find

We make mistakes like everyone else. If you find mistakes in this book please tell us so we can correct them. By "mistake" we mean typos, calculation errors, reference errors and things like that. Just send us a message at **info@practicalsteppress.com.**

But we definitely do not want to hear about differences of opinion about arguable issues. So if your professor says the rule is different that what we say here, humor your professor. But also do your own independent study and decide those issues for yourself.

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Chapter 1: Overview of Constitutional Law

Constitutional Law in law school is simply the study of the important parts of the U.S. Constitution that are NOT the focus of study in classes on **Criminal Procedure**. In addition, some portions of the U.S. Constitution are of little or no interest in law school, at all.

Limited Issues and Government as the Restrained Party. Unlike many other areas of law, the study of Constitutional Law focuses on only a few issues, and one of the parties in every Constitutional Law dispute will always be the government, either the federal government, a state or a state agency. And, the issue is always how the U.S. Constitution limits the government entity from taking some action. State constitutions are seldom discussed.

Extensive Rule Discussion and Case Citation. More than any other area of law, Constitutional Law issues demand that the student give a complete explanation of the judicial interpretation of the provisions of the U.S. Constitution with discussion of various cases as appropriate.

Division of Constitutional Study. The provisions in the U.S. Constitution that are studied in Constitutional Law classes are usually the following:

- Article I – the enumerated powers of Congress, especially the power to:
  - **"tax and spend"** for defense and welfare,
  - the **"commerce clause"** to control interstate commerce and with Indians,
  - naturalization and immigration,
  - coin money,
  - establish a post office,
  - establish lower federal courts, their jurisdiction and rules,
  - control federal property,
  - declare war, and raise and equip the army and navy;
- Article II – the powers of the executive, especially the power to:
  - execute the laws,
  - act as **commander in chief** of armed forces; and
  - appoint and receive ambassadors and negotiate treaties with Senate approval;
- Article III – the jurisdictional powers of the federal courts;
- Article IV – the powers of the States, including:
  - **full faith and credit** clause,
  - **privileges and immunities** clause, and
  - federal guarantee of **state sovereignty**;
- Article VI – the supremacy of federal law over State law – **the supremacy clause**;
- 1st Amendment – **freedom of religion, press, association, assembly and travel**;
- 5th Amendment – **due process** and "takings";
- 9th and 10th Amendments – **reservation of traditional powers to the States and rights to the People** unless specifically delegated to Congress or denied to the States;
- 11th Amendment – prohibition of **suits by individuals against States** in federal courts;
- 14th Amendment – prohibition of denial of **due process** and **equal protection** by States;
- 21st Amendment – giving States power to **regulate commerce in alcoholic beverages**.

The study of Constitutional Law usually **ignores** or only **mentions in passing** those parts of the Constitution that are not listed above.

1. Historical Perspective

Historical development of Constitutional Law is not tested on exams, but understanding historical changes can be helpful to understand Constitutional interpretation. The changes in Constitutional interpretation have largely been in reaction to political and social events.

1789-1865 – From the adoption of the Constitution in 1789 to the Civil War the widespread concern was to limit the powers of the federal government so it could not oppress the people as the British had done. The "Bill of Rights" (the first 10 Amendments) was adopted in 1791 to limit the federal government, not the States. Since the voters (i.e. White males[1]) were free to move from state to state, there was little concern that the States needed to be controlled. Consequently, the Bill of Rights applied only to the federal government and not to the States.

1865-1930 – Following the Civil War the Constitution was changed to prohibit slavery (13th Amendment, 1865). Subsequent oppression of Blacks by the States led to the adoption of the 14th Amendment in 1868 guaranteeing equal protection and due process. The 15th Amendment that followed in 1870 guaranteed Blacks the right to vote. The 14th Amendment guarantees of "due process" and "equal protection" were used to extend the "fundamental rights" in the Bill of Rights to the States in a piecemeal approach called "selective incorporation". The right to vote was held to be fundamental and later extended to women by the 19th Amendment in 1920. During this period the federal power to regulate interstate commerce was narrowly construed.

1930-1960 – In the social upheaval of the Depression in the 1930s the federal power to regulate interstate commerce was drastically broadened by judicial interpretation under the "Aggregation Doctrine." Under that doctrine Congress was empowered to regulate almost any activity remotely related to interstate commerce.

1960-1980 – Following World War II the Supreme Court significantly defined the civil rights guaranteed by the 1st, 5th, 6th and 14th Amendments, freedom of expression, the right to vote and the right to privacy. Poll taxes were prohibited by the 24th Amendment in 1964, and everyone over 18 years of age was given the right to vote by the 26th Amendment in 1971.

1980-2000 – The last part of the 20th Century saw a narrowing in the interpretation of Congress' power to regulate commerce under the Aggregation Doctrine.

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[1] A significant body of the case law on Constitutional issues deals with slavery and oppression of Blacks, American Indians and other racial and ethnic groups. The older case law was so dismissive of Blacks they were referred to as "negroes". Later that became a more respectful but still dismissive "Negroes". The recent trend is to use "African-Americans" along with "Mexican-Americans", "Chinese-Americans", etc. This well-intentioned but unfortunate trend produces bizarre and self-defeating results. After all, the United States has no monopoly on being "America." Mexico is part of America, and all Mexicans are Americans, no matter where they live. So it is simply wrong to imply they are "less American" than everyone else. The same goes for Blacks. They are so vastly more "American" than "African" that it is simply wrong to imply they are "less American" than other "Americans". As a group, the ancestry and history of the majority of Blacks in the United States goes back far longer than the vast majority of Whites, and their influence on law, food, music, fashion, etc. has significantly defined what is referred to as the "American Experience." It is as disrespectful and dismissive to refer to the men and women that fought and died for the rights we enjoy today as "blacks" or "whites" as it would be to refer to other peoples as "yellows", "reds" and "browns." From these considerations, this book will refer to racial groups with equal respect as "Black", "White", "Asian", etc. and ethnicity based on nationality will be referred to as peoples "of descent."

2. Two Levels of Government.

There are only **two levels** of government in the United States: the **federal** government and the **States.** All counties and cities are subdivisions of the States, and this includes subdivisions of each of them such as municipal power agencies and county water boards.

3. Three Branches of Federal Government

There are only **three branches** of the federal government, the Congress, the Executive (president and agencies reporting to the president) and the Supreme Court. All "inferior" federal courts are established and controlled by Congress, and this would include the federal district courts.

Congress has legislative authority but it may delegate its legislative powers to executive agencies via "enabling statutes." These statutes allow executive agencies to promulgate rules and regulations that have the effect of law. But Congress has no executive authority to enforce laws.

4. The Hierarchy of Laws

The **supremacy clause** of the U.S. Constitution makes it the "supreme law of the land":

> **Article VI [2]: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."**

This means all federal laws, treaties and even contracts override any conflicting State laws.

Each Amendment to the Constitution overrides every conflicting Article and previously adopted Amendment. For example, the 14th Amendment expanded the powers of Congress to allow the adoption of any law necessary to enforce its provisions. If Congress enacts a valid statute pursuant to the 14th Amendment that conflicts with the limitations established by the 11th Amendment, the 14th Amendment would be override the 11th Amendment.

5. The Fundamental Rights

By Court interpretation, certain rights of the people are held to be fundamental. The guarantees of **due process** in the 5th and 14th Amendments require that preservation of fundamental rights be afforded a much higher level of protection.

> **The FUNDAMENTAL RIGHTS are those rights that are rooted in our nation's traditions and implied in the concept of an ordered liberty.**

Rights "rooted in tradition" are those that have been historically recognized, and "ordered liberty" means freedom to act within the limitations of rationally necessary laws. Therefore, the "fundamental rights" are those that are 1) HISTORICALLY RECOGNIZED and 2) implied by the concept of FREEDOM based on LAWS. The fundamental rights will be listed and discussed in detail in later chapters.

Chapter 2: The Constitutional Powers of Congress

The rights and powers of Congress are often the first subject of discussion in the study of Constitutional Law. Congress has the authority to enact federal laws, but for any federal law to be valid, it must be one that Congress had the Constitutional authority to enact. That authority is narrowly defined and limited by the Constitution.

1. The Enumerated Powers of Congress

The view that the Congress of the United States has broader powers than the States to adopt laws for the health, education and safety of the citizens is absolutely incorrect. Under the Constitution Congress only has those powers that are expressly granted to it. The **10th Amendment** expressly states that all powers that the Constitution does not specifically delegate to the United States (federal government) or prohibit to the States are retained by the States, or to the people.

> **10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."**

But where the Congress has authority in any area, it also has the authority to create any law **necessary and proper** to give effect to those powers. This is called the **"Necessary and Proper Clause"**:

> **Article I, Section 8: "[1] The Congress shall have Power … [18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."**

In some areas Congress has "plenary" power, meaning that it has absolute power over the subject matter and states may not intercede. In other areas Congress has "concurrent" power, meaning that states may also exercise authority in those areas. But where federal and state law conflict, the federal law always overrides state law under the **supremacy clause** of Article VI.

Some of the powers of Congress are more important and some are less important, in terms of law school studies, because they are not discussed or tested as much. The more important powers will be discussed in detail in this chapter.

The "less important" powers of Congress are still important to know because they can be raised in essay questions or the focus of MBE questions on the Bar Exam. But they are less likely to be the main focus of a law school essay question.

> **For Example:** The State of California announces it will print a postage stamp honoring its former governor, Pete "I Blame the Mexicans for Everything" Wilson. Can it do that? No, because Congress has plenary (absolute) power over the **postal system**.

Less Important Powers of Congress: Some of the powers of Congress that have less importance in terms of law school study are as follows:

1. The power to **borrow money** (Article I, Section 8 [2]);
2. Plenary power over **bankruptcy law** (Article I, Section 8 [4]);
3. Plenary power to **coin and regulate the value of money** (Article I, Section 8 [5]);
4. Plenary power over **weights and measures** (Article I, Section 8 [5]);
5. The power to punish **counterfeiting** (Article I, Section 8 [6]);
6. Plenary power to establish the **postal system** (Article I, Section 8 [7]);
7. Plenary power over **patents and copyrights** (Article I, Section 8 [8]);
8. Complete power to punish **piracy and crimes on the high seas** (Article I, Section 8 [10]);
9. Complete power to **declare war, raise an army and navy, establish military rules, raise and control the militia, suppress insurrections and repel invasions** (Article I, Section 8 [11], [12], [13], [14], [15], [16]);
10. Power to **approve treaties** by two-thirds of the Senate (Article II, Section 2 [2]);
11. The power to establish the **income tax** (16th Amendment);

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A. The Tax and Spend Clause

One of Congress' most important powers is the power to **tax and spend** for the **common defense** and **general welfare**. This is often called the "tax and spend" clause.

> **Article I, Section 8: "[1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence [sic] and General Welfare of the United States; but all Duties Imposts and Excises shall be uniform throughout the United States;"**

Note that this is the "tax and spend" clause and NOT a "general welfare" clause. There is no "general welfare" clause in the Constitution, and Congress does not have the power to pass laws to directly regulate or control the "general welfare!"

The power to directly regulate public health, safety and welfare is a power reserved to the States under the 10th Amendment. This is very important to remember because it is heavily tested.

> **For Example:** Congress passes a law that all school children must be vaccinated for polio. This is unconstitutional because regulation of the public health is a State power.

Congress can raise taxes and provide States with **funding** to promote public health, safety and welfare. And federal funding can be withheld if the States do not meet federal rules. THAT is the only mechanism Congress can use to promote the "general welfare" other than use of the power to control commerce as will be discussed below.

> **For Example:** Congress passes a law that "no federal highway fund grants can be given to any State with posted speed limits above 55 m.p.h." Congress has this power under the "tax and spend" clause.

So the "tax and spend" clause gives Congress the **fiscal power** to promote or encourage the public welfare through spending. But the **legal authority** to mandate public welfare is reserved to the States. A clear understanding of this distinction is very, very important. While this may seem like "mere semantics" remember that,

Semantics is the Mother's Milk of Lawyers!

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B. The Power over Commerce – The Commerce Clause

A second important power of Congress is the power to regulate **commerce with foreign nations, interstate commerce** and **commerce with Indian tribes** and. This is called the "commerce clause."

> **Article I, Section 8: "[1] The Congress shall have Power … [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."**

Over the last seventy years this power has been one of Congress' most powerful tools.

1) The *Cooley* Doctrine: States Have Concurrent Power to Regulate Commerce

Under *Cooley v. Board of Wardens of the Port of Philadelphia* (1851) 53 U.S. 299 Congress does NOT have plenary power to control interstate commerce. Rather, the States have **concurrent power** to regulate commerce. This is referred to as the **Cooley Doctrine.** However, there are certain **exceptions** to this general rule that limit States from inhibiting interstate commerce.

Direct Federal Conflict Exception. States are **preempted** from regulating commerce in **conflict** with federal law because federal laws override State laws under the **supremacy clause**.

> **For Example:** Congress passes a law that the maximum length for rail cars nationwide is 80 feet. California passes a law that the maximum length for rail cars in that state is 75 feet. California's law is unconstitutional because the federal statute **preempts** the State.

Comprehensive Federal Rules Exception. Second, **federal preemption is implied** where Congress has adopted a **comprehensive regulatory scheme** for a type of commerce.

> **For Example:** Congress establishes the Nuclear Regulatory Commission to establish comprehensive safety rules for nuclear power plants. Texas establishes additional safety rules for nuclear power plants in Texas. This is unconstitutional because the comprehensive federal regulatory scheme **impliedly preempts** the State.

The Dormant Commerce Clause – Uniform National Standards. Third, **federal preemption is implied** where the commerce to be controlled **requires uniform national standards**, even if Congress has not acted. This concept has been called the **"Dormant Commerce Clause."**

> **For Example:** Oregon passes a law adopting direct current as its power standard (instead of the alternating current used in the rest of the U.S.). This would exceed the power of a

state to burden interstate commerce because **uniform national standards are needed**, even if none exist, and **even if Congress has not acted** in this area.

2) The Expansion of Congressional Power Through the Aggregation Doctrine

During the administration of President Franklin D. Roosevelt in the Depression of the 1930s Congress passed several acts intended to promote the economy. But those acts were held to be unconstitutional by the Supreme Court because they attempted to regulate commerce within the States rather than between the States. These Court holdings stymied efforts to end the Depression.

After a period of political frustration, Roosevelt and Congressional leaders discussed "packing" the Court by appointing additional judges to the Supreme Court that would support Congress' efforts to end the Depression. While the Supreme Court has traditionally had nine members, nothing in the Constitution specifies the actual size of the Court. And the President has the authority to appoint judges to the Supreme Court with the "advice and consent" of the Senate.

This plan was never put into effect, but it caused several members of the Court to soon retire and Roosevelt was able to appoint new members anyway.

The newly composed Supreme Court reversed prior decisions and created what is now called the **"Aggregation Doctrine."** Beginning with *NLRB v. Jones & Laughlin Steel Corp.* (1937) 301 U.S. 1 and culminating with *Wickard v. Filburn* (1942) 317 U.S. 111 the Court came to hold that the Commerce clause gives Congress the power to regulate any economic activity that, in the aggregate, has an effect on interstate commerce.

The **Aggregation Doctrine** afforded Congress broadly increased powers to regulate national economic activities (e.g. minimum wages, health and safety standards.)

3) No Laws to Intentionally Discriminate Against or For Citizens of a State

Federal Prohibition. Under Article I, Section 9 [5] and [6] the federal government is expressly prohibited from taxing the exports of any State and from adopting any regulation of commerce giving preference to the ports of any State over any other State. This is seldom tested.

State Prohibition. The States are generally prohibited from any regulation of interstate commerce that is for the **purpose of deliberately discriminating** against out-of-state suppliers and to favor in-state business. Statutes of this type are "**invalid per se**", and frequently tested.

There are two exceptions to this general rule, the **market participant** exception and the **21st Amendment** regarding alcoholic beverages. Those will be discussed in detail below.

> **For Example:** Iowa prohibits garbage ("solid waste products") from being brought to landfills in Iowa from other states. The purpose of the law is to reserve Iowa landfill space for Iowa citizens. Since the **purpose** is to benefit Iowa citizens to the detriment of citizens and businesses outside the state, the law is **invalid per se.**
>
> **For Example:** Oklahoma requires 10% of the coal used in electric plants in the state to be from Oklahoma mines. Since the **purpose** is to benefit Oklahoma mines to the detriment of mines elsewhere, the law is **invalid per se.**

4) State Preservation of Natural Resources – Least Discriminatory Means

States may adopt regulations to protect "natural resources" for 1) a **legitimate local purpose** if the means chosen is the 2) **least discriminatory alternative**.

A regulation is not invalid per se simply because the **effect** is discriminatory. To be invalid per se the actual **purpose must be to discriminate** against out of state suppliers or in favor of in-state suppliers. The fact that an otherwise neutral statute has a disproportionate impact on out-of-state suppliers in its application is irrelevant if it is the least discriminatory alternative.

> **For Example:** Pennsylvania prohibits natural gas from being removed from the State to conserve existing gas supplies for State residents. Since the purpose is to benefit State residents at the expense of out-of-state users the law is **invalid per se.**
>
> **For Example:** Oklahoma prohibits naturally occurring (i.e. "wild") minnows harvested for fish bait from being taken outside the State, but there is no limit on the use of minnows within the State. Since a **less discriminatory alternative** exists, to simply limit the harvesting of minnows, the law is **invalid**.
>
> **For Example:** Maine bans bait fish from being brought into the State to protect native fish from infestation by parasites that don't exist in Maine. Since no less discriminatory means of protecting native fish is available, the law is **valid.**

5) Extension of State Rules to Cities and Counties

Subdivisions of States, such as cities or counties, are equally restricted because efforts to favor the citizens or businesses within any subdivision of a State, or efforts to favor the subdivision itself, automatically work to the detriment of everyone located elsewhere, including those located outside the State.

> **For Example:** New York City requires all solid waste collected within the City to be deposited in its new landfill facility. The purpose of the law is to generate revenues for the City to the detriment of landfills outside the city that are deprived "dumping fees," including landfills in New Jersey. Therefore, the law is **invalid.**

6) No State Burdens on Commerce Without a Legitimate Purpose

Even if a State regulation of interstate commerce is NOT for deliberate discrimination, it is still invalid if it is **not for a legitimate State purpose.** Traditionally legitimate State government purposes are to **protect the public health, safety, welfare** and **morals.**

> **For Example:** Pittsburgh requires all products sold in the city to show the emblem of the Pittsburgh Steelers football team. This statute 1) burdens commerce and 2) is not for a legitimate government purpose so it would be **invalid**.

7) Balancing State Regulation of Commerce Against State Benefits

State regulation of commerce that is not discriminatory is still invalid if the **burden on interstate commerce clearly outweighs the benefits** to the State. This is a factual issue based on a **balancing test**.

Under *Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137 state regulation of commerce is valid if 1) it is for a **non-discriminatory purpose,** 2) for a **legitimate State interest,** 3) has an **incidental effect** on commerce and 4) the state **benefits outweigh the burden** to interstate commerce.

> **For Example:** To protect the environment Minnesota requires all milk sold in the state to be in glass containers. The law is not for the legitimate government purpose of environmental protection and not for discrimination. But the law burdens commerce and will be invalid if the **burden outweighs the benefit** to the State.
>
> **For Example:** California establishes fruit inspection stations at the state line to keep harmful pests out of the State. This is for a legitimate government purpose and not to discriminate against out-of-state growers. But the law has **more than an incidental effect** so it will be invalid if the **burden outweighs the benefits** to the State.
>
> **For Example:** Florida bans out-of-state banks from giving investment advice to prevent "monopolistic practices". The law is discriminatory in effect and will be **invalid** unless the State can prove the **benefits outweigh the burden**.

8) The State Market Participant Exception

States **may intentionally discriminate** against out-of-state businesses and residents in favor of in-state businesses and residents with respect to a particular good or service when the State is using its **own funds and employees to produce** that good or service. This is called the **"Market Participant"** exception, and it is based on considerations of **state sovereignty**.

State sovereignty is guaranteed in that,

> **Article IV, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government…"**

To protect state sovereignty the federal government is barred from commandeering the resources of the States to **fund and staff federal programs**. And when **States fund and staff their own programs** they can generally use those resources as they see fit.

Close attention to detail is needed to determine if a state is a market participant or merely trying to **extend its control** to purchases and sales being made by others.

> **For Example:** New York City will not contract with landfills outside city limits for waste disposal. This discriminates against landfills outside the City, but it is **valid** because the City is a market participant **paying for a service.**

> **For Example:** Texas only hires Texas residents to be Texas Rangers. This discriminates against residents from bordering states (e.g. Oklahoma). But the law is **valid** because the state is a market participant **paying for services** (i.e. labor services.)
>
> **For Example:** South Dakota owns a cement plant and will not sell cement to businesses in North Dakota. The state is a market participant because it is **selling a product**. So it can discriminate and the rule is **valid.**
>
> **For Example:** Alaska won't sell timber from state-owned forests to any buyers unless they agree to mill the timber into lumber before they ship it out of the state. This is **invalid** because the state trying to control the **milling** of the timber **after** it is sold.

9) The State 21st Amendment Exception

The **21st Amendment** allows the states to prohibit or regulate the sale of "intoxicating liquors" (alcoholic beverages). This power is limited and subject to other Constitutional considerations.

> **21st Amendment, Section 2: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."**

States **may burden interstate commerce** to a **limited extent** when regulating the **sale and use** of alcoholic beverages. But States can NOT **intentionally discriminate** to favor in-state businesses. Those acts would be **invalid per se**.

> **For Example:** Hawaii places a 20% tax on all liquor except locally produced "pineapple wine." Since this is intentional discrimination to favor in-state businesses, this is **invalid per se.**
>
> **For Example:** Ohio requires out-of-state distillers to sell only to licensed in-state wholesalers in order to assure payment of state taxes. This is a **valid** restriction on commerce because the intent is to prevent tax avoidance, not to benefit in-state distillers.

Unnecessary burdens on **advertising and pricing** of alcoholic beverages are often **invalid**.

> **For Example:** Arkansas bans the advertisement of alcoholic beverages on cable television. Since this is not a prohibition or limitation on "sale or use" it is **invalid** unless the State can show the **benefit to the state outweighs the burden** on commerce.

But **labeling requirements** are often **valid**.

> **For Example:** To assure payment of state taxes, North Dakota requires liquor sold free of State tax at U.S. military bases inside the state to have special labels. Since this is a **valid** rule because the burden on commerce is minor compared to the state need, even though it allows the State to exert some control over federal lands.

10) State Subsidization of Commerce Versus Burdens on Commerce

The commerce clause is not generally violated when State funds are used to directly subsidize in-state businesses, even though the intent and effect is to give the in-state business a competitive advantage over out-of-state businesses. The direct subsidy makes the state a **market participant promoting interstate commerce** rather than burdening it.

> **For Example:** California gives a $10 million research grant to Apple Computer to promote semi-conductor research. Even though this intentionally favors in-state businesses, it is **valid** as a **direct subsidy** to increase interstate commerce.

But **discriminatory taxation is invalid per se.**

> **For Example:** Texas gives a $10 million tax break to Texas Instruments to help fund its semi-conductor research. This is **invalid per se** because it is **discriminatory taxation** that burdens out-of-state businesses and **decreases interstate commerce.**

11) Recent Narrowing of Congress' Commerce Clause Authority

Under the "Aggregation Doctrine" Congress was given broad power from the 1930s through the 1980s to control any activity that, in the aggregate, had any effect on interstate commerce. This exception threatened to "swallow the rule" that Congress' powers were narrowly limited to those enumerated in the Constitution.

Over the past few years the Court has moved to narrow Congress' powers under the Aggregation Doctrine to only those situations where activities have significant effects on interstate commerce.

In *United States v. Lopez* (1995) 514 U.S. 549 the Court invalidated the Gun-Free School Zones Act of 1990 holding that the Constitution does not give Congress the enumerated power to make it a federal crime to possess a firearm near a public school.

In *United States v. Morrison* (2000) 529 U.S. 598 the Court invalidated the Violence Against Women Act of 1994, despite statements of Congressional intent that the purpose of the Act was to promote interstate commerce by preventing violence against women. The Court held that despite those express statements the relationship between violence against women and interstate commerce was not significant enough for Congress to control local law enforcement.

> **For Example:** California legalizes the use of marijuana prescribed by a medical doctor for medical purposes, but federal law makes it illegal. Federal agents seize marijuana from Bevis, a cancer victim dying in Los Angeles. Does Congress have the power to override State law under application of the **commerce clause**? Probably not.

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C. Power Over Immigration and Naturalization

A third important power of Congress is the power to control **naturalization.**

> **Article I, Section 8: "[1] The Congress shall have Power … [4] To establish an uniform Rule of Naturalization…"**

This is seldom tested, but Congress has **plenary** power over immigration and naturalization. No state can pass laws or take independent action in this field.

> **For Example:** Pete "I Blame the Mexicans for Everything" Wilson, Governor of California, announces he will direct the California Highway Patrol to start controlling illegal immigration along the Mexican border. This would be an illegal act because Congress has plenary (absolute) power over **immigration**. Although the Highway Patrol can detain illegal aliens (and turn them over to the U.S. Border Patrol), it cannot assume the role expressly reserved to the federal government by the Constitution.

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D. No Power Over Citizenship by Birth

Neither Congress nor any State has any power to deny citizenship to **a person born** within the United States. Congress can only control the rules of **naturalization**. Citizenship is defined by the 14th Amendment:

> **14th Amendment, Section 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States…;"**

This is seldom tested, but citizenship by birth is a Constitutional "birthright" regardless of the circumstances of the birth.

If a person is a naturalized citizen, Congress has the apparent power to revoke citizenship. But if a person is a citizen by birth, that status cannot be taken away under the 14th Amendment.

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E. Power Over Federal Courts

Another important power of Congress is the power to **establish** all federal courts inferior to the Supreme Court, and to determine their **jurisdiction and rules**, including rules for appeals.

> **Article I, Section 8: "[1] The Congress shall have Power … [9] To constitute Tribunals inferior to the supreme Court;"**
>
> **Article III, Section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…"**

> **Article III, Section 2: "[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."**

This is seldom tested. The important thing to understand is that all federal courts (e.g. district courts, bankruptcy courts, etc.) and the rules they follow (e.g. the Federal Rules of Civil Procedure) are created by **Congress**, and not by the Supreme Court.

However, the rulings of the Supreme Court are binding on all "inferior courts", and Congress has no direct power over the Supreme Court. Further, Congress cannot prevent the Supreme Court from providing ultimate appellate review on Constitutional issues.

> **For Example:** Congress declares, "Federal courts have no jurisdiction over cases about abortion." The law would be **valid as to district courts**, but it could not prevent the Supreme Court from hearing such cases. Otherwise Congress could prevent the Supreme Court from deciding Constitutional issues contrary to its authority under Article III.

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F. Power Over Maritime and Military Matters, Military Laws and Courts

Congress also has plenary power to establish all laws and rules applicable to the high seas, military matters, the military forces of the United States and the militias of the States (the National Guard).

> **Article I, Section 8: "[1] The Congress shall have Power … [10] To define and punish Piracies and Felonies committed on the high Seas…;**
>
> **[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;**
>
> **[12] To raise and support Armies…;**
>
> **[13] To provide and maintain a Navy;**
>
> **[14] To make Rules for the … land and naval Forces;**
>
> **[15] To provide for calling forth the Militia… suppress Insurrections and repel Invasions;**
>
> **[16] To provide for organizing, arming, and disciplining, the Militia…reserving to the States respectively, the Appointment of the Officers, and the…training…;"**

This is seldom tested. The important thing to understand is that Congress establishes the rules for the military (i.e. the Uniform Code of Military Justice.) Congress may establish a Military Oversight Committee authorized to approve of military action proposed by the President.

For Example: President George W. Bush wants to wage war on Iraq. He can only do that if Congress has approved it. Approval may be by a Military Oversight Committee delegated that power by an act of Congress. But if the Congressional committee does not support the President's war plan, he has no Constitutional authority to act on his own.

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G. Power Over District of Columbia and Federal Lands and Buildings

Congress also has plenary power to establish all laws and rules applicable to the **District of Columbia** and **federal lands,** including federal lands located within the States.

> **Article I, Section 8: "[1] The Congress shall have Power … [17] …over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;"**
>
> **Article IV, Section 3 [2]: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States…"**
>
> **23rd Amendment: "Congress shall have power to enforce this article…"** [providing for Presidential elections in the District of Columbia.]

This is seldom tested. The important thing to understand is that Congress establishes all laws governing the **District of Columbia**, **territories** or **federal property**. **State laws have no effect on federal properties** or within a federal building, except as Congress may allow.

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H. Power to Protect Civil Rights and Voting Rights

Congress is expressly given the power to enforce, by appropriate legislation, the provisions of the 14th, 15th, 19th, 24th and 26th Amendments.

> **14th Amendment: "….No State shall make or enforce any law which shall … deprive any person of life, liberty, or property, without <u>due process</u> of law; nor deny to any person within its jurisdiction the <u>equal protection</u> of the laws…"**
>
> **15th Amendment: "The right of citizens …<u>to vote</u> shall not be denied or abridged …on account of <u>race, color or previous condition of servitude</u>… "**
>
> **19th Amendment: "The right of citizens …<u>to vote</u> shall not be denied or abridged …on account of <u>sex</u> …"**
>
> **24th Amendment: "The right of citizens …<u>to vote</u> in any primary or other election for President or Vice President…or for Senator or Representative in Congress, shall not be denied or abridged …by reason of failure to <u>pay any poll tax or other tax</u>…"**

26th Amendment: "The right of citizens …who are eighteen years of age or older, to vote shall not be denied or abridged …on account of age …"

The interpretation and application of the 14th Amendment is extensively tested in law school and the concepts of **due process** and **equal protection** guaranteed by that amendment will be discussed in greater detail in later chapters.

The **voting rights** guaranteed by the 15th, 19th, 24th and 26th Amendments is seldom tested in law school.

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I. Impeachment

Under Article I, Section 1 [5] the House of Representatives has sole power to impeach federal officials and Article I, Section 3 [6] gives the Senate sole power to try impeachments. The judgment in the case of impeachment is limited to removal from and disqualification for office, but impeached officials remain liable for criminal prosecution under Article I, Section 3 [7]. This is of minor interest in law school but may be the subject of a Bar exam question.

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J. Immunities and Privileges of Congress

Members of Congress are **privileged from arrest**, except for treason, felony and breach of the peace while attending or going to or from sessions of Congress, and they are **immune from civil or criminal prosecution** for any **speech or debate in Congress.**

2. Powers Specifically Denied Congress

The discussion above concerns the powers the Constitution specifically gives Congress. The Constitution also specifically denies Congress certain powers. Some of these prohibitions are very important, and others are less important in terms of law school study.

The limitations on the power of Congress that are important to know in classes on **Constitutional Law** (as opposed to Criminal) will be discussed in detail in later chapters and only listed here.

Important Denied Powers and Prohibitions: The more important powers, in terms of law school study, that are **specifically denied** to Congress in the Constitution are:

1. The power to pass laws **respecting establishments of religion** (1st Amendment, 1791, the "establishment clause");
2. The power to **infringe the free exercise of religion** (1st Amendment, 1791, the "free exercise clause");
3. The power to **infringe the freedom of speech** (1st Amendment, 1791);
4. The power to **infringe the freedom of the press** (1st Amendment, 1791);
5. The power to **infringe the right of assembly** (1st Amendment, 1791);

6. The power to **infringe the right to petition government for redress of grievances** (1st Amendment, 1791);
7. The power to deprive a person of life, liberty or property without **due process** (5th Amendment, 1791, the "due process" clause);
8. The power to **take private property without just compensation** (5th Amendment, 1791, the "takings" clause);
9. The power to deny the right to a **jury trial** in suits as established in common law (7th Amendment, 1791);
10. The power to levy **excessive fines** or **cruel and unusual punishments** (8th Amendment, 1791).

Other Denied Powers and Prohibitions: The less important powers, in terms of law school study on Constitutional Law, that are **specifically denied** to Congress are:

1. The ability to **stop slave importation** before 1808 (Article I, Section 9 [1]);
2. The power to **suspend the writ of habeas corpus** except during rebellions or invasions (Article I, Section 9 [2]);
3. The power to pass **bills of attainder or ex post facto laws** (Article I, Section 9 [3]);
4. The power to **tax states except by per capita** (Article I, Section 9 [4]);
5. The power to **tax exports from any state or give tax preferences to any state** (Article I, Section 9 [5], [6]);
6. The power to **spend except by appropriation** (Article I, Section 9 [7]);
7. The power to **grant titles of nobility** (Article I, Section 9 [8]);
8. The power to **infringe the right to bear arms** (2nd Amendment, 1791);
9. The power to **quarter soldiers in homes** (3rd Amendment, 1791);
10. The various **criminal procedure guarantees** studied in criminal procedure classes (4th, 5th, 6th, and 8th Amendments, 1791);
11. The power to **deny citizens the right to vote** on account of **race, color or prior condition of servitude** (15th Amendment, 1870), or on account of **sex** (19th Amendment, 1920), or because of a failure to pay a **poll tax or other tax** (24th Amendment, 1964) or on account of **age** if over 18 years of age (26th Amendment, 1971).

3. Powers Impliedly Denied to Congress

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A. No Power to Directly Promote the Public Welfare

The Constitution is not expressly given the power to pass laws to directly promote the "general welfare", and there is no such thing as a "General Welfare Clause." Congress can only promote the general welfare through the "tax and spend" clause which gives it the power to tax and spend to promote the public welfare. That generally is done by providing grants or loans or through federal revenue-sharing agreements with the various States.

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B. No Power to Appoint Officers or Enforce Laws

Article II, Section 1 [1] vests executive powers in the President, and Section 2 [2] (which may be called the "Appointments Clause") gives the President the power to appoint ambassadors, ministers, consuls, Supreme Court judges, and all other officers. But Congress can vest the power to appoint "inferior officers" in courts of law or executive departments. By implication, Congress CANNOT directly appoint any executive officers or enforce any laws itself.

Chapter 3: The Constitutional Powers of the States

The 10th Amendment reserves to the individual States or the people every power not specifically delegated to the federal government by the Constitution or specifically prohibited to the States.

> **10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."**

1. The Enumerated Powers of the States

The mandate of the 10th Amendment is so sweeping that there are few other provisions in the Constitution granting States specific rights and powers except those prohibitions against Congress discussed above. To recap, the major specific rights and powers of States are as follows:

1. The right to maintain and **train the militia** and **appoint militia officers** (Article I, Section 8 [16].)
2. The right to **export goods free** from federal tax (Article I, Section 9 [5].)
3. The right to **send and receive goods free** of duties to other States (Article I, Section 9 [6].)
4. The right to **equal treatment in federal regulation** of interstate commerce (Article I, Section 9 [6].)
5. The right to a **republican form of government, protection from invasion** and, upon request, **protection against domestic violence** (Article IV, Section 4, the "Sovereignty Clause.")
6. The **right of ratification** of Constitutional amendments by three-fourths of the States (Article V.)
7. The right to **at least one representative in the House** (Article I, Section 2 [3].)
8. The right to an **equal voice in the Senate** (Article V.)
9. Protection from **lawsuits in federal courts filed by private citizens** (11th Amendment.)
10. The power to control the **use and sale of alcoholic beverages** (21st Amendment.)

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A. Limited State Sovereignty

Sovereignty of the several States, within the limits imposed by the Constitution, is implied by the 10th Amendment and the **sovereignty clause** of Article IV:

> **Article IV, Section 4: "The United States shall guarantee to every State in this Union a Republican Form of Government…"**

This principal is also referred to as "federalism". But State sovereignty does not mean states can do whatever they want without limit. State sovereignty is limited by the other Constitutional provisions, including the **supremacy clause** of Article VI [2]. While both the state and federal governments are sovereign, but they are NOT equal sovereigns.

1) Traditional Areas of State Sovereignty

The traditional areas of State sovereignty are to regulate **public health, safety, welfare**, and **morality,** to control **police** powers, provide **education** and establish systems of **taxation**.

Any federal law should automatically be suspect and subjected to critical review if it attempts to directly control or mandate activities in one of the traditional areas of State sovereignty. **Federal laws are** invalid unless they are justified **by the authority given Congress by the** commerce clause or one of the other enumerated powers **of Congress.**

Not all federal laws in these areas are invalid per se. If valid, federal laws override conflicting State laws under the supremacy clause. But frequently federal laws in these subject matter areas are invalid because Congress has exceeded its authority.

> **For Example:** Congress makes it a federal crime to possess a handgun within 1000 feet of a public school. The law is **invalid** because the law has no significant relationship to interstate commerce and Congress has no authority otherwise to enact laws to protect the "general welfare." [see *United States v. Lopez* (1995) 514 U.S. 549]

Remember, however, that Congress may always use the "tax and spend" clause to **withhold federal funding** if States do not meet federal program guidelines.

> **For Example:** Congress denies federal matching funds for education to any State that does not make it a crime to possess a handgun within 1000 feet of a public school. The law is **valid** under Congress' authority to **tax and spend for the general welfare**.

2) The Federal Government Can Not Commandeer State Resources

Generally Congress cannot commandeer the resources of any State. There are exceptions, however.

> **For Example:** Congress passes the National Parasite Control Act ordering all states to establish roadblocks at state lines to inspect fruit for agricultural pests. This is **invalid** because Congress cannot commandeer State resources to control interstate commerce.

> **For Example:** Congress passes the National Parasite Control Act establishing federal roadblocks at state lines to inspect fruit for agricultural pests. This is **valid** because Congress can control interstate commerce and is not commandeering State resources.

But exceptions are created by the authority given Congress by the 14th Amendment:

> **For Example:** A federal court orders Little Rock High School to be racially integrated. Governor Orville Faubus blocks integration, and President Eisenhower has the U.S. Army seize the school. Faubus protests this violates his state sovereignty. Well duh! **The 14th Amendment** guarantees equal protection and gives Congress the power to pass any law necessary to ensure it. Valid federal laws override all conflicting state laws under the **supremacy clause**, and the 14th Amendment (1868) superseded the earlier 10th Amendment (1791) to the extent the two conflict. Therefore, States have no sovereign right

to deny equal protection to any person, and the federal government can seize any State assets to the extent necessary to assure equal protection.

3) Federal Regulation of State Activities

If Congress' legitimate efforts to exercise its enumerated powers are in **direct conflict** with the concepts of state sovereignty established by Article IV the Courts will apply a **balance test** comparing the relative impact on the two levels of government. In that balance, the resolution will depend on whether the activity involved is one that has been **traditionally relegated** to the States and the **impact** of federal relation on **concepts central** to State autonomy.

Concepts of state sovereignty will typically prevail, and federal law will be held **invalid,** if Congress is attempting to control activities that have traditionally been **within the control** of the States and inflict **significant impact** on functions **central** to notions of state sovereignty.

But Congress' enumerated powers will typically prevail, and federal law will be **valid,** if the States are engaged in **'non-governmental' activities** or where the federal law has **little significant impact** on traditional notions of state sovereignty.

> **For Example:** The Interstate Commerce Commission sets maximum continuous driving hours for truck drivers at 12 hours. New Mexico requires its own state employees to drive for 14 hours. The federal law will **override** the state rule because it would have only an **incidental impact** on New Mexico's sovereignty.
>
> **For Example:** Minnesota requires public school teachers to be U.S. citizens. George, a Canadian national and qualified teacher with a permanent residence visa is denied employment. The Minnesota law is invalid because Congress has **plenary power over immigration** under Article I, the law denies **equal protection** and the sovereignty of Minnesota would suffer **no significant impact** by letting non-citizens teach school.
>
> **For Example:** Nevada forecloses on the Virginia City Railroad, a railroad that failed to pay state taxes. Nevada continues to operate the railroad and refuses to obey federal railroad safety rules arguing that **state sovereignty** makes it exempt. The state claim is **invalid** because running a railroad is **not a traditional function of government.**

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B. The 11th Amendment

Article III of the Constitution states:

> **Article III: "The judicial Power of the United States, shall … extend to all Cases, in Law and Equity… between a State and Citizens of another State…"**

That provision was overridden and sharply changed by the 11th Amendment which prohibits any person from suing a State, for damages, in a federal court.

> **11th Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State…"**

This is an important limitation that is frequently tested.

1) No Suit by Any Person Against Any State in Any Federal Court

The 11th Amendment has been interpreted by the Courts to mean that NO person from ANY place can sue ANY state in a federal court.

> **For Example:** Max sues Ohio in federal court because he was hit by an Ohio state highway department truck. The suit should be **dismissed on motion** because the 11th Amendment prohibits Max from suing Ohio or any other state in a federal court. It doesn't matter where Max is from. Max's remedy is to sue Ohio in a state court.

2) 11th Amendment Effectively Bars Monetary Damage Awards, Not Injunctive Relief

Although the 11th Amendment expressly states that it applies both to suits in "law or equity" it does not, in reality, bar a federal court from granting a citizen an equitable injunction stopping states from Constitutional or federal law violations. The reason is that a party may simply seek an injunction stopping **state officials** from continuing the acts on behalf of the state. This is referred to as the **"stripping doctrine".** (See *Ex parte Young* (1908) 209 U.S. 123.) Consequently, in most cases **the 11th Amendment usually only bars** suits in federal courts against states for **MONEY DAMAGES**.

> **For Example:** Bevis, the Registrar of Voters, refuses to let Bo, a citizen of Florida, register to vote because Bo is Black. Bo sues in federal court for an injunction ordering "the Florida Register of Voters and all agents and employees thereof" to allow him to register to vote as promised by the 15th Amendment. The suit does not violate the 11th Amendment because it is against officials and not against the State of Florida and involves an injunction to protect **constitutional rights.**

But if the state is the **real party in interest** and no unconstitutional acts are involved, the 11th Amendment does prevent a federal court from granting an injunction against state officials. (See *Ford Motor Co. v. Department of the Treasury*, (1945) 323 U.S. 459.) In particular, a federal court cannot be used to obtain an injunction to force state officials to obey state laws. (*Pennhurst State School & Hospital v. Halderman* (1984) 465 U.S. 89.)

> **For Example:** The State of California owes Sam a state tax refund and won't pay it. Sam seeks an injunction in federal district court to force the State Controller to issue him his refund check. The 11th Amendment bars this claim because the State of California is the real party in interest and the claim does not seek to prevent unconstitutional acts.

3) Subdivision of State Exception to 11th Amendment

By interpretation the 11th Amendment does not bar federal court actions against **cities, counties and other subdivisions of the States**.

> **For Example:** Bo, a citizen of Georgia, sues Dade County, Florida, in federal court for injuries suffered in an auto accident. The 11th Amendment does not bar the suit because the State of Florida is not the defendant.

4) The Subsequent Amendment Exception to 11th Amendment

Any Constitutional amendment that was adopted **after** the 11th Amendment overrides it, and several dealing with civil rights allow Congress to enact "laws appropriate" to give effect to their provisions. If Congress enacts any valid law under this authority it can allow a person to sue a State for damages in federal courts. However, in any particular case the provisions enacted by Congress must be **appropriate** to enforce protection of the guaranteed rights.

> **For Example:** Congress adopts a statute allowing a person to sue a State in federal court for punitive damages if the right to vote is denied on the basis of sex in violation of the 19th Amendment. This law is **valid** if it is **appropriate** legislation for enforcement of the right to vote.

But, a law that gives an individual the right to sue a state is **not appropriate** to give effect to the 14th Amendment if it is **not necessary** to assure due process and equal protection.

> **For Example:** Congress passes the Americans with Disabilities Act (ADA) giving individuals the right to sue States for money in federal court. Alabama refuses to give Garrett, a disabled person, "reasonable accommodation" required by the Act. Garrett sues Alabama in federal court. The 11th Amendment prohibits individuals from suing States in federal court, but the 14th Amendment might override it. The 14th Amendment gives Congress the right to pass "appropriate legislation" to ensure equal protection. But Garrett seeks preferential treatment, not equal protection. And the ADA was not necessary to prevent States from oppressing the handicapped because States have a long history of helping, not oppressing, the disabled. So Congress had no reason to let individuals sue States for money in federal court in the ADA provisions, and that section of the Act is **invalid**. (*Board of Trustees of Univ. of Alabama v. Garrett* (2001) 531 U.S. 356.)

2. Powers Specifically Denied the States

The Constitution specifically denies the States certain powers. Some require extensive discussion and some don't:

1. States are prohibited from **entering into treaties, alliances or confederations** (Article I, Section 10 [1]);
2. States are prohibited from **issuing letters of marque or reprisal** (Article I, Section 10 [1], documents authorizing private parties (e.g. "buccaneers") to attack and seize property);
3. States are prohibited from **coining money** (Article I, Section 10 [1]);
4. States are prohibited from passing **bills of attainder or ex post facto laws** (Article I, Section 10 [1]);

5. States are prohibited from passing **bills impairing contracts** (Article I, Section 10 [1]);
6. States are prohibited from **granting titles of nobility** (Article I, Section 10 [1]);
7. States are prohibited from **placing duties on exports and imports** except as authorized by Congress or necessary for inspection expense (Article I, Section 10 [2]). This may be called the "Import-Export Clause";
8. States are prohibited from **placing duties on tonnage** except as authorized by Congress (Article I, Section 10 [3]);
9. States are prohibited from **keeping troops or ships of war** in peacetime (Article I, Section 10 [3]);
10. States are prohibited from **entering into agreements or compacts with other states or with a foreign power** (Article I, Section 10 [3]);
11. States are prohibited from **engaging in war** except when actually invaded or danger is imminent (Article I, Section 10 [3]);
12. States are prohibited from **denying full faith and credit** to the public records, acts and judicial proceedings of every other state (Article IV, Section 1, the "Full Faith and Credit Clause.")
13. States are prohibited from **denying privileges and immunities to the citizens of other states** (Article IV, Section 2 [1], the "Privileges and Immunities Clause.")
14. States are prohibited from **refusing to extradite criminals** (Article IV, Section 2 [2].)
15. States are prohibited from **harboring runaway slaves** and **indentured servants** (Article IV, Section 2 [3].)
16. States are prohibited from depriving any person of life, liberty, or property without **due process** of law (14th Amendment, Section 1, the "Due Process Clause.")
17. States are prohibited from depriving any person **equal protection** (14th Amendment, Section 1, the "Equal Protection Clause.")
18. States are prohibited from denying the **right to vote** based on **race, color, prior condition of servitude** (ex-slaves), **sex, tax debts** (in federal elections), or **age** (if over 18) (15th, 19th, 24th and 26th Amendments.)

The Constitutional provisions prohibiting States (and the federal government as well) from denying fundamental rights will be discussed in detail in later chapters.

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A. States are Barred from Impairing Existing Contracts

The "Contract Clause" of the Constitution prohibits States from passing any law that **substantially impairs** the obligations of parties under **existing contracts**.

> **Article I, Section 10[1]: "No State shall…pass any…Law impairing the Obligation of Contracts…"**

The importance of the contract clause as a limit on State legislative action declined substantially following the adoption of the **due process** clause of the 14th Amendment because that is broader and somewhat duplicative. However the contracts clause still has valid application and should be discussed when a state law **substantially denies** benefits that a party would have been enjoyed (or **relieves duties** that a party would have had to perform) under an existing contract.

The contracts clause does not generally prohibit States from **exercising sovereignty** by creating, repealing or amending statutes, even if that would have retroactive effect on existing contractual obligations where these statutory changes are **reasonable** and for a **legitimate public purpose.**

If States enact statutory changes for legitimate public purposes that impair existing contracts, the Courts will apply a **balance test** to consider whether the enactment is **reasonable**. The Court will balance the **necessity** of the measure and the importance of the **public purpose** against the **burden** to existing contracts. The Court will also consider whether the statutory changes are appropriately **tailored and limited** to meet the public need. A State is not free to adopt a statute imposing a **drastic impairment** on existing contracts when other **more moderate and appropriate courses of action are equally available** to serve the public purpose.

> **For Example:** Leary contracts to buy hallucinogenic mushrooms. Massachusetts then makes it a crime to possess the mushrooms. Leary's supplier refuses to deliver because the contract is now illegal. The statute is **valid** even though it impairs an existing contract because it is **appropriate** to the **legitimate State purpose** of protecting public morals.

As a general rule a State Legislature may not enter into a contract that prevents all future Legislatures of the same State from having the power to enact laws for the legitimate purpose of protecting the health, safety and similar interests of the State residents. But, a State that enters into a contract has **no legitimate purpose** in refusing to meet its **own legitimate financial obligations** simply because it doesn't want to spend the money.

> **For Example:** New York enters into a long-term contract to buy electricity. The market price for electricity then drops, so the State declares the contract void. The act voiding the contract would be **invalid** because it is **not motivated by a legitimate public purpose**.

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B. Considerations of State Comity Limit State Actions

The main provisions of Article IV of the Constitution were intended to promote comity (i.e. civility, courtesy) between the States.

1) Full Faith and Credit Clause

The "Full Faith and Credit Clause" of Article IV requires each state to honor the official acts and findings of each other state.

> **Article IV, Section 1: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."**

The effect of this is that each State must **respect** the determinations of every other State, even if the determination would have been different had the proceeding been brought in a different jurisdiction.

> **For Example:** Hawaii adopts a law that allows same-sex marriage, and Bevis, a man, marries Butthead, a man, in Hawaii under the provisions of the new law. All other states must recognize the marriage as a legal fact, even though Bevis could not have married Butthead in any other jurisdiction, because each State must afford full faith and credit to the "Acts, Records and Proceedings" of every other State.
>
> **For Example:** Bevis sues Butthead in Kentucky for negligence, and the jury finds that Bevis was contributorily negligent. If that is not a bar to recovery under Kentucky law, it does not bar Bevis from collecting by enforcing the judgment in every other state, even if some of the other states recognize contributory negligence as a complete defense, because the other states must give **full faith and credit** to the Kentucky holding.

2) Privileges and Immunities Clause of Article IV

There are actually two different "Privileges and Immunities Clauses" in the Constitution. The "Privileges and Immunities Clause" of Article IV of the Constitution is the only one of any importance. It prohibits each state from **discriminating against the citizens of the other states** with respect to **matters of fundamental concern** unless there is a **substantial justification** for the discrimination. This primarily applies to individuals as opposed to corporations.

> **Article IV, Section 2[1]: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."**

Since the purpose of the clause was to **promote comity** among the states, it only has been held applicable to **basic and fundamental activities** which belong to the citizens of all free governments.

The second "Privileges and Immunities Clause" is in the 14th Amendment. That provision is of little or no importance and should never, ever be confused with the clause in Article IV. [Hint: On the MBE any answer that suggests the privileges and immunities clause of the 14th Amendment is important in any way is likely to be WRONG every time.]

The use of the term "fundamental" with respect to the privileges and immunities clause of Article IV applies to "activities" and is NOT the same concept as a "fundamental right" as that term is used regarding due process, freedom of religion, etc. The **"basic and fundamental activities"** protected by the privileges and immunities clause of Article IV are mundane activities such as the right of out-of-state residents:

- To **pass through** another state;
- To **reside** in another state;
- To engage in **trade, agriculture** or a **profession** in another state;
- To **take, hold and dispose of property** in another state;
- To **be free of discriminatory taxes and fees** in another state.

Some activities that are **NOT basic or fundamental**, and for which a **state may discriminate** against the residents of other states are:

- Terms under which out-of-state residents may **attend state funded colleges**;
- **Hunting and fishing** within the State by out-of-state residents;
- To use **state-owned campgrounds and parks**.

  For Example: Bevis, a resident of New Jersey, enrolls in Ohio State University and is charged out-of-state tuition. This is **valid** and Ohio could even refuse to let him attend the university altogether because attending an out-of-state college is NOT a basic or fundamental activity necessary to promote comity among the States.

  For Example: Virginia requires attorneys to take the Bar Exam **if they are not State residents**. This is **invalid** because practicing a profession is a basic and fundamental activity and it violates the privileges and immunities clause to prevent out-of-state residents from practicing their profession on the same footing with State residents.

The privileges and immunities clause of Article IV is not absolute and a state may discriminate against out-of-state residents if it is closely related to a substantial state interest. It is usually necessary to show that the out-of-state residents are a particular source of the problem the discriminatory treatment is intended to eliminate.

3) Extradition and Runaway Slaves

The "Extradition" and "Runaway Slave" clauses of Article IV were also intended to promote comity among the States. These provisions are now of minor interest.

Chapter 4: The Constitutional Jurisdiction of Federal Courts

The jurisdiction of the federal courts is more limited than the powers of the State courts. State courts are courts of **general jurisdiction** and that means they can consider virtually any controversy. Any claim, including claims arising under federal law, may be raised in a state court. But federal courts have **limited jurisdiction** and can only consider certain specific matters.

The jurisdictional power of the federal courts is always a threshold consideration in the analysis of any action brought in the federal court. Two Constitutional Law considerations are of primary concern: 1) What is the proper Constitutional role of the Supreme Court in the judicial process? And 2) Does a federal court even have jurisdiction to hear a particular matter brought before it?

1. The Constitutional Role of the Supreme Court

The role of the Supreme Court is defined in Article III of the Constitution.

> **Article III, Section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…**
>
> **Section 2: "[2] In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions and under such Regulations as the Congress shall make."**

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A. Appellate Jurisdiction and Determination of Constitutionality

The exact meaning of these provisions was decided in the seminal case of *Marbury v. Madison* (1803) 5 U.S. 137. Earlier Congress had passed the Judiciary Act of 1789 giving the Supreme Court the power to issue writs of mandamus (i.e. court orders) to require any federal court or any federal officer to act or refrain from acting. Marbury petitioned the Supreme Court under the provisions of the Act seeking a writ that would order James Madison, the Secretary of State, to deliver to him a commission naming him as a justice of the peace in the District of Columbia. Marbury had been appointed to that position by the outgoing president, John Adams, on the last day of his administration. But the commission was withheld from Marbury by Madison acting on orders from the incoming president, Thomas Jefferson.

The Supreme Court held that 1) the U.S. Constitution was the supreme law of the land and 2) the judicial power of the federal courts extends to all cases arising under the Constitution. Further 3) that it was the right and duty of the federal courts to interpret the Constitution. The Court further held that Marbury had a legal right to the commission he sought, and 4) that federal courts (in general) had the power to order the President to deliver the commission in this particular case because it sought the performance of a legal duty imposed by Congress.

However, the Court held 5) that the Constitution only gave the Supreme Court appellate jurisdiction over matters that had been previously decided in lower courts, except as to those

matters specifically enumerated in Article III, Section 2[2], and this matter was not brought on appeal from any lower court. Since the Judiciary Act of 1789 attempted to give the Supreme Court original jurisdiction powers beyond those specified in the Constitution, it held that the Act was unconstitutional and inherently invalid. In other words Marbury was in the wrong court and his petition was rejected on that basis.

Marbury v. Madison established principles that we take for granted today:

1. That except for the original jurisdiction set forth in the Constitution, the Supreme Court only has appellate jurisdiction;
2. That it is the right and duty of the federal courts, including the Supreme Court, to decide whether any challenged law is unconstitutional; and
3. That laws found by the Court to be unconstitutional are null and void.

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B. Discretionary Review by Supreme Court

Every party to a judgment in a federal district court has an automatic right to appellate review one time. Appeal is made to a United States Court of Appeal (i.e. U.S. Circuit Court). An appeal by right is brought by a writ of appeal. But there is generally no automatic right to appellate review by the United States Supreme Court. Supreme Court review is usually discretionary and is sought by a writ of certiorari.

1) No Review of State Court Decisions by Federal District Courts

Only the Supreme Court has the authority to review the decisions of state courts, and federal district courts do not have jurisdiction in such matters.

2) No Supreme Court Review of State Court Decisions Clearly Based on State Law

State courts are the final judges of the meaning of state laws. The Supreme Court will not attempt to tell states what their own state laws mean. Further, when a state court decision is based on issues of both state and federal law, the Supreme Court will not grant review if the state court's decision clearly points to state law as an **adequate and independent basis** for the result.

But the Supreme Court may grant review of a state court decision based on a combination of state and federal law if there was no clear determination that the state law formed an adequate and independent basis for the result.

And the Supreme Court may always review the Constitutionality of state laws and the decisions based upon them.

3) Supreme Court as Appeals Court of Last Resort

One theoretical situation when a party would have a mandatory right to appeal to the Supreme Court, as opposed to discretionary review, would be if no appeal to the U.S. Court of Appeals were possible.

For Example: Congress passes an act that denies the U.S. Court of Appeals jurisdiction to hear appeals from cases involving abortion. The parties have a right to appeal, and it would then be to the Supreme Court if they could not appeal to any other court.

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C. The Appellate Path to the Supreme Court

If the trial of a legal dispute is held in a **federal district court**, the appeal of the trial court decision would be to the **U.S. Court of Appeals** for the circuit in which the district court was located. Petition for review by writ of certiorari may be made to the **Supreme Court**.

If the trial of the dispute is held in a **state court** the appeal must be made to the **state appeals court**. From the state appeals court a petition for review, if allowed, would be to the **highest court in the state**. That would generally be the **State Supreme Court**. Once the possibility of appeal to the highest court in the state has been exhausted a petition for review by writ of certiorari may be made to the **U.S. Supreme Court**.

It is important to understand the terms used to describe the various courts. "Superior Court" generally means a state trial court (although some states may refer to their "appeals" court as their "superior" court.) "District Court" always means the federal trial court. And "Circuit Court" means the federal appeals court.

For Example: Bevis is tried and convicted for murder in superior court. He petitions the U.S. Supreme Court for review. This petition would be summarily rejected because his remedy is first to appeal to the state appeals court. Then if his appeal is denied his remedy is to seek review by the highest court in the state (generally the state supreme court). He can only petition the U.S. Supreme Court after he has exhausted his remedies within the state court system.

2. The Jurisdiction of Federal Courts

A federal court may only consider a matter over which it has jurisdiction. The jurisdiction of all federal courts, including the Supreme Court, is established in Article III of the Constitution.

Article III, Section 1: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish…

Section 2: "[1] The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction, -- to Controversies to which the United States shall be a Party; -- to Controversies between two or more States; -- between a State and Citizens of another State; -- between Citizens of different States; -- between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

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A. Jurisdiction Restricted to Actual Cases and Controversies

The jurisdictional power of the federal courts, including those matters over which the Supreme Court has original jurisdiction, is restricted by Article III of the Constitution to "cases" and "controversies." This has been interpreted to mean the courts may only consider **actual disputes** and may NOT issue **advisory opinions** or consider **hypothetical claims**.

Claims that fail to constitute actual cases and controversies are said to not be "justiciable" or to "lack justiciability."

By judicial interpretation, justiciable disputes are those brought by a party with 1) **standing** that are 2) **not moot** and are 3) **ripe** for consideration. Each of these terms will be discussed below. Further, even where there is an actual dispute, the federal court may 4) **abstain** from considering the matter as discussed below.

1) No Jurisdiction Over Claims by a Party Lacking Standing

The federal courts have no jurisdiction over a complaint by a plaintiff that lacks **standing**. Whether a plaintiff bringing a claim in federal court has standing is a threshold issue determined by the Court solely on the specific, concrete facts alleged by the plaintiff.

Standing means that the plaintiff alleges to have a **personal stake** in the outcome and is **asserting his or her own rights and interests** either because **actual injury has been suffered** or because **risk of harm** is actually threatened. It is NOT enough for plaintiffs to simply assert that they are members of a large group that would all generally suffer harm equally. And plaintiffs cannot claim standing by asserting the rights of other third parties.

> **For Example:** Bevis files a complaint in federal district court seeking an injunction to stop the federal government from allowing increased logging in national forests. Bevis alleges that the increased logging threatens to deprive him and all citizens of a national resource because it would reduce the number of trees in the forest. His suit would FAIL because he does not cite specific, concrete facts to show he would suffer **personal, actual harm** more than a general harm all citizens would suffer equally.

But an **association of individuals** may have standing if the alleged facts show one or more members of the association are threatened with immediate harm and the nature of the claim or relief sought makes it appropriate for the association to act on behalf of the represented members.

> **For Example:** Tree Huggers Anonymous (THA) files a complaint in federal district court seeking an injunction to stop the federal government from allowing increased logging in national forests. THA alleges that the increased logging threatens to deprive all of its nature-loving members of a national resource because it would reduce the number of trees in the forest. The THA suit would FAIL because it does not cite specific, concrete facts to show that **one or more members** are threatened with **immediate harm** and that it is appropriate for the association to act on behalf of those members.

There is no standing where it is **speculative** whether the plaintiff will actually suffer any harm or that the action sought from the Court would actually provide any remedy to the plaintiff.

> **For Example:** Butthead files a complaint in federal district court seeking an injunction to stop the federal government from allowing increased logging in national forests. Butthead alleges that he was **planning to buy** a cabin in the woods and the increased logging would, or at least might, make living in that area of the forest less enjoyable. His suit would FAIL because he does not cite facts to show he would suffer **personal, actual harm.** Rather, his claim is speculative that IF he bought a cabin he MIGHT have a less enjoyable setting.

> **For Example:** Louisiana law states that a married man may be jailed if he fails to support his children, but unwed fathers do not face the same threat. Brunehilda, the unwed mother of Bevis' child, challenges the law as unconstitutional and she thinks Bevis will start paying child support if he were threatened with jail. Her action will not be heard by the federal court because it is **speculative** whether the remedy sought would cause Bevis to pay child support.

A plaintiff cannot generally bring an action based on a claim the rights of other "third parties" are being violated by a statute. But once the plaintiff has proven his or her **own standing** to challenge that statute the plaintiff may then **act as an advocate for the rights of other third parties** that would be harmed by the challenged statute.

> **For Example:** Oklahoma law states that it is legal to sell beer to a woman over 18 but not to a man unless he is over 21. Bevis the Bartender challenges the law on the grounds that it forces him to engage in unconstitutional discrimination against men and threatens him with criminal prosecution if he does not comply. The threat of prosecution gives Bevis standing to bring the action. And once he has standing to bring the action he can further argue that the law violates the constitutional rights of the young men affected by the law, even though those are "third parties" and assertion of their rights alone would not have given Bevis standing to bring the action.

A plaintiff does NOT generally have standing to bring an action simply because they are a citizen or a taxpayer and **don't like the way government is being run**. The general view is that the federal courts should not be used as an alternative means of political action. But there is one narrow exception. A "taxpayer" can bring a challenge in federal court where **public monies are being spent to support a church** or religious establishment.

> **For Example:** The Defenders of Wildlife, a large organization, seeks an injunction to force the government to declare the cockroach an endangered species. The suit will be dismissed because they do not have standing to challenge the administration of government through the courts.

> **For Example:** Bevis, a sole citizen and taxpayer, seeks an injunction to stop Massachusetts from giving money to support the Episcopalian Church. The suit will NOT be dismissed for a lack of standing because this is a recognized exception to the general rule.

2) Limited Power to Consider Moot Claims

The federal courts generally have no jurisdiction over a complaint that is **moot**. Moot means that by the time the Court addresses the complaint events have occurred that either remedy the situation or make it impossible for the Court to fashion an appropriate remedy.

> **For Example:** Bevis is put in prison for murder. He files an appeal that he did not get a fair trial. While his appeal is pending he is stabbed and killed by another inmate, Butthead. Since no "actual case or controversy" now exists, the Court has no jurisdiction to hear more on the matter of Bevis' appeal.

But the Court will address moot issues if the nature of the complaint is such that it **may reoccur** and each reoccurrence **would otherwise escape judicial review** due to the nature of the claim and the delays inherent in the judicial process.

> **For Example:** Roe is prohibited from obtaining an abortion under Texas law. She sues in federal court claiming the law is an unconstitutional prohibition of her fundamental right to privacy and personal autonomy. By the time the case is considered by the U.S. Supreme Court Roe has already had the baby. In fact, the child is several years old. As a result, it is impossible for the Court to fashion any remedy for Roe. Nevertheless the Court hears the case because the same situation would necessarily recur. Given that a pregnancy takes only nine months while getting to the Supreme Court takes much longer, this issue **would always escape judicial review** if the Court dismissed it for mootness. Therefore, the Court hears the case as representative of the plight of other, unnamed women.

3) No Consideration of Complaints that are Not Ripe

The federal courts generally have no jurisdiction over a complaint that is **not ripe** for judicial resolution. "Not ripe" means that the plaintiff does not face immediate injury, and the possibility of future injury is vague and uncertain.

> **For Example:** Bevis is notified that the City of Bangor, Maine is considering rezoning his land. Bevis fears the zoning might reduce the value of his land, so he files an action in federal district court seeking to have the rezoning law declared unconstitutional. Although Bevis is <u>at risk</u> of having his land rezoned, his complaint is <u>not ripe</u> because the City has not yet made any zoning decision. Therefore, the Court would dismiss the complaint as being premature and unripe for adjudication.

> **For Example:** A Los Angeles Police officer stopped Lyons for no apparent reason (except maybe DWB) and choked him until he was unconscious. Lyons obtained an injunction prohibiting the LAPD from choking people without reason. The Supreme Court overturned the injunction on a holding that it would be "incredible" to think that <u>all</u> officers in the LAPD <u>always</u> choke people without reason or that the City of Los Angeles would order or authorize this practice. Therefore, it held Lyons had no reason to fear this would ever happen again and there was no "ripe" controversy justifying an injunction. (*City of Los Angeles v. Lyons* (1983) 461 U.S. 95.)

Where a challenged law prohibits some act, the **plaintiffs do not have to violate the law to gain standing**. But they must allege they are **actually affected**, threatened or deterred by the law from acting in the prohibited manner. The Court will look to the likelihood the plaintiff would disobey the law, the likelihood there would be a resulting prosecution, and the present injury caused by the threat of future prosecution.

A claim that the challenged law deters the plaintiff from prohibited acts must be more than a claim of only "feeling inhibited."

> **For Example:** Darwin, a public school teacher in Arkansas, challenges a state law prohibiting the teaching of evolution, even though the statute has never been enforced in the 70 years since it was adopted. She has standing if she alleges the existence of the law actually impairs or threatens her ability to teach, but not if she merely alleges the law makes her "feel uncomfortable."

No General Requirement that Administrative and Judicial Remedies be Exhausted. Although the Court will not consider a request that is not ripe, there is generally NO requirement that a plaintiff **exhaust state administrative or judicial remedies** before seeing an injunction in federal court against the application of state law, even if those remedies are reasonable and available.

This was not always the case. Prior to the 1960s federal courts held that requests for injunctions against application of state laws were **unripe if administrative remedies had not yet been exhausted**. But that requirement was eliminated in a series of cases, and there now is no requirement that administrative remedies be exhausted before seeking an injunction to stop a state from applying a state law challenged as unconstitutional. (See *McNeese v. Board of Education* (1963) 373 U.S. 668, *Damico v. California* (1967) 389 U.S. 416 and *Patsy v. Florida Board of Regents* (1982) 457 U.S. 496.)

There never has been any general requirement that plaintiffs seek **judicial remedies** in state court before turning to federal courts, but there are two narrow exceptions to this general rule. By statute plaintiffs may not seek a remedy in federal court where a "plain, speedy and efficient remedy" exists in state courts when challenging the setting of **public utility rates** or the **assessment or collection of state taxes.** (28 U.S.C. §§ 1341 and1342.)

4) Abstention

Younger Abstentions. Because of considerations of comity the federal courts generally will **abstain** from enjoining criminal prosecutions and civil or administrative enforcement proceedings that are **actually pending** before state courts or tribunals. The rationale of this type of abstention is that it would unnecessarily interrupt and delay state court proceedings if defendants were able to pull the federal courts into the dispute. Beyond considerations of comity, it would be an "end run" around the traditional appeal path if a defendant in a state court proceeding were able to take his or her case to federal court without following the established state court appeal process. This principal is called a "Younger Abstention" and was set forth in the case of *Younger v. Harris* (1971) 401 U.S. 37.

> **For Example:** In the middle of his murder trial O.J. seeks a federal injunction to halt the proceedings on a claim that Judge Ito is violating his right to due process. The federal court will abstain from granting the injunction because the state action is pending. O.J.'s remedy

is to wait until the trial is over, appeal to the state appeals court, appeal to the state supreme court and then appeal to the U.S. Supreme Court.

But a federal court may enjoin a state from beginning a prosecution or enforcement action.

> **For Example:** South Dakota passes a law that makes it a felony to perform an abortion. Dr. Kildare, an abortionist, seeks a ruling that the law is unconstitutional. The federal court will not abstain because of comity considerations because no state action is yet pending.

Political Abstention. The Courts may only address "actual cases and controversies" that involve the interpretation of the law and its application to the facts. Because of that, the Court will generally abstain from addressing controversies that are purely political rather than legal in nature. This is often called a "Political Abstention."

However, the Court will not abstain simply because a controversy has political implications or overtones, and has often addressed controversies with sharply political aspects. In one case the Supreme Court held that the House of Representatives could not expel one of its members, Adam Clayton Powell, Jr., because its action was contrary to the clear mandate of the Constitution. (*Powell v. McCormack* (1969) 395 U.S. 486.)

But, in another case the Court abstained on deciding whether the Senate could use a committee to impeach President Nixon because the Constitution clearly said the Senate had the "sole power" to impeach. (*Nixon v. United States* (1993) 506 U.S. 224.) In that case the Court held it was purely a "political question" how the Senate did this and not a matter of legal interpretation.

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B. 11th Amendment

The 11th Amendment is a restriction on the jurisdiction of the federal courts that was discussed in detail above as one of the "enumerated rights and powers of the states."

To reiterate the previous discussion, an individual generally cannot sue a state in a federal court except when seeking an injunction to prevent unconstitutional acts by the state.

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C. Effect of Federal Court Dismissal of an Appeal

A federal court (i.e. a circuit court or the Supreme Court) may affirm, reverse and remand or dismiss an appeal from a lower court. An affirmation is precedential. A reversal sends the case back to the lower court for reconsideration. But the effect of a dismissal depends on whether the case has been appealed from a lower federal court or from a state court to the Supreme Court.

A Supreme Court dismissal of a case appealed **from a state court** (i.e. a state court of appeals or a state supreme court) for lack of standing, mootness, etc. **leaves the lower court decision in effect**. But a Supreme Court or federal appeals court dismissal of a case appealed **from any lower federal court** for lack of justiciability sends the case back to the lower court with instructions to dismiss, and all prior decisions in the matter by the lower courts are without judicial effect.

Chapter 5: The Powers of the President

The Office of the President has not been discussed previously because it is not really of much importance to the study of Constitutional Law. This may be surprising because of the important role the President plays in national and international affairs. But Congress and the States establish the laws, the courts interpret the laws, but the President just carries out the law. Since the President does not make or interpret the laws, the only Constitutional Law issue that involves the presidency is the **Separation of Powers**.

"Separation of Powers" means that the Constitution delineates three branches of the federal government and states the authority of each. If either the Congress or the President attempt to cross over into the territory of the other branch it is unconstitutional per se and said to be a violation of the separation of powers doctrine.

1. Delegation of Legislative Power

In reality, the separation of powers in the federal government may appear illusionary because the executive branch is composed of numerous administrative departments that establish laws in the form of regulations and adjudicate claims under those laws in administrative hearings.

It is a fundamental principal of Constitutional Law that Congress may not delegate its legislative power to any other branch of the government. Nevertheless, Congress may legislate in broad terms and allow the other branches of government discretion in developing detailed rules. But the acts of Congress must provide sufficient guidance and clear principles. Otherwise there would be an improper delegation of legislative power.

The separation of powers doctrine requires that 1) Congress has authorized or directed the administrative agency to establish regulations via an "enabling statute" that provides sufficient guidance to prevent an impermissible delegation of legislative power and 2) parties are provided with a reasonable means to appeal administrative decisions to the Courts.

> **For Example:** The Environmental Protection Agency (EPA) establishes a regulation setting a limit for benzene in wastewater treatment plant effluent. The City of Hoboken is cited for exceeding the benzene release limits, and an administrative law judge (ALJ), employed by EPA determines in an administrative hearing that the City of Hoboken should be fined $10,000 per day until the limits are no longer exceeded. Does this violate the separation of powers doctrine? Not if the regulations were authorized and adopted in accordance with a valid enabling statute passed by Congress and the ALJ's findings can be challenged in a regular Court.

In sum, when the Congress tells the President to "establish regulations and an administrative process" the subsequent actions of the President are actually "carrying out the law" rather than creating the law, even if the actions are legislative in nature.

But there are Constitutional limits on how far the President and the Congress can each invade the turf of the other.

2. The Independent Powers of the Presidency

The powers of the Presidency stem either from 1) the express provisions of the Constitution or 2) from an act of Congress conferring power upon the President.

The main **Constitutional powers** of the President are:

1. To be the **commander in chief** of the army and navy of the United States, and of the militias of the States when they are called into actual service of the United States (Article II, Section 2 [1]);
2. To grant **pardons and reprieves** for offenses against the United States (Article II, Section 2 [1]);
3. To **make treaties** with consent of two-thirds of the Senate (Article II, Section 2 [2]);
4. To **appoint ambassadors, ministers, consuls, judges of the Supreme Court and officers of the United States** with consent of the Senate and Congress may further allow the President, the Courts or department heads to **appoint inferior officers** without Senate consent (Article II, Section 2 [2]);
5. To **fill vacancies in the Senate** to the end of the session (Article II, Section 2 [3]); and
6. To **veto bills** presented by Congress (Article I, Section 7 [2] and [3]).

The main **Constitutional duties** of the President are:

1. To **inform Congress** on the state of the union and **recommend needed measures** (Article II, Section 3);
2. To **receive ambassadors** (Article II, Section 3);
3. To **faithfully execute the laws** (Article II, Section 3);
4. To **commission officers** of the United States (Article II, Section 3).

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A. Presidential Authority as Commander in Chief

While only Congress has the authority to declare war, the President as commander in chief of the armed forces is authorized and duty bound to resist by force any attack on the United States without waiting for legislative approval. Further, Congress may authorize the President to call out the militia and use military forces in case of potential invasion or to suppress insurrections. (*The Prize Cases* (1863) 67 U.S. 635.)

And, when Congress expressly authorizes the President to engage in a given military action, the President may do so without a formal declaration of war, and there is an implied consent by Congress for the President to proceed militarily in such a case unless and until Congress decides otherwise. (*Mora v. McNamara* (1967) 389 U.S. 934, *Orlando v. Laird* (2d Cir.1971) 443 F.2d 1039, cert. denied (1971) 404 U.S. 869.) The thrust of this is that there is no basis to arguments the war in Vietnam and similar engagements are "illegal wars" simply because Congress has not formally declared war. If Congress has authorized military action, is fully aware of the actions being taken and does not oppose the action being taken, then the President has Constitutional authority to act.

But otherwise the President's authority as commander in chief does not equate to the power to attack foreign nations, dictate national policy, or seize control of private property without express or implied consent from Congress. In 1951 President Truman seized control of the United States steel industry claiming the seizure was necessary for the national defense. But, Congress had previously rejected proposals that would have authorized such actions. The President's actions were held unconstitutional by the Supreme Court on a holding that Congress had not approved the seizures, and the Constitutional designation of the President as commander in chief did not otherwise provide the authority for such actions. (*Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579.)

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B. Presidential Authority in Foreign Relations

The authority to make treaties, appoint ambassadors, ministers and consuls and to receive ambassadors confers upon the President almost plenary power over foreign relations and international affairs. However, the Constitution requires treaties to be approved by two-thirds of the Senate.

It is not clear to what extent a President may enter into Executive Agreements with foreign powers or issue Executive Orders concerning international affairs without Senate approval. In practice Presidents have entered into Executive Agreements without Senate approval, and where the Senate has not disapproved the Court has found an implied consent.

> **For Example:** President George enters into a treaty with Mexico that the U.S.—Mexico border will become an "open" border. But Senator Sam, head of the Senate Foreign Relations Committee, opposes the treaty. So Senator Sam refuses to let the treaty be voted out of his committee. Since the treaty is permanently held in committee, it cannot be voted on by the full Senate. And that prevents the treaty from either being ratified by the required two-thirds vote or rejected. President George then enters into an Executive Agreement to open the border with the President of Mexico, and issues an Executive Order for the Border Patrol to stand down. Can he do that? Maybe, but clearly not if the Senate passes a resolution, by majority vote, opposing the action.

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C. Presidential Authority to Veto Bills

The authority to veto bills, orders, resolutions or votes passed by both houses of Congress is one of the President's most important powers.

All bills must be passed by both houses, and bills raising revenues must begin in the House of Representatives. (Article I, Section 7 [1] and [2].) All bills must be presented to the President for approval, and other acts of Congress that require consent of both houses, such as joint resolutions, must also be presented to the President. (Article I, Section 7 [2] and [3].)

If the President vetoes an act of Congress it is nullified unless Congress subsequently passes the measure over the President's opposition by a two-thirds vote in each house. If the President fails to approve or veto a bill within 10 days, the bill automatically becomes law unless Congress adjourns

within the 10 day timeframe. In the latter case the bill fails to become law, and that is called a "pocket veto".

Except as provided in the Constitution, Congress cannot establish any law that attempts to retain for itself the veto power or avoid the need for concurrence in both houses.

> **For Example:** Congress has plenary power over immigration and naturalization. Congress passes a bill that requires the Immigration and Naturalization Service (INS) to deport any foreign citizen convicted of a felony unless the House of Representatives, by a resolution passed by majority vote, suspends application of the rule in general or in the case of any particular individual. Constitutional? No. This would be totally unconstitutional for two reasons. First because it attempts to set up a law so that it can be changed later without a bill being passed by both houses of Congress. The Constitution requires approval of both houses before any law is established or changed. Second, this law attempts to give an unlimited veto power to the House of Representatives. That power is reserved to the President alone. (*Immigration and Naturalization Service v. Chadha* (1983) 462 U.S. 919.)

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D. Presidential Authority to Appoint Officers of the United States

The President has the authority to appoint the "Officers of the United States" with the consent of the Senate, but Congress may delegate to the President, to the Courts or to the Heads of Departments the power to appoint "inferior officers" without Senate approval.

> **For Example:** Congress passes an act that establishes a Special Court with the power to appoint an "independent counsel" to investigate and prosecute high ranking government officials for violation of federal criminal laws. The independent counsel is subject to removal by the Attorney General. The Special Court appoints Morrison to be independent counsel in the investigation of Olson, a highly placed official in the Environmental Protection Agency. Olson challenges that the Special Court cannot appoint the independent counsel because only the President can appoint "officers of the United States." Is Olson right? No, because the independent counsel is an "inferior officer" appointed with limited jurisdiction to perform limited duties subject to removal at any time by the Attorney General. Since the position is an "inferior officer" Congress had the Constitutional authority to delegate appointment power to the Special Court. (*Morrison v. Olson* (1988) 487 U.S. 654.)

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E. The Limits of Presidential Immunity

As explained above the Courts will abstain from considering complaints that are purely political in nature but will not abstain from considering complaints that raise judiciable issues of law and fact, even if they involve the Presidency. In particular, the Judiciary is not automatically precluded from considering whether privileges claimed by a President are Constitutionally valid.

Confidential communications between the President and high government officials who advise and assist the President in the performance of his duties **are privileged** because of the supremacy of that branch in its area of Constitutional duties.

Other communications have only a **qualified privilege** where there is a claimed need to **protect military, diplomatic or sensitive national security interests.** In this case generalized needs for confidentiality must be weighed against competing needs for access to the information. (*United States v. Nixon* (1974) 418 U.S. 683.)

Beyond privileges of confidentiality, the President is absolutely **immune from any liability** for civil claims arising out of official acts within the broadest scope of his official responsibility. (*Nixon v. Fitzgerald* (1982) 457 U.S. 731.)

Chapter 6: The Constitutional Rights of the People

The body of the Constitution embodied in Articles I through VII primarily enumerates the rights, powers and limitations on the Congress, the President and the federal Courts, while the first ten amendments, the **Bill of Rights**, primarily establish the Constitutional rights of the people. The express intention of the Constitution was to limit the powers of the federal government and retain for the people, and to the States, the broadest possible freedom consistent with the concept of ordered liberty:

> **9th Amendment: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."**
>
> **10th Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."**

Within this broad conceptual framework, certain specific rights were expressly enumerated in the Bill of Rights, and some of those rights are now held to be fundamental rights. The study of the fundamental rights is central to the study of Constitutional Law.

> **The fundamental rights are those that are rooted in our nation's traditions and implied in the concept of an ordered liberty.**

There are also some rights now held to be fundamental that the Constitution never mentions at all. These are often referred to as the "penumbral" rights, meaning that they are the rights referred to by the 9th Amendment as having not been expressly guaranteed but which are still "retained by the people." "Penumbral" means these rights lie in the fringe about the expressly stated rights.

There are also rights expressly guaranteed in the Bill of Rights that have either NOT been held by the Court to be fundamental OR they are the subject of classes in Criminal Procedure. These rights will be summarily dispensed with in the next section before fundamental rights are discussed in detail.

1. Constitutional Provisions of Minor Interest

Certain Constitutional rights are of little interest in Constitutional Law classes. Often they are the main focus of other classes in law school. The Constitutional rights set forth in the 4th, 5th, 6th, and 8th Amendments are discussed in **Criminal Procedure** classes, not Constitutional Law classes.

Other Constitutional provisions that are seldom discussed are **ex post facto laws** and **bills of attainder**, but these can cause unpleasant surprises on Bar Exams! An **ex post facto law** declares a prior act to be illegal or increases the penalties for a criminal act after the fact. A **bill of attainder** is a finding of criminal guilt, usually of treason, or the infliction of punishment on an individual without a trial, by legislative fiat.

Other Constitutional provisions of little interest in Constitutional Law classes are mechanical or administrative such as the income tax (16th Amendment) and voting and election rules (15th, 17th,

19th, 20th, 22nd, 23rd, 24th, 25th, 26th and 27th Amendments.) While these have important historical and social implications they are not the traditional focus of Constitutional Law classes.

Some other Constitutional provisions are of little interest because they are anachronistic. For example, the 3rd Amendment prohibition prohibiting soldiers from being quartered in homes has little or no modern application.

And some Constitutional rights, such as the 2nd Amendment right to bear arms, have been held to be non-fundamental rights, even though the Constitution expressly guarantees them. These rights that are not considered fundamental can be limited by government for legitimate government reasons, and they were not extended to the States by the 14th Amendment at all.

> **For Example:** Congress passes a law that airplane passengers cannot carry knives. Bevis sues in federal court claiming this law violates his Constitutional right to bear arms. Bevis will lose because the law is rationally related to legitimate government needs.

Although it is possible your law school professor has a deep interest in one of these particular areas of Constitutional law that is probably not the case.

2. The Fundamental Rights

The concept of **fundamental rights** is the result of judicial interpretation of the Constitution. These are the rights that the Courts have decided are so traditional, basic and important to the concept of a free nation that government may not infringe upon them without compelling reasons.

Generally speaking the fundamental rights are those that are either expressly guaranteed or implied in the Constitution, especially the Bill of Rights (i.e. the first 10 Amendments). But as mentioned previously some rights guaranteed in the Bill of Rights are not held to be fundamental.

The **FUNDAMENTAL RIGHTS** will be discussed in greater detail later. But they are generally recognized to be as follows:

1. Freedom of Expression (Freedom of Speech and the Press, 1st Amendment);
2. Freedom of Religion (1st Amendment);
3. Freedom of Assembly and Association (1st Amendment);
4. Freedom to Petition the Government for Redress of Grievances (1st Amendment);
5. Freedom to Travel (Implied in 9th and 10th Amendments and arguably by the 1st Amendment);
6. Protective Rights in Criminal Prosecution (4th, 5th, 6th and 8th Amendments);
7. Right to Jury Trial in Civil Actions (7th Amendment);
8. Right to Due Process of Law (5th and 14th Amendments);
9. Prohibition of Involuntary Servitude (i.e. Slavery, 13th Amendment);
10. Right to Equal Protection of the Law (14th Amendment and implied in 5th Amendment);
11. Right to Vote (implied in 9th, 10th and defined in 15th, 19th, 24th and 26th Amendments);
12. Right to Privacy and Self Autonomy (e.g. abortion, contraception and parenting, implied in 9th and 10th Amendments)
13. Right to Marry and Procreate (implied in 9th and 10th Amendments);

There is **NO FUNDAMENTAL RIGHT** to the following things generally, as long as government does not deny equal protection by discriminating against similarly situated individuals:

1. No fundamental right to Education;
2. No fundamental right to Employment;
3. No fundamental right to pursue any Occupation;
4. No fundamental right to Profit in any Business;
5. No fundamental right to own or use Private Property;
6. No fundamental right to get Government Benefits or use Government Property;
7. No fundamental right to Bear Arms (2nd Amendment);
8. No fundamental right to Grand Jury Indictment (5th Amendment);
9. No fundamental right to Drive a car or have a Driver's License;
10. No fundamental right to engage in Homosexual Acts.

3. Selective Incorporation: Extension of Guarantees to Limit States

The original purpose of the Bill of Rights in 1791 was to protect certain rights of the people from infringement by the federal government, and there was no Constitutional prohibition to prevent States from denying those same rights.

> **For Example:** The 1st Amendment says "Congress" cannot abridge the "freedom of speech" but it did not prevent a State from prohibiting free speech.

Later in 1868 the 14th Amendment was adopted to prevent States from denying the people due process and equal protection of the law. By judicial interpretation the 14th Amendment was held to prevent States from denying the people "fundamental rights" that were basic to the concept of a nation of free people. The process by which certain rights guaranteed in the Bill of Rights were held to be fundamental to the 14th Amendment guarantee of due process is called **Selective Incorporation**.

The 14th Amendment will be discussed in detail later, but it is important to understand that it is the Constitutional provision that now prevents States from denying the people fundamental rights such as freedom of speech.

4. If Fundamental Rights Restricted Government Has Burden

If government infringes upon a fundamental right, then the burden is on the government to prove the infringement is justified. **Government has the burden** in this case of proving the limitation is 1) **narrowly tailored** and 2) **necessary** to attain a 3) **compelling** and 4) **legitimate** government goal. This test is referred to as one of **"strict scrutiny"** by the Court.

When the Court weighs whether the needs of government are sufficiently **compelling** and whether a law is sufficiently **narrowly tailored** it applies a **balancing test** in which the needs of government are balanced against the impact the government infringement has on the individual.

> **For Example:** Rainbow puts a sign that says "Stop the War" in front of her house. She is cited for violating a Village use restrictions that prohibits signs on private residences. The ordinance infringes Rainbows 1st Amendment right to freedom of speech so the **Village**

has the burden of proving that its ordinance is **narrowly tailored** and **necessary** for a **compelling government purpose**. The Court would balance the Village's need for the ordinance against the effect it has on Rainbow.

5. If Non-Fundamental Rights Restricted Individual Has Burden

But if government infringes a non-fundamental right, then the burden is on the individual to prove the infringement is NOT justified. **The individual has the burden** in this case of proving the infringement is NOT 1) **rationally related** to the pursuit of a 2) **legitimate** government goal.

> **For Example:** Tyson raises pigs on his farm at the edge of Town. To combat a problem with flies, Town outlaws the raising of pigs. Tyson challenges the new Town ordinance. Since use of private property is not a fundamental right, **Tyson has the burden** to prove the new ordinance is **not rationally related to any legitimate government problem**. He will lose because flies are a threat to public health and welfare, a legitimate concern of local government, and eliminating pigs would help reduce the number of flies.

6. Intermediate Case: Government Must Prove Substantial Need

The world is not always black and white. And although the general rule is that rights are either fundamental or not fundamental, the Courts have often recognized intermediate situations where the rights involved are **important or significant rights** even though they are not fundamental rights.

In these intermediate situations the Court will often apply a **higher level of scrutiny** than the rational relation test. And frequently the Court **shifts the burden of proof** to the government to prove the deprivation of individual rights is **substantially related** to a **substantial or significant government need**.

Two areas of note are **procedural due process** and **equal protection** of classes that are not "suspect classes". In these areas the Court often requires the government to show substantial or significant needs rather than compelling needs.

> **For Example:** Health inspectors shut down Bevis' restaurant without warning on a finding there were continuing health code violations. This is a denial of procedural due process because he was not given advance notice and an opportunity for a hearing before the closure. But procedural due process, as opposed to fundamental due process, is not always recognized as a fundamental right that demands a compelling need. Rather, the Court may apply an intermediate level of scrutiny and only require government to prove an **important or significant need**.

Another area of note is **symbolic expression**. Symbolic expression is related to, but not exactly the same as protected speech. So the Court will often require the government to show that limiting symbolic expression is **substantially related to a significant government need.**

> **For Example:** Arlo is arrested for violating federal law by burning his draft card to protest the war. The government does not have to show a **compelling need** for the law but might be required to show it is **substantially related to a significant government need**.

7. Extension of Constitutional Protections to Corporations

Corporations are considered legally to be "people" but when the Bill of Rights and 14th Amendment were adopted they were intended to protect natural persons, not corporations.

However, the concepts of due process and equal protection have slowly been extended to protect corporations to some extent, because corporations are created and owned by people, and a denial of due process or equal protection to corporations can, in turn, cause a denial of those protections to the people who own the corporations. Therefore, while corporations have no right to vote, they do have a right to due process, a right to freedom of expression, and some other rights the same as natural persons. For example, *Gulf, Colorado & Santa Fe Railroad Co. v. Ellis* (1897) 165 U.S. 150 held a State law that singled out railroad companies for disparate treatment to be invalid.

But, the Privileges and Immunities Clause still does not apply to corporations to some extent.

8. Constitutional Protections Against Individuals

It is common to hear that the Constitution only protects individuals (People) from "the government". Law students are often told that there is no application of Constitutional principles unless there is some "state action". This is clearly incorrect, and it can leave law students very perplexed in trying to understand why or how Congress or the federal courts have the power to stop discrimination by private individuals.

It is true the Constitution was first established in 1789 to protect the People and the States from oppression by the federal government. This was a reaction to the injuries previously inflicted on the People by English royalty. There was clearly no intent at that time for the Constitution to control the actions of States or individuals. But later changes to the Constitution have incorporated provisions to also protect People from the acts of both States and private individuals.

The 13th Amendment (1865) was adopted to end slavery and this includes the "incidents" of slavery. The 14th Amendment (1868) was adopted to protect individuals from oppression by the States, and it gave Congress the power to enact any laws necessary to insure equal protection and due process. And the 15th Amendment (1870) prohibited infringement of the right to vote based on race, color and former condition of servitude. These three amendments clearly gave Congress the power to protect individuals from the acts of both States and private individuals, and to the extent Congress has acted, those enactments are controlling. This is the basis for the Civil Rights Act of 1964, the Americans With Disabilities Act of 1990, etc.

Even when Congress has not acted, constitutional protections may still control private individuals who are using the property, protections and mechanisms of State and federal government to give effect to discriminatory practices. The more a State or local government is involved in, associated with, or benefiting from private activities, the more likely those "private activities" will be deemed to be "governmental acts" that are controlled by Constitutional protections.

Chapter 7: 1st Amendment Rights

The 1st Amendment prohibits the government from restricting the rights of the people to freedom of religion, speech, the press, association, assembly, and the right to petition government over grievances. All of these rights are now held to be **fundamental rights**.

> **1st Amendment: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."**

The rights protected by the 1st Amendment can be remembered with the mnemonic **ARTS:**

- **ASSEMBLY**
- **RELIGION**
- **TRAVEL**
- **SPEECH, PRESS and EXPRESSION**

1. Freedom of Assembly

The 1st Amendment protects the freedom of people to assemble and associate with others from infringement by the government (originally the federal government, but now also the states because of the 14th Amendment as explained previously). The protection is established by implication in the express provisions citing protection of the freedom of speech and freedom to "peaceably assemble."

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A. Government Action to Discourage Association

If government can dissuade, discourage or forbid people from assembling together to speak among themselves and worship together, then the freedoms of speech and religion would be hollow promises. Therefore, unrestricted freedom of assembly and association are **fundamental rights** that may not be suppressed unless government proves it is **narrowly tailored** and **necessary** to attain **compelling** and **legitimate government purposes**.

> **For Example:** Alabama wants to stop the NAACP from helping Black students enroll in the State University, so it demands the names and addresses of all the NAACP's members. An Alabama Court orders the information revealed. But the information could be used to threaten and harass the association's members. That would infringe the 1st Amendment right to freedom of association, a fundamental right. So Alabama must prove it has a **compelling and legitimate need** for the lists. (*NAACP v. Alabama* (1958) 357 U.S. 449.)

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B. Government Action to Force Association

Conversely, the freedom of an individual to assemble and associate with others holding similar views implies a **freedom to refuse** to assemble and associate with others as well.

> **For Example:** The United States Jaycees, citing their 1st Amendment right to refuse association, refuse to let women become members. Minnesota passes a law that prohibits organizations like the Jaycees from excluding members on the basis of sex. The State can force the Jaycees to accept women as members if it can prove the law is **necessary** and **narrowly drawn** to attain a **compelling state need.** The Court will **balance** the State's need to prevent sex discrimination against the impact the forced admission of women will have on the organization. (*Roberts v. United States Jaycees* (1984) 468 U.S. 609.)

> **For Example:** For many years the Veteran's Council holds a St. Patrick's Day parade pursuant to a City parade permit. The Veteran's Council refuses to let the Gay, Lesbian and Bisexual League (GLBL) participate. The City refuses to issue a new parade permit unless the Veteran's Council agrees to let the GLBL participate. The Veteran's Council has a fundamental 1st Amendment right to **refuse to associate** with any other group, and the City cannot refuse the permit unless it can show a compelling need to infringe on that right. (*Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* (1995) 515 U.S. 557.)

But in some situations **individuals may be required to join an organization**, such as a labor union, if they chose to engage in a certain occupation, because government has compelling needs to regulate occupations and industries. But, the infringement of rights must be **no broader than necessary**.

> **For Example:** California requires attorneys to belong to the State Bar Association (the Bar), which is run similar to a labor union. But the Bar begins using the attorney's dues to promote controversial political causes such as gun control. The State can require the attorneys to belong to the Bar because it has a compelling need to regulate the legal profession and improve the quality of legal services, but the Bar cannot use its power to infringe member's rights more than is necessary. The Bar may only use member dues for legitimate government purposes of regulating the legal profession and improving legal services within the State. (*Keller v. State Bar of California* (1990) 496 U.S. 1.)

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C. Associations for Illegal Goals

Although government may be generally prohibited from stopping individuals from associating with each other, it can stop them from associating for illegal goals such as fixing prices, suppressing competition, violence, criminal conspiracies and torts such as malicious interference.

Whether interference in the affairs of others is "malicious" or a Constitutionally protected right depends on the motives of the individuals and the social desirability of the actions being taken.

> **For Example:** Bevis and Butthead, the CEOs of the two largest oil companies in Texas, meet at the country club and agree to run Doofus, a competing oil producer, out of business by delaying shipments to him and other covert acts intended to disrupt his business. Although they have a 1st Amendment right to associate with each other, they have no right to engage in malicious interference against the business of others or suppress competition.

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D. Political Boycotts and Member Liability

Individual members of a group are not liable for the violent acts of others in the same group unless the whole group has unlawful goals that those particular members intend to pursue.

> **For Example:** The NAACP urged Blacks in Mississippi to peacefully boycott and picket businesses owned by Whites until they were given just and equal treatment. Marches were organized and some members of the boycott resorted to violence. Claiborne Hardware sues the NAACP for malicious interference with its business and damage to its property. **Peaceful boycotts to promote social and political change are protected by the 1st Amendment.** The 1st Amendment does not protect violence, but all members of the NAACP are not liable for the misdeeds of a few unless the organization urged or condoned the violence and those members supported that goal. (*NAACP v. Claiborne Hardware Co.* (1982) 458 U.S. 886.)

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E. State Power Over Political Parties

States have the power to control elections, but their power to control the actions of political parties is limited by the 1st Amendment rights of assembly and association of those same parties.

> **For Example:** Illinois law required minorities, women and young people to be seated as delegates at the Democratic National Convention in 1972. The law was unconstitutional because it violated the party's 1st Amendment right to freedom of association. (*Cousins v. Wigoda* (1975) 419 U.S. 477.)

> **For Example:** Wisconsin's "open primary" law allows voters to participate in any party's primary election. That is Constitutional. But once delegates are selected Wisconsin law cannot require them to vote in accordance with the primary results at national party conventions because it would violate the 1st Amendment right of association. (*Democratic Party of United States v. Wisconsin ex rel. LaFollette* (1981) 450 U.S. 107.)

2. Freedom of Religion

The 1st Amendment protects freedom of religion in two distinctly different ways. First, it prohibits the government (originally the federal government, but now also the states because of the 14th Amendment as explained previously) from passing laws **"respecting an establishment of religion."** This is called the **"Establishment Clause".**

Second, the 1st Amendment prohibits the government from passing laws **"infringing the free exercise"** of religion. That is called the **"Free Exercise Clause".**

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A. The Establishment Clause and the *Lemon* Test

The establishment clause prohibits the government from passing laws "respecting an establishment of religion." This means government is prohibited from favoring any particular religion, from favoring any group of religious beliefs or from favoring religions in general over atheism (and vice versa).

As a **general rule** government must be **neutral** in the treatment of religious and non-religious groups. The antithesis of this principal is exemplified by other countries like England where the Church of England is the "official" religion.

One aspect of this is that the 1st Amendment prohibits government from recognizing any group or type of religions as being "legitimate religions" as opposed to other beliefs that are different.

> **For Example:** A law provides that church property is exempt from property tax. "Churches" are defined as institutions that "advocate belief in a monotheistic deity." Since this would favor monotheism as opposed to polytheistic beliefs, and favor beliefs in "deities" over "humanist" and "spiritualist" sects, it would be invalid under the 1st Amendment.

And the 1st Amendment prevents the government from favoring "religions" in general over other non-religious organizations in the same category. (*Larson v. Valente* (1982) 456 U.S. 228.)

> **For Example:** A law that provides a state income tax deduction for charitable contributions to "religious organizations that solicit less than 50 percent of their funds from nonmembers" violates the 1st Amendment because it favors "religious" charities over other charities such as the United Way.

The 1st Amendment prevents the government from discriminating either for or against religions. The **general rule** is simply that **government must be neutral** in its policies between and among religious and non-sectarian groups.

1) Government Aid to Religious Organizations: The *Lemon* Test

The 1st Amendment does not prohibit government from aiding religious groups. Rather, the 1st Amendment prevents government from **showing favor or disfavor** toward a religion, a group of religions or all religions as a group over other non-religious beliefs (and vice versa). Government acts that provide resources or benefits to churches are tolerable within certain guidelines that were established in *Lemon v. Kurtzman* (1971) 403 U.S. 602. This is called the **"Lemon Test."** Under the Lemon Test, it does not offend the 1st Amendment for government resources to be used by or furnished to religious groups if:

1. It is for a **secular purpose** (i.e. a purpose other than to promote religion);
2. The **primary effect** is to neither promote nor inhibit religion; and
3. It does not **foster excessive government entanglement** in the affairs of the religion.

2) Government Funds for Education

When the government provides funding to a school run by a religious group for a **stated secular purpose** it may nevertheless violate the 1st Amendment if the actual **primary effect and purpose** is to **advance religion**. Two common unconstitutional situations have been recognized. One is when government acts to **specifically promote religious activities** in or through schools.

> **For Example:** Illinois law lets religious instructors into public schools to teach religion. Students that do not want to be taught religion are sent to other classes. **Government resources** are being used for a **non-secular purpose** (i.e. the purpose is sectarian, to promote religion) and the **primary effect** is to promote religion. So the law violates the 1st Amendment. (*McCollum v. Board of Education* (1948) 333 U.S. 203.)

> **For Example:** Michigan pays its teachers to go to parochial (i.e. church operated) schools to teach mathematics. The **purpose is secular** but the **primary effect** is a government endorsement of religion. Public funds are being used to pay expenses that the parochial schools would otherwise have to pay, so it **promotes religion** and violates the 1st Amendment. (*Grand Rapids School District v. Ball* (1985) 473 U.S. 373.)

> **For Example:** New York law defines the land occupied by a religious cult as a "school district" so the children of the cult will not have to leave the cult boundaries and be exposed to other religious beliefs. The law is **not neutral**, the **purpose** is not secular, and the **primary effect** is to promote the religion of the cult. Therefore it violates the 1st Amendment. (*Board of Education of Kiryas Joel Village School District v. Grumet* (1994) 512 U.S. 687.)

> **For Example:** Federal law funds construction at private universities and after the first 20 years facilities built with the money can be used for religious purposes. The law violates the 1st Amendment because the facilities can eventually be used for religious purposes, a **non-secular purpose**. (*Tilton v. Richardson* (1971) 403 U.S. 672.)

The second common unconstitutional situation is when **religion is so pervasive** in the school that a substantial portion of its educational functions are absorbed into its religious mission. These situations violate the Lemon Test in every instance. (*Hunt v. McNair* (1973) 413 U.S. 734.)

> **For Example:** Jesus Christ University is run by a fundamentalist sect that includes prayer and religious instruction in every class and every activity. Since no portion of the university activities is secular, it would be impossible for public funds to be provided to the school in any manner without violating the 1st Amendment.

Government may fund the expenses of students attending parochial schools if the same funding is provided to all students in a **neutral** manner, neither advancing nor inhibiting religion.

> **For Example:** New Jersey reimburses parents for bus passes used by children to go to school. The reimbursement is available whether the child is going to a public school, to a non-sectarian private school or to a parochial school. The **purpose is secular**, to promote education, the effect **neither promotes nor inhibits religion**, and the program **does not entangle** the government in church affairs. Therefore, the law is not unconstitutional. (*Everson v. Board of Education* (1947) 330 U.S. 1.)

For Example: New York City allows students to leave school during the school day to attend religion classes. Students that do not want religious instruction stay at the public school. No school resources are used, all expenses are paid by the religious groups, and children are **neither encouraged nor discouraged** from participating. Since the government was neither promoting nor inhibiting religion this is not a violation of the 1st Amendment. (*Zorach v. Clauson* (1952) 343 U.S. 306.)

For Example: State law lets parents claim a tax deduction for books and tuition expenses for school children in **any** elementary or secondary school. No government resources are being paid directly to any religious establishment, and the law is **neutral** between parochial and other schools. So the law does not violate the 1st Amendment. (*Mueller v. Allen* (1983) 463 U.S. 388.)

For Example: State law gives **direct monetary grants to parents** so they can afford to send their children to parochial schools. The **purpose and primary effect** of the law is to fund attendance in church schools, so the law does violate the 1st Amendment. (*Committee for Public Education and Religious Liberty v. Nyquist* (1973) 413 U.S. 756.)

For Example: Ohio started a program to give **school vouchers** to students in areas with substandard schools so they could attend parochial schools as an alternative. (*Zelman v. Simmons-Harris* (2002) 536 U.S. 639.) The U.S. Supreme Court held the program did not violate the Constitution because the Ohio program satisfied a **5-part test** established specifically for this case:

- The program had a **valid secular purpose**,
- **Aid went to the parents** and not the schools,
- A **broad class of beneficiaries** was covered,
- The program was **neutral with respect to religion**, and
- There were **adequate nonreligious options** for the students.

Although the Court has **rejected tax credits to parents** of children in parochial schools, **property tax exemptions** for religious groups have been held to not violate the 1st Amendment.

For Example: State law exempts property owned by churches from property tax. The practice helps guarantee the free exercise of religion without favoring any particular faith, so the law does violate the 1st Amendment. (*Walz v. Tax Commission of New York* (1970) 397 U.S. 664.)

Sometimes government agencies discriminate against religions out of concerns they will be accused of "favoring" religion. This is equally unconstitutional. Case decisions are often logically inconsistent.

For Example: Witters wants to attend a Christian college to become a preacher. Washington Department of Services for the Blind refuses to pay his tuition but would have funded other vocational educational. The purpose and primary effect of the State decision is **to inhibit religious education** in favor of non-religious instruction. The State position is

not neutral so it violates the 1st Amendment. (*Witters v. Washington Department of Services for the Blind* (1986) 474 U.S. 481.)

For Example: The State of Washington offers to give scholarships to certain students who study secular subjects but not if they intend to study theology. Davey wants to study theology and is denied a scholarship. The State position was upheld by the Court (*Locke v. Davey* (2004) 540 U.S. 712) in a holding that seems entirely contrary to *Witters v. Washington* (1986) 474 U.S. 481 in the previous example.

For Example: The school district lets social and civic groups meet in the school but will not let the Christian Youth Club meet there. The policy is **not neutral** between religious and non-religious groups so it violates the 1st Amendment. (*Lamb's Chapel v. Center Moriches Union Free School District* (1993) 508 U.S. 384.)

For Example: California law provides that school districts must provide a sign-language interpreter for deaf high-school students. But School District will not provide an interpreter for Zobrest because he goes to the Catholic school. The district policy is **not neutral.** It discriminates on the basis of religion, so it violates the 1st Amendment. (*Zobrest v. Catalina Foothills School District* (1993) 509 U.S. 1.)

For Example: The University of Virginia lets student clubs meet on campus, and it also helps fund student publications, but University refuses to allow the Children of God to meet on campus and will not publish its pamphlets. The policy is **not neutral** so it discriminates on the basis of religion in violation of the 1st Amendment. (*Rosenberger v. Rector and Visitors of the University of Virginia* (1995) 515 U.S. 819.)

3) Excessive entanglement

There are two possible ways government might become unnecessarily entangled in religion. One possible entanglement is when the government is **drawn into church affairs** or called upon to decide controversies over religious authority or dogma.

For Example: New York pays teachers to go to the parochial schools to teach mathematics. The **purpose** is secular but the practice causes **excessive entanglement** since public employees are actually working in and for the parochial schools. So it violates the 1st Amendment. (*Aguilar v. Felton* (1985) 473 U.S. 402.)

Another possible entanglement arises when government becomes **embroiled in theological disputes** or otherwise **forces individuals**, or their children, to **recite** religious beliefs, **participate** in religious practices or **listen** to religious views.

For Example: Rhode Island school officials invite church leaders to give prayers at high school graduation ceremonies. Reverend Rabid takes the podium, pulls out a rattlesnake and delivers a prayer that calls the Pope the "Great Satan" and Jews the "assassins of Christ." School resources are being **used to promote religion**, and the government is immediately **entangled** in a theological firestorm. This violates the 1st Amendment, even if Reverend Rabid delivers a much milder prayer. (*Lee v. Weisman* (1992) 505 U.S. 577.)

> **For Example:** Louisiana forbids the teaching of evolution in public schools unless "creation science" is also taught. The **purpose and primary effect** is to promote religion and government is drawn into a **theological dispute** regarding what "creation science" is and who is qualified to teach it. (*Edwards v. Aguillard* (1987) 482 U.S. 578.)

4) Control of Religious Displays on Government Property

The placement of religious symbols and displays on government property poses particular problems. Government may not allow displays or religious symbols on government property if the **context implies a religion is endorsed, favored or preferred** over any other religion or **that religious beliefs in general are endorsed or favored** over atheism (or vice versa).

> **For Example:** Allegheny County allows the Roman Catholic Church to place a crèche (i.e. representation of the Nativity scene depicting the birth of Christ) prominently on display on the grand staircase of the grand staircase of the county courthouse at Christmas. No other holiday symbols, religious or secular, are presented. This violates the 1st Amendment because it implies the Christian religion is **favored or preferred** (*County of Allegheny v. American Civil Liberties Union* (1989) 492 U.S. 573.)

> **For Example:** Allegheny County allows a lighted Christmas tree and a lighted Menorah outside the administration building by a sign declaring the lights to be a "salute to liberty." This does NOT violate the 1st Amendment because it implies a **secular purpose** other than the promotion of religion (*County of Allegheny v. American Civil Liberties Union* (1989) 492 U.S. 573.)

> **For Example:** Ohio allows Christmas trees, United Way signs and a menorah on the capitol grounds, but it refuses to let the Ku Klux Klan put a cross on the grounds at Christmas. This violates the 1st Amendment because it is **discriminatory and non-neutral** to prohibit the religious display after allowing the non-religious displays. (*Capitol Square Review and Advisory Board v. Pinette* (1995) 515 U.S. 753.)

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B. The Free Exercise Clause

The free exercise clause of the 1st Amendment prohibits the government from passing laws "prohibiting the free exercise" of religion. This means that the government is prohibited from suppressing the **belief** in a creed and its **study, teaching, expression** and **advocacy**. This is a fundamental right that cannot be restricted by government in any manner unless government can show the restriction is 1) **necessary** for a 2) **compelling** and 3) **legitimate government reason**. This **strict scrutiny standard** invalidates almost every imaginable restraint on religious belief.

1) Freedom of Religious Speech

Usually government infringement of the freedom of religion involves a restriction of the **freedom of speech**, and where government is infringing more than one fundamental right the Court will subject the government position to an even higher level of critical scrutiny. In these situations the government has the burden of proving that suppression of religion is **necessary** for any **compelling** government reason. This **strict scrutiny standard** can almost never be met.

> **For Example:** City requires anyone who wants to go door to door in residential neighborhoods to pay a fee to get a city permit. The purpose of the ordinance is to prevent burglary. Maria, a Jehovah's Witness is arrested for going door-to-door proselytizing without a permit. This restricts Maria's religious expression so the City must show that it has a **compelling reason** that makes the permit ordinance, and the payment of a fee, **necessary**. City would be unable to meet that burden. First, other cities prevent burglaries without the same ordinance, and second the permits could be issued without the payment of a fee. So the ordinance is an unconstitutional religious restraint.

2) Freedom from Compelled Statements of Belief

The government cannot **compel** a person to make vows of belief unless it is **necessary** for any **compelling** government reason. This **strict scrutiny standard** can almost never be met.

> **For Example:** West Virginia requires students to salute the flag and recite the Pledge of Allegiance or be expelled from school for "insubordination." Judy refused to salute the flag because it offended her beliefs as a Jehovah's Witness. This is a violation of the free exercise clause, and a violation of freedom of speech, even if religious considerations were not involved. (*West Virginia Board of Education v. Barnette* (1943) 319 U.S. 624.)

3) The *Smith* Test: Neutral Restriction of Religiously Motivated Acts

But a sharp distinction must be made between religious belief and the actions or conduct based on that belief. There is generally no fundamental right to act or advocate action by others in a manner that violates the law, even if the motivation for the acts is a religious belief.

Religiously motivated conduct may be restrained by 1) **neutral** laws of 2) **general application** that are 3) **rationally related** to 4) **legitimate government needs**. This is called the **Smith Test.**

> **For Example:** Smith is fired from his job for using an illegal drug, peyote. The Oregon Unemployment Department refuses to pay him benefits because he was fired "for cause," the use of illegal drugs. Smith says this violates his freedom of religion because he belongs to a church that uses peyote for sacramental purposes. The state action is Constitutional because the State has the authority to declare certain substances "illegal drugs." And the refusal to pay unemployment to those fired for taking illegal drugs is a **neutral law of general application** that is **rationally related** to the **legitimate government need** to not reward illegal behavior. (*Employment Division, Department of Human Resources of Oregon v. Smith* (1990) 494 U.S. 872.)

An alternative supporting argument for the Smith Test is that it would **violate the neutrality** required by the establishment clause if religiously motivated lawbreakers were given preferential treatment compared to other lawbreakers.

However, the government must still have **legitimate and important** reasons for prohibiting religiously motivated acts and the laws in question must be **neutral and of general application**.

> **For Example:** The City of Hialeah arrests Babalu for killing chickens in his Santeria religious services. The law against killing chickens was specifically adopted to prevent

animal sacrifice in the Santeria religion and allows chickens to be killed elsewhere in the same exact manner. This violates the 1st Amendment right to freedom of religion because it is **not neutral.** (*Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (1993) 508 U.S. 520.)

4) First Exception: Religiously Motivated Unemployment

An apparent exception to the Smith Test has been recognized when **religious convictions necessarily cause** an individual to quit a job, lose a job or refuse to take a job that conflicts with their religious beliefs. Although these situations could be viewed as the result of "religiously motivated conduct", the Courts have viewed them more as situations the state unemployment programs must recognize as "hardship cases" and assess with the **neutrality** demanded by the establishment clause unless the State can show, on balance, that religious discrimination is **necessary to attain any compelling government purpose**.

For Example: Sherbert, a Seventh-day Adventist, is told by her employer that she will have to start working on Saturdays. She refuses because working on Saturday is against her religion. She is fired, and South Carolina refuses to give her unemployment payments. Although there is no fundamental right to get unemployment insurance, there is a fundamental right to freedom of religion. If South Carolina recognizes other "hardship" situations that arise for non-religious reasons, it cannot penalize Sherbert because her particular hardship arose out of her religious beliefs unless the State can show that denial here is **necessary to attain a compelling government purpose**. (*Sherbert v. Verner* (1963) 374 U.S. 398.)

For Example: Thomas, a Jehovah's Witness, works on an auto assembly line. His employer transfers him to an assembly line making arms for the military. Because of religious objections he quits his job. The state denies him unemployment because he quit "for personal reasons." But if the State recognizes other "hardship" situations it cannot deny him unemployment here unless it can show that its denial is **necessary to attain a compelling government purpose**. (*Thomas v. Review Board of the Indiana Employment Security Division* (1981) 450 U.S. 707.)

5) Second Exception: The *Yoder* Test

A second apparent exception to the Smith test is recognized when government restrictions on religiously motivated conduct, even though they are neutral laws of general application, will both **endanger and restrain** the free exercise of religion and interfere with other fundamental rights such as the right of parental control over children. In these situations the state must show, **on balance**, even **more substantial reasons** for the restrictions. This is called the **Yoder Test.**

For Example: Wisconsin law requires children to attend school to the age of 16. Yoder, Yutzy and Miller violate the law and take their children out of school when they are 14 or 15 because they are of the Amish faith and believe continued public education will substantially interfere with the children's religious development. If restraint on religiously motivated conduct would **gravely endanger and restrain the freedom of religion** and also infringe on the **fundamental right** to **raise and guide children,** the State must show **substantial reasons** why its needs outweigh the rights of the parents. (*Wisconsin v. Yoder* (1972) 406 U.S. 205.)

6) Time, Place and Manner Restrictions on Religious Speech

Even though freedom of religion is fundamental, reasonable **content-neutral** restrictions on the **time, place** and **manner** of **religious speech** are valid. Content-neutral means that the restriction is not on what is being said but on how, when and where it is being said.

> **For Example:** Myron is arrested for disturbing the peace because he is using a bullhorn to preach his religious beliefs at 1:00 a.m. in the middle of a sleeping residential neighborhood. This is not a violation of his 1st Amendment right to freedom of religion if it is a **content-neutral restriction** that does not prevent him from preaching his beliefs in a more reasonable manner at other times and places.

3. Freedom of Travel

The 1st Amendment protects the freedom of people to travel from place to place from infringement by the government. The protection is established by implication in both the privileges and immunities clause of Article IV and also in the express provisions of the 1st Amendment citing protection of the freedom of to "peaceably assemble" and "petition the government for redress of grievances." If the people could not travel freely, they could neither assemble freely nor petition the government for change.

Moreover, and more importantly, the freedom to travel from one state to the other has been held to be a fundamental, if unstated, right within the "penumbra" of the Constitution implied by the 9th Amendment which states the enumeration of rights in the Constitution does not "disparage" others retained by the people, and the 10th Amendment which reserves other powers "to the people". It would simply be **repugnant to the concept of federalism**, the ideal that the United States would be one nation, indivisible, but composed of many sovereign States, if people were not free to travel from State to State in pursuit of opportunity and happiness.

The freedom to travel is **an unconditional, fundamental right**, but it is one of less interest because it is so seldom disputed. It primarily applies when a state adopts rules that restrict or penalize people when they attempt to move from one state to the other.

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A. Laws Penalizing Newcomers Generally Invalid

In general, **any State restriction on the rights of newcomers** to the State, absent a compelling need, is an unconstitutional restriction on the fundamental freedom of travel.

> **For Example:** Washington, D.C. denied welfare benefits to anyone that had not lived there for one year to discourage poor people from moving there. Even though the rule was rationally related to the District's financial concerns there was no compelling reason to suppress the fundamental right to travel. Without a compelling need the rule was unconstitutional. (*Shapiro v. Thompson* (1969) 394 U.S. 618.)

For Example: Tennessee denied the right to vote to anyone that had not lived there for a year. The law was unconstitutional because it **penalized newcomers** to the state and there was no compelling reason for it. (*Dunn v. Blumstein* (1972) 405 U.S. 330.)

For Example: Arizona denied medical care to indigents if they had not lived in the State for a year. The law was unconstitutional because it **penalized newcomers** to the state and there was no compelling reason for it. (*Memorial Hospital v. Maricopa County* (1974) 415 U.S. 250.)

For Example: Alaska law provided that oil revenues would be distributed to State residents in a manner that gave out more money to long-term residents and less money to newcomers. The law was unconstitutional because it **penalized newcomers** to the state and there was no compelling reason for it. (*Zobel v. Williams* (1982) 457 U.S. 55.)

For Example: New York's civil service system gave preference to military veterans that had previously entered the service at the time they lived in New York. The law was unconstitutional because New York had no compelling need to discriminate against **veterans that came to New York after being in the military**. (*Attorney General of New York v. Soto-Lopez* (1986) 476 U.S. 898.)

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B. Divorce Jurisdiction Exception

An exception to the general rule that **newcomers** to a state must be treated exactly as everyone else arises when the **newcomer files for a divorce** in the State court against an out-of-state spouse. Since a divorce granted by any state must be honored by all other states under the full faith and credit clause (Article IV, section 1.), a state has **important and substantial reasons** to establish reasonable **residency requirements for divorce**, even if those considerations are not compelling. So in this case the Court applied **intermediate level scrutiny.**

For Example: Iowa required people to live there for one year before they could file for a divorce in Iowa courts. The law was not unconstitutional because it was **substantially related to important State considerations**, even if they were not compelling needs. (*Sosna v. Iowa* (1975) 419 U.S. 393.)

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C. Criminal Flight Exception

Another exception to the general rule arises when a **criminal flees the state** where a crime has been committed. The freedom to travel is not violated when a state establishes enhanced punishments for criminals that flee the state following their crime.

For Example: Georgia law makes child abandonment a felony if the defendant flees the State after abandoning the child. The law was not unconstitutional because flight from the State was a separate serious element of the offense. (*Jones v. Helms* (1981) 452 U.S. 412.)

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D. Non-Domicile Exception

The government is NOT treating **"newcomers"** in a discriminatory manner in the case of people that actually have their **domicile elsewhere**.

> **For Example:** Philadelphia requires that city employees live within the City. McCarthy, a City fireman, moves out of the City and challenges the rule as a violation of freedom of travel. Philadelphia's rule does NOT violate the freedom to travel by treating people in the City differently from those domiciled outside the City. (*McCarthy v. Philadelphia Civil Service Comm'n* (1976) 424 U.S. 645.)

> **For Example:** Texas school districts charge tuition if students are domiciled outside the district, even if they reside temporarily away from their parents inside the district. This does not violate the freedom of travel because the school district has no duty to treat children domiciled outside the district the same as those domiciled inside the district. (*Martinez v. Bynum* (1983) 461 U.S. 321.)

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E. Freedom of Travel and Equal Protection

Frequently violation of the right to freedom of travel involves discrimination against **newcomers** to the area, and this in turn involves a violation of **equal protection** because the newcomers are being treated differently than long-time residents of the area. The concept of equal protection will be discussed in greater detail later.

Government restrictions on the freedom of travel are more likely to be found unconstitutional than an associated denial of equal protection, because freedom of travel is a fundamental right while equal protection is not always a fundamental right. The government must prove restrictions on the freedom of travel are **necessary** to attain a **compelling government need**, and the government is less likely to be able to sustain that heavy burden.

4. Freedom of Expression

The 1st Amendment protects freedom of **speech,** freedom of the **press,** and freedom to **petition** the Government for redress of grievances from infringement by the government (originally the federal government, but now also the states because of the 14th Amendment as explained previously). These three freedoms can be summarized as **freedom of expression** of thoughts, beliefs, opinions and desires. And the forms of protected expression extend to **song, dance, movies, painting, sculpture** and other arts as well as traditional expression by **speech** and **writing**.

The 1st Amendment only protects the individual from <u>government infringement</u>

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> **For Example:** Bevis Bigot, an employee of General Motors, is fired after he calls a fellow worker a "nigger." He sues on the argument this violates his right to free speech. Bevis will lose because the 1st Amendment only protects him from <u>government</u> acts and does not protect him from being fired by a <u>private</u> employer.

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A. Protection in the Public and Private Forum

The 1st Amendment protects the freedom of speech in both **private** and in the **public forum**. The public forum means those public places where people have traditionally been allowed to express themselves. Publicly owned streets, sidewalks, parks and plazas are typically within the public forum.

> **For Example:** City outlaws the distribution of handbills in the streets, a public forum, to prevent littering. The ordinance violates the 1st Amendment. Even though the City has a legitimate need to prevent litter, it cannot prove the ordinance is **necessary** since distribution of the handbills does not necessarily cause them to be discarded as litter any more than the sale of newspapers causes litter.

1) Creation of a Public Forum

If government allows any one group to express themselves on any subject in any public place then that place is part of the **public forum** where any other group may express themselves on that subject or any other subject.

> **For Example:** City allows the United Way to put a sign on the steps of City Hall urging citizens to give them contributions. City police arrest Billy Bigot from giving a speech on the steps in which he blames the nation's problems on "the Jews." This is a violation of the 1st Amendment because the steps became a public forum as soon as the City allowed the United Way to use that spot to express their own views. Billy and every other citizen then have an equal right to express their views on the steps as well.

2) Not All Government Property is a Public Forum

Government may control the use of its property for lawful purposes and public ownership does not necessarily make it a public forum.

> **For Example:** Students went onto the grounds around the State Capitol to protest. They were told to leave, and were arrested for trespass when they did not. The arrest violated their 1st Amendment rights because the capitol grounds were a traditional public forum.

> **For Example:** Students went into the Tallahassee jail to protest the arrest of other student protesters the day before. They were told to leave, and were arrested for trespass when they did not. The arrest did not violate their 1st Amendment rights because the jail building was not a public forum. (*Adderley v. Florida* (1966) 385 U.S. 39.)

3) Freedom of Expression in a Private Forum

An individual also has a right to express themselves on their own property in any manner that would be protected speech in the public forum.

> **For Example:** Village law prohibits signs on residential homes except for "For Sale" signs. Hippie is cited for violating the law by putting a "Stop the War" sign in front of his home. This violates the 1st Amendment because he has a right to express political views on

> his own property in the same manner he would be allowed to express those same views in the public forum unless the Village can prove it is necessary to attain a compelling government goal. (*City of Ladue v. Gilleo* (1994) 512 U.S. 43.)

Individuals that use their own property as a private forum do NOT turn it into a public forum and generally cannot be forced to let others enter to present their own views. Newspapers that express particular views CANNOT be forced to print the "other side's" view.

> **For Example:** Pacific Gas and Electric Company (PG&E), a private utility company, distributes political editorials with its utility bills. Nader, an activist, wants PG&E to distribute his own editorials expressing the contrary view. The Public Utility Commission cannot force PG&E to distribute Nader's views because it would violate the 1st Amendment. It would stifle speech if each party that expresses a view could then be forced to distribute all of the opposing views. (*Pacific Gas and Electric Co. v. PUC* (1986) 475 U.S. 1.)

4) Broadcasters' Exception

Television and radio broadcasters are licensed to use a public resource, radio frequencies, to broadcast their signals, but that does not grant them a right to monopolize a radio frequency to the detriment of all other citizens. As a result, licensing statutes may require broadcasters to sell air time for "reasonable access" to all political candidates.

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B. No Vague or Overbroad Restrictions on Speech

Laws that restrict freedom of expression violate the 1st Amendment and are **invalid per se** if they are **vague** or **overbroad**. A law is **fatally vague** if **a person cannot tell with relative certainty** the boundaries between legal and illegal expression.

> **For Example:** Herndon, a Black man, was arrested in Alabama for violating a law that made it a crime to "attempt to induce others to join in a combined resistance to the lawful authority of the State." The law was held invalid per se because it was so **vague and uncertain** that no one could tell what types of statements were legal and which types were not. (*Herdon v. Lowry* (1937) 301 U.S. 242.)

And a law is **fatally overbroad** if it **outlaws protected speech** in the process of prohibiting unprotected speech.

> **For Example:** Coates was arrested for participating in a student protest under an ordinance that prohibited "three or more people from assembling on a public sidewalk in a manner that annoys people passing by." The law violated the 1st Amendment because it was so **vague and overbroad** it made Constitutional assembly and speech a crime. (*Coates v. Cincinnati* (1971) 402 U.S. 611.)

But an individual **lacks standing** to challenge a law for being an overbroad infringement of the freedom of speech unless it threatens a **substantial infringement**.

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C. The Categories of Expression that are Not Protected

Not all expression is protected by the 1st Amendment. Some forms of expression are not protected, and these unprotected types of expression are called **"non-protected speech."** All other forms of expression besides non-protected speech are called **"protected speech."**

The categories of non-protected speech can be remembered with the mnemonic **FIDOFA** (or DO FICA, if you prefer)**:**

1. **FIGHTING words**
2. **INCITEMENT of violence or crime**
3. **DEFAMATION**
4. **OBSCENITY**
5. **FALSE ADVERTISING**

1) Fighting Words

The freedom of expression does not protect fighting words (and gestures, too), expressions that are **intended** to be a **personal insult** that by their nature will **inflict injury** and **incite an immediate breach of the peace**. Fighting words are **non-protected speech.**

> **For Example:** Bevis walks up to police officer Oscar in a bar, gives him the "finger", and asks, "How would you like for me to stick that tin badge in your ear, you @#$#@& flatfoot?" Oscar arrests Bevis for disturbing the peace. Bevis objects that this violates his freedom of speech. Bevis loses because fighting words are **not protected speech.**

But a person cannot be prevented from making statements or expressing opinions simply because other persons might disagree or take offense. Fighting words must be directed at some **particular person or group** and made with the **intention of causing an immediate disturbance**.

> **For Example:** Cohen walks through the Los Angeles County Courthouse wearing a jacket with "Fuck the Draft" written on the back. Cohen is arrested for disturbing the peace. This violates the 1st Amendment because these are not fighting words directed at particular people with the intention of causing an immediate disturbance. Since these words are not fighting words (and not obscenity either, as will be defined below) they are **protected speech**. (*Cohen v. California* (1971) 403 U.S. 15.)

Statutes that make "fighting words" an offense are often held to be overbroad.

> **For Example:** Houston law makes it a crime to "interrupt any policeman in the execution of his duty." Hill sees Officer Oscar arresting Charles and asks, "Why are you arresting him?" Oscar then arrests Hill for "interrupting" him. This is an illegal violation of 1st Amendment rights because the statute is overbroad and goes beyond "fighting words." Since Hill's question was not fighting words it was **protected speech**. (*City of Houston, Texas v. Hill* (1987) 482 U.S. 451.)

2) Incitement: The *Brandenburg* Test

The freedom of expression does not justify incitement of violence or crimes. Solicitation is more properly covered in Criminal Law classes, but generally words urging others to commit acts of violence or crimes are **non-protected speech**.

In the United States' past exaggerated claims of "incitement" have been used to unconstitutionally oppress various social groups. That resulted in a series of cases that formulated a **clear and present danger** test. Later that was reformulated as the **Brandenburg Test:**

> **INCITEMENT means statements that 1) urge imminent lawless action and 2) are likely to incite or produce such action.** (*Brandenburg v. Ohio* (1969) 395 U.S. 444.)
>
> **For Example:** Martin tells Black civil rights demonstrators, "If they deny us the right to vote we should hold a sit-in at the Office of the Registrar of Voters!" Sheriff Sullivan has Martin arrested for inciting a breach of the peace. This violates the 1st Amendment because Martin did not urge imminent and likely lawless action. Rather his suggestion was that depending on future events some illegal actions might result.
>
> **For Example:** Brandenburg speaks at a Ku Klux Klan rally and says, "If the President continues suppressing the White race we are going to march on Congress July 4th and might take revenge!" He is arrested and prosecuted for advocating "violence, terrorism, crime and sabotage." This violates his 1st Amendment right to free speech because there was no advocacy of **imminent and likely** violence. (*Brandenburg v. Ohio*.)

3) Defamation, Interference and *New York Times v. Sullivan*

Defamatory statements are false statements of fact that cause injury to the reputation of another. And even where statements are not false, deliberate wrongful interference in the financial affairs of another are tortious. These are more properly the subject of study in Torts Classes. The freedom of speech does not prevent a Court from awarding a remedy, including damage awards and injunctive relief, where defamatory statements and interference cause others injury. This is **non-protected speech.**

> **For Example:** Al Attorney seeks an injunction to stop Crazy Carol, his bitter ex-wife, from picketing his law office with a sign that says "Don't Hire Al the ADULTERER!" If the injunction is granted it would not violate the 1st Amendment because defamation and statements made for tortious interference are not protected speech.

However, the government may not casually allow the freedom of speech to be denied. And expressions of opinion about **public figures** and **public issues** are especially afforded a high degree of Constitutional protection. To **maintain balance** between protection of the freedom of speech of the individual on one hand vis-à-vis protection of the individual from defamation on the other, the Court in *New York Times Co. v. Sullivan* (1964) 376 U.S. 254 developed the rule that a **public figure** claiming defamation must prove **actual malice**, that the defendant made false statements with either **knowledge** of the falsity or with **conscious disregard** for the truth.

In subsequent cases the Court held that where a **public issue** is involved a plaintiff claiming defamation must show at least **negligence**, and that **no punitive damages** may be awarded for defamation in any case without at least proof of **negligence.**

4) Obscenity: The *Miller* Test

The freedom of expression does not extend to obscenity. Obscenity is **non-protected speech.** But just what "obscenity" means and how to tell what is obscene and what is not was considered by the Courts in a number of cases. One of those cases produced the **Miller Test** which generally holds that:

> **OBSCENITY means that a work, taken as a whole, appeals to prurient interests in sex or excretory functions and is totally devoid of redeeming scientific, literary, artistic, political or social value.** (*Miller v. California* (1973) 413 U.S. 15.)

A mnemonic for remembering the categories of the Miller Test is SLAPS:

- **SCIENTIFIC VALUE**
- **LITERARY VALUE**
- **ARTISTIC VALUE**
- **POLITICAL VALUE**
- **SOCIAL VALUE**

Generally, pornography (including graphic sexual depictions of women being subordinated) is not necessarily obscene unless it fails to meet the standard of the Miller Test. (*American Booksellers Association, Inc. v. Hudnut* (7th Cir.1985) 771 F. 2d 323.) Neither nudity nor a focus on sex or sexual activity is alone sufficient to render a work obscene.

> **For Example:** Jenkins is arrested for obscenity in Georgia for showing the film "Carnal Knowledge." The film is not obscene, even though it has nude scenes and concerns sexual conduct, because it is not totally devoid of redeeming value. (*Jenkins v. Georgia.* (1974) 418 U.S. 153.)

However, **child pornography** is obscene per se and **not protected speech**.

> **For Example:** Ferber is arrested in New York for distributing films of young boys masturbating. It does not violate the 1st Amendment because possession and distribution of child pornography is not protected speech. (*New York v. Ferber.* (1982) 458 U.S. 747.)

5) False Advertising and the *Central Hudson* Test for Commercial Speech

False advertising is **non-protected speech**, but commercial speech that is truthful and not misleading **is protected speech**.

Government may place reasonable time, place and manner restrictions on protected commercial speech, but **blanket prohibitions** on commercial speech are unconstitutional. The extent to which government can restrain commercial speech was set forth as the **Central Hudson Test:**

COMMERCIAL SPEECH can be subjected to 1) narrowly drawn restrictions 2) as necessary 3) to directly advance 4) a substantial government interest. (*Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980) 447 U.S. 557.)

For Example: Virginia prohibits pharmacists from advertising prices for prescription drugs. The purpose of the law is to maintain professionalism among pharmacists. The law is unconstitutional because it restrains speech and is **not necessary**. (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976) 425 U.S. 748.)

For Example: Kentucky prohibits lawyers from advertising their services by direct mail to individuals known to have legal problems. Shapiro wanted to advertise his services as a bankruptcy attorney to people facing bankruptcy. The Kentucky law was an unconstitutional **blanket prohibition** that did not directly advance a substantial state interest. (*Shapiro v. Kentucky Bar Association* (1988) 486 U.S. 466.)

For Example: New York prohibits electrical utilities from promoting the use of electricity. There is a substantial need to conserve energy and advertising causes increased usage. But the law is unconstitutional because it also prevents utilities from promoting devices that conserve electricity like heat pumps. (*Central Hudson Gas & Electric Corp. v. Public Service Commission* (1980) 447 U.S. 557.)

For Example: Rhode Island prohibits liquor stores from advertising prices. The law is unconstitutional because there is no substantial need for banning truthful advertising.

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D. No Prior Restraint of Speech

Laws (or injunctions) that prevent future statements are called **prior restraints.** Prior restraints, in general, violate the 1st Amendment and are **invalid per se** because they threaten to **suppress protected speech** in an effort to suppress unprotected speech.

For Example: A Minnesota court enjoins Near from printing a newspaper story that will allege Minneapolis police are allowing gangsters to control local bootlegging. The order violates the 1st Amendment because it is a **prior restraint**. (*Coates v. Cincinnati* (1971) 402 U.S. 611.)

Not all injunctions against future publications are illegal prior restraints. An injunction against publication is valid if there is a **continuing course of illegal conduct**, the speech prohibited is **not protected speech** and the publication enjoined is **clearly defined**.

For Example: Bevis' ex-wife passes out fliers that say he is a child molester. He sues her for defamation and obtains an injunction stopping her from doing this in the future. The injunction is a prior restraint but does not violate the 1st Amendment if it clearly defines the forbidden acts because there is a continuing course of conduct and defamation is not protected speech.

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E. Prohibiting Protected Speech Requires a Compelling Need

The freedom of even protected speech in the public forum is not absolute. Government may absolutely prohibit protected speech in the public forum if the ban is 1) **narrowly drawn** and 2) **necessary** to 2) attain a **compelling and legitimate state interest**.

> **For Example:** Bevis is a nuclear physicist working on top-secret military research. Federal law prohibits him from telling anyone anything about his research anywhere or he can be imprisoned for up to 20 years. The law is not unconstitutional because it is **narrowly drawn** and **necessary** to attain a **compelling state interest**.

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F. Content-Neutral Time, Place and Manner Restrictions

Even if government does not have a compelling need, it may still place reasonable **content-neutral** restrictions on the time, place and manner of protected speech in the public forum if there are **alternative channels** for communication. Such restrictions must be 1) **content neutral** and 2) **narrowly drawn** to serve a 3) **significant public need** and there must be 4) **ample alternative channels** by which individuals can express the same ideas.

> **For Example:** Travelers complain that Bevis stops them in the San Francisco Municipal airport as they rush for their airplane and begs them for money to fund the Krishna Society. The airport establishes a "free speech booth" and requires all people seeking to stop and communicate with passing travelers to stay in the booth. This is a valid rule because it is **content-neutral** and **narrowly drawn** to serve a **significant public purpose** and leaves **alternative channels** for communication. (*International Society for Krishna Consciousness, Inc. v. Lee* (1992) 505 U.S. 672.)

Content neutral means that all types of speech are placed under the same restrictions, not just certain types of speech.

> **For Example:** Darin is cited for disturbing the peace because he is using a bullhorn to express his political position at 1:00 a.m. in the middle of a sleeping residential neighborhood. This is not a violation of his 1st Amendment right to freedom of speech if the law applies to everyone equally, because then it is a **content-neutral restriction.** And he has ample other means of expressing his political views.

Time, place and manner restrictions must be **narrowly drawn**.

> **For Example:** Los Angeles Airport Commission adopts a regulation that prohibits "all 1st Amendment activities" in the Los Angeles Airport (LAX). This violates the 1st Amendment because it is **not narrowly drawn**. (*Board of Airport Commrs. Of Los Angeles v. Jews for Jesus, Inc.* (1987) 482 U.S. 569.)

> **For Example:** A court issues an injunction prohibiting anti-abortion pickets from talking to people within 300 feet of the abortion clinic. This violates the 1st Amendment because "300 feet" is **overbroad**. (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753.)

There must be **alternative means or channels** for the party to communicate their views.

> **For Example:** Bevis is cited for picketing in front of the home of Dr. Bucks, an abortionist, in violation of a Brookfield law that prohibits picketing before or about any one particular person's residence. This is not a violation of the 1st Amendment because the ordinance is a **reasonable manner** restriction that does not prevent him from picketing up and down the street. It only prevents him from focusing his picketing activities at one single home in a manner intended to harass that particular individual. (*Frisby v. Schultz* (1988) 487 U.S. 474.)

> **For Example:** Bevis is enjoined by a court order from picketing within 36 feet of an abortion clinic. This does not violate the 1st Amendment because it is a reasonable place restriction that leaves ample alternative channels for expression available. (*Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753.)

The "content neutral" aspect of the "time, place, manner" rule does not apply to government restrictions on **commercial speech** because, by definition, such restrictions are almost never content neutral. But such restrictions **must not unreasonably restrain expression.**

> **For Example:** California prohibits building contractors from advertising unless they put their license number on every advertisement. Clearly this is a "manner" restriction, and it is not content neutral since it only applies to advertising by building contractors. But it **does not unreasonably restrain expression.**

> **For Example:** New York prohibits Consolidated Edison from sending its customers fliers stating its corporate viewpoint on public energy policy. This violates the 1st Amendment because it **unreasonably restrains expression**. (*Consolidated Edison Co. of New York v. Public Service Commission* (1980) 447 U.S. 530.)

Government may regulate the time, place and manner of **pornographic businesses** like "adult theaters" if 1) the **predominant purpose** is to control the **place** of expression and NOT to restrict the **content** of expression, AND 2) the application of the restriction **does not unreasonably restrain** the expression.

> **For Example:** City prohibits "adult theaters" within 1000 feet of a church. This is not a content-neutral restriction since it only applies to "adult theaters." But it is not unconstitutional if 1) the **predominant purpose** is not to restrict the content of expression and 2) there are enough places where theaters could be located that it is **not an unreasonable restriction**. (*City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41.)

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G. The Right of Free Speech in Public Schools

School officials have a legitimate need to control conduct in public schools and may infringe upon the freedom of expression as **reasonably necessary to maintain school decorum**. This is a lower standard than either the "compelling interest" or "time, place manner" standards.

But school officials must be able to show a **valid relationship** between limiting expression and **legitimate education interests**. School officials may not stifle expression by students simply because they disagree or the students' ideas are unpopular in the local community.

> **For Example:** Tinker was suspended from school because he wore a black armband to protest the Vietnam War. School authorities did not expect the armbands to cause any disturbance at the school. Tinker's 1st Amendment rights were violated because the actions taken by school officials were **not reasonably necessary to maintain school decorum**. (*Tinker v. Des Moines Independent Community School District.* (1969) 393 U.S. 503.)

But, schools have broad discretion over classroom curriculum, and if a school newspaper is published as part of a **regular classroom activity**, school officials may regulate newspaper contents in **any reasonable manner**. Further, schools have **no duty to publish student views** and do not violate freedom of speech when they refuse to do so.

> **For Example:** Principal Reynolds suppressed two pages of the high school newspaper because he was concerned that two articles were not suitable. The action did not violate the 1st Amendment because schools have **broad discretion over classroom activities** and schools have **no duty to publish student views**. (*Hazelwood School District v. Kuhlmeier* (1988) 484 U.S. 260.)

Schools have less discretion to restrict the content of school **libraries**. School officials may exclude books because they are vulgar. But they may **not prevent students from being exposed to social or political views** with which the school officials disagree.

> **For Example:** The School Board has a list of books removed from the school library because they are "anti-American, anti-Christian, anti-Semitic and just plain filthy." The action violated the 1st Amendment if it was merely to suppress political ideas with which the school officials disagreed. (*Board of Education v. Pico* (1982) 457 U.S. 853.)

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H. Government Funding of Social and Political Expression

Government may fund any social and political messages it pleases, and when it does, there is no duty to fund the conflicting views.

> **For Example:** Congress establishes public health grants to non-profit public health organizations. The act prohibits any of the funds from being spent for abortion counseling. The act does not violate the 1st Amendment because **Congress is not suppressing speech** by refusing to fund speech. (*Rust v. Sullivan* (1991) 500 U.S. 173.)

But government may not demand suppression of speech as a requirement for funding of other activities.

> **For Example:** Congress establishes public health grants to non-profit public health organizations for the purpose of immunizing children for polio. The act denies funds to any organization that also advocates abortion. The act violates the 1st Amendment because

> **Congress is suppressing speech** by denying funding to organizations unless they stop advocating abortion.

I. Restrictions on Symbolic Acts for Important Reasons: The *O'Brien* Test

While the 1st Amendment expressly protects freedom of **speech,** freedom of the **press,** and freedom to **petition** the Government for redress of grievances, it also protects freedom of **expression** by symbolic acts. These protections of symbolic acts are referred to as the penumbral rights because they are said to lie within the edges of the 1st Amendment.

But, government has more freedom to limit symbolic acts than it does to limit speech or the press. Limits on symbolic acts must be 1) **within the power of government** and 2) as **narrowly limited** as necessary to 3) further an **important government interest** that is 4) not simply to **suppress free expression**. This test for symbolic acts is the **"O'Brien Test."**

> **For Example:** O'Brien burned his draft card to protest the war in Vietnam and was convicted of destroying a federal document. The law against destroying draft cards was not unconstitutional because Congress had an **important interest** in maintaining the Selective Service system, the law was **not adopted to suppress free speech** and the law was drawn **as narrowly as necessary.** (*United States v. O'Brien* (1968) 391 U.S. 367.)

The O'Brien Test for restriction of symbolic acts is LESS STRICT than the test for restriction of protected speech because government only has to show an <u>important</u> interest and does NOT have to show a <u>compelling</u> interest.

> **For Example:** Bambi danced naked in a private club in Indiana to support her two kids after Bubba left town. She was arrested for dancing naked without a "G-string." She argued that this denied her freedom of expression. But the law was NOT unconstitutional because it was a restriction on **symbolic acts** adopted for the **important public purpose** of protecting public morals and **not to deliberately suppress free expression**. (*Barnes v. Glen Theatre, Inc.* (1991) 501 U.S. 560.)

But if government limits symbolic acts to suppress free expression of political, social or religious beliefs, the government must meet a higher test by showing a **compelling interest**.

> **For Example:** Johnson burned a United States flag and was convicted to a year in prison for violating a Texas law prohibiting the desecration of the flag. The law is **for the purpose of suppressing free expression.** Therefore it is an unconstitutional violation of the 1st Amendment. (*Texas v. Johnson* (1989) 491 U.S. 397.)

Chapter 8: Rights to Privacy and Personal Autonomy

Other than the fundamental rights expressly established by the 1st Amendment, probably the second most important group of fundamental rights are the "**penumbral rights**" implied in the 9th and 10th Amendments.

The 10th Amendment retains to the States and the people all rights that are not expressly denied them by the Constitution. Further, the 9th Amendment expressly provides that although the Constitution expressly guarantees some rights to the people that does not deny or disparage the other unstated rights retained by the people.

The rights of the people implied by these two Amendments are often referred to as the "Right to Privacy and Personal Autonomy." These rights go far beyond privacy. They might more correctly be called the implied right to be "Left Alone" from unnecessary government interference.

The Right of Privacy and Personal Autonomy includes the implied rights to live and act as a free person, free **to marry**, to have **sexual relations** within marriage, and perhaps even to engage in sex outside of marriage. They include the freedom of the individual to either **conceive and bear children** or not to conceive and bear children. They include the implied rights of family members to be free from unnecessary interference from **living together and raising and educating children**. They include the right of an individual to enter into **contracts**, to obtain an **education**, to engage in **common occupations**. And they include the implied right of the individual to be free to choose a manner of **dress, behavior** and **appearance** without unnecessary restriction.

The Right of Privacy and Personal Autonomy often overlaps with the rights guaranteed by the 1st Amendment as previously discussed. Just as the freedom of religion demands freedom of speech, freedom in personal matters is implied by the freedom of travel, expression and religion.

1. The Implied Rights of Privacy and Personal Autonomy Recognized as Fundamental

Some of the rights retained by the people under the phrase "Right to Privacy and Personal Autonomy" are fundamental rights. The fundamental rights are those that are **"rooted in our nation's traditions and implied in the concept of ordered liberty."**

The same rule applies to the Right of Privacy and Personal Autonomy as to other rights – if a fundamental right is infringed the **government has the burden** to prove the infringement satisfies **strict scrutiny** because it is 1) **necessary** and 2) **narrowly drawn** to attain a 3) **compelling** and 4) **legitimate government purpose**.

But if the government infringes a right that is not fundamental the **individual has the burden** to prove the government action is 1) **not rationally related** to a 2) **legitimate government need.**

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A. The Right to Marry is a Fundamental Right

The right to marry, or not marry is a **fundamental right**.

> **For Example:** Wisconsin would not issue Redhail a marriage license because he owed back child support payments. The State action was unconstitutional because his right to marry was a fundamental right and refusing to let him get married did not provide him with an ability to make the past support payments or in any way further any legitimate government need. (*Zablocki v. Redhail* (1978) 434 U.S. 374.)

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B. Conception, Contraception and Abortion are Fundamental Rights

The right to decide to **not conceive** and not bear children is a **fundamental right**.

> **For Example:** Griswold was arrested by Connecticut for explaining contraceptive techniques to married couples. The arrest was unconstitutional because individuals have a fundamental right to learn about and practice contraception, and Connecticut had no compelling and legitimate reason to prevent it. (*Griswold v. Connecticut* (1965) 381 U.S. 479.)

Both married and unmarried people have a privacy right to obtain and use contraceptives.

> **For Example:** Baird was arrested in Massachusetts for giving an unmarried woman contraceptive foam. The arrest was unconstitutional because both married and unmarried people have a fundamental right to privacy. (*Eisenstadt v. Baird* (1972) 405 U.S. 438.)

The right to **conceive children** is also fundamental.

> **For Example:** Oklahoma started to castrate Skinner because he had been convicted more than once of crimes of moral turpitude (Seriously, I am not making this up!). The State action was unconstitutional because his right to father children was a fundamental right and Oklahoma had no compelling reason to castrate Skinner. (*Skinner v. Oklahoma* (1942) 316 U.S. 535.)

A woman has a right to obtain an **abortion**. This right is **important, if not fundamental**, and government cannot deliberately create **substantial obstacles** to the woman's ability to obtain an abortion.

> **For Example:** Texas denied Roe the right to obtain an abortion. The State action was an unconstitutional infringement of the Right of Privacy and Personal Autonomy because it was a total barrier to abortion. (*Roe v. Wade* (1973) 410 U.S. 113.)

But the woman's rights must be **balanced** against the government interest. The State may enact **regulations** to protect the health and safety of the woman seeking an abortion. And the government may **delay the abortion** until the woman is informed about medical and philosophical arguments against abortion. However, the government may not create substantial obstacles or otherwise create an **undue burden** to the woman's rights.

> **For Example:** The State required a woman seeking an abortion to be given certain information, including arguments against abortion, at least 24 hours before the abortion was performed. The State action was NOT an unconstitutional infringement of the Right of Privacy and Personal Autonomy because it **did not create an undue burden**. (*Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) 505 U.S. 833.)

Requiring a pregnant married woman to **tell her husband she is pregnant and seeking an abortion** is an **undue burden** because it might threaten the stability of the marriage and lead to possible physical abuse by the husband.

> **For Example:** The State prohibited a married woman from obtaining an abortion unless she notified her husband. The State requirement WAS an unconstitutional infringement of the Right of Privacy and Personal Autonomy because it **did create an undue burden**. (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, supra.)

Requiring a pregnant **minor** to obtain **parental consent** is NOT clearly an undue burden because the privacy rights of the pregnant minor must be balanced against the **family rights** of the parents. Those rights are discussed below. Since abortion is a medical procedure, the parents of the minor have a significant interest in exercising control. Nevertheless, requiring parental consent does create an undue burden to the pregnant minor unless there is an **adequate judicial bypass** procedure by which the minor could get an abortion even without parental consent.

> **For Example:** The State prohibited a minor from obtaining an abortion unless her parents consented, but there was a judicial bypass procedure by which the minor could still obtain an abortion when the parents refused to consent. The State requirement was NOT unconstitutional because it **did not create an undue burden**. (*Planned Parenthood of Southeastern Pennsylvania v. Casey*, supra.)

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C. Family Rights are Fundamental

The right of family members to live together is a **fundamental right**.

> **For Example:** Cleveland arrested old Mrs. Moore and sentenced her to five days in jail for letting her grandson live with her after his mother died. (Seriously, I am not making this up!) Although the city may have had a legitimate purpose of reducing school crowding, the right of family members to live together cannot be denied by government without a compelling reason. (*Moore v. City of East Cleveland, Ohio* (1977) 431 U.S. 494.)

The rights of parents to educate children are **important or fundamental** and cannot be infringed by the government unless it is necessary to protect the children.

> **For Example:** Nebraska arrested Meyer for speaking German while teaching school children (Seriously, I am not making this up!). The law was unconstitutional because parents have a right to educate their children any language they choose. (*Meyer v. Nebraska* (1923) 262 U.S. 390.)

> **For Example:** Oregon passed a law prohibiting parents from sending their children to private schools. The law was unconstitutional because parents have a right to send their children to the schools of their choice and cannot be restricted to only public schools. (*Pierce v. Society of Sisters* (1925) 268 U.S. 510.)

But even when the **fundamental rights** of parenthood are at stake, the government may be justified by a demonstrated need to protect the children and family integrity.

> **For Example:** Bob's wife Carol had sex with their neighbor, Ted, and later gave birth to Alice. Ted believes Alice is his biological daughter. But under California law any child born to a married woman is legally the daughter of her husband, regardless of any contrary evidence. The law is intended to preserve and protect family integrity and privacy. Ted demands that DNA tests be done on little Alice, and if she is his biological daughter he demands joint custody. Alice's "legal father" Bob refuses to let Ted get anywhere near little Alice. The California law is valid, even though it totally denies Ted any contact with his biological daughter, because it is necessary for the State's substantial interest in protecting family integrity and privacy. (*Michael H. v. Gerald D.* (1989) 491 U.S. 110.)

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D. The Right to Refuse Medical Treatment is Fundamental

The right of a mentally competent person to decide to **refuse medical treatment** is a **fundamental right**.

> **For Example:** Massachusetts ordered Jacobson to get a smallpox vaccination. He refused. The State could not force him to be vaccinated, even though it had a legitimate interest in protecting the public health because Jacobson had a fundamental right to refuse medical treatment that was not outweighed by the State interest. (*Jacobson v. Massachusetts* (1905) 197 U.S. 11.)

2. Other Non-Fundamental Rights of Privacy and Personal Autonomy

Not all rights retained by the people under the phrase "Right to Privacy and Personal Autonomy" are fundamental rights. As discussed previously when rights are not fundamental the **individual has the burden** of proving government acts are 1) **not rationally related** to a 2) **legitimate government interest**.

The three most common legitimate reasons government can infringe the freedom rights of the people are:

1. Protecting public health,
2. Protecting safety, and
3. Protecting public morality.

But when a law restricting the freedom of the people does not fall within one of these three categories, it is much more suspect. In each case the Court will focus on whether there is a rational

relationship between the challenged law and the claimed purpose of the law, and whether the law would actually serve to advance that goal.

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A. New Trends in Protecting Safety

Historically government has only had a legitimate purpose in protecting people from the dangerous acts of others, and there was no legitimate reason to prevent a person from putting themselves in danger. Under this view the individual was seen as having a freedom right to behave in any dangerous or foolish way they wished, as long as they did not put anyone else in danger. In many ways this is still the case.

> **For Example:** Bubba is cited for plowing his own field with his farm tractor without a driver's license. This would traditionally be viewed as an invalid violation of Bubba's freedom rights because government has no legitimate reason to require Bubba to have a driver's license on his own property where he is not putting anyone at risk but himself.

But over the past thirty years this attitude has begun to change because public health programs, such as Medicaid, have incurred staggering costs in treating patients impoverished by the medical expenses caused by traumatic injuries, especially preventable head injuries. So now government has a legitimate interest in protecting people from their own dangerous behavior.

> **For Example:** Butthead is cited for riding his motorcycle without a helmet. This would traditionally be viewed as an invalid violation of Butthead's freedom rights because government has no legitimate reason to require him to wear a helmet where he is not putting anyone at risk but himself. But the law is **rationally related** to the new **legitimate government purpose** of reducing the State's Medicaid expenses. And that is sufficient since riding a motorcycle without a helmet is not a fundamental right.

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B. The Limits of Protection of Public Morals

The concept of "protecting public morality" is a tautological concept. To a great degree **public morality is whatever the majority of the public thinks it is**. And if the majority of the public think some act is a moral offense government may generally prohibit it. This is especially true when there has been a long historical and traditional opposition to some practice.

Among the practices traditionally prohibited **in public places** to protect the "public morality" are **nudity, fornication, masturbation, urination,** and **defecation**.

> **For Example:** Bambi is arrested for dancing naked in a private club in Indiana. The law was NOT an unconstitutional because it was rationally related to the **legitimate public purpose** of protecting public morals. (*Barnes v. Glen Theatre, Inc.* (1991) 501 U.S. 560.)

And some other practices traditionally prohibited to protect public morality regardless of the place or consensual participation of others are **polygamy, homosexuality, prostitution, bestiality, cruelty to animals,** and **illegal drug use.**

But protection of public morals does not justify infringement of a fundamental right.

> **For Example:** Cohen is arrested for having "Fuck the Draft" written on the back of his jacket. This was unconstitutional because the **important public purpose** of protecting morality was **outweighed by** his **fundamental right** of free speech. (*Cohen v. California* (1971) 403 U.S. 15.)

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C. Right to Engage in Homosexual Acts

It was long held that there was no fundamental right to engage in homosexual acts. In *Bowers v. Hardwick* (1986) 478 U.S. 186 the U.S. Supreme Court held that the practice of sodomy was not a fundamental right and that laws prohibiting homosexual acts were rationally related to the protection of **public morals**. But that decision was reversed seventeen years later in *Lawrence v. Texas* (2003) 539 U.S. 558.

Chapter 9: Due Process and the Taking of Property

The rights of the people, both the fundamental rights and those that are not fundamental, were discussed above. Those rights are not absolute, and the government can deprive individuals of those rights. But the manner by which this can be done is restricted by the concept of **"due process."**

The 5th Amendment protects people from having their property and rights taken from them by the federal government without **just compensation** and **due process**. It states, among other things:

> **"No person…shall be…deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." (5th Amendment, 1791.)**

The 14th Amendment subsequently was adopted to protect the rights of the people from infringement by the States. It states:

> **"…nor shall any State deprive any person of life, liberty, or property, without due process of law…" (14th Amendment, 1868.)**

1. Due Process

The term "due process" is not defined in the Constitution and judicial interpretation of the concept has a long and twisted history. The purpose here is to explain what the concept is today rather than dwell unnecessarily on how it came to be so.

> **DUE PROCESS means that government may not 1) deprive people of their rights to life, liberty or property unless it is 2) justified by the government need and 3) done in a reasonable manner.**

The basic concept of due process is that government must treat the people in a manner that is fair and reasonable given a balance between the needs of the government and the injury it inflicts on the individual.

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A. Every Deprivation of Rights Demands Due Process

Due process is required when government **intentionally** deprives an individual of any **legally entitled** right.

1) Rights Must Be Interests Based on Legal Entitlement

An individual has a "right" to due process if they would be denied an "interest" in life, liberty or property to which they otherwise would be entitled. An "entitlement" to an interest requires **more than a mere need or desire or expectation**. It requires legal recognition. Legal entitlement may created by **statute, rules, regulations, a course of dealing or practice, or contract provisions**.

> **For Example:** Roth was hired under a contract to teach for Wisconsin State University. The University did not have to renew the contract if it did not want to. Roth criticized the administration so his contract was not renewed. He was not denied "liberty" because he was free to leave. He was not denied "property" because the contract he had with the University gave it the option not to renew. (*Board of Regents of State Colleges* (1972) 408 U.S. 564.)

2) Due Process is Violated Only by Intentional Government Acts

A denial of due process requires some **deliberate act** by the government to cause a denial of the individual's legal rights and it cannot arise out of mere negligence by a government employee.

> **For Example:** Bevis, a prisoner, silently gave the guard, Butthead, a note that said, "Help, Doofus is going to rape me. Get me out of here! Butthead negligently failed to read the note until after Bevis was assaulted. Bevis was not denied due process because the 5th and 14th Amendments were intended to prevent deliberate abusive government conduct, not negligence. (*Davidson v. Cannon* (1986) 474 U.S. 344.)

3) Civil Service Employment Creates a Recognized Property Interest

Employment can generally be terminated at will. But **civil service rules** generally give **government employees** a property interest in continued employment. Once the property interest is created it cannot be denied without **advance notice** and a **hearing**.

> **For Example:** Loudermill gave false statements on his employment application when he was hired by Ohio. When the truth was discovered he was fired without a hearing. There was a denial of due process because civil service rules promised Loudermill continued employment absent some malfeasance or misbehavior on his part. That formed an entitlement so due process demanded that he be given notice and a hearing before he could be dismissed. (*Board of Regents of State Colleges* (1972) 408 U.S. 564.)

4) Lesser Recognition is Afforded Prisoner's Liberty Rights

In contrast to the rights civil service rules give government employees, **prison rules** do not generally give **prisoners** a liberty interest in a particular type of incarceration. Prisoners are deprived of due process only if they are punished in a manner that imposes **atypical and significant hardship** compared to normal prison conditions.

> **For Example:** Prison rules directed that prisoners be sent to solitary confinement for "high misconduct." Conner was sent to solitary for "high misconduct" without a hearing. He was not denied due process because the prison rules did not create an interest to which he could claim he was legally entitled. (*Sandin v. Conner* (1995) 515 U.S. 472.)

In fact, the government may deprive prisoners of rights, including fundamental rights, in any manner **reasonably related to a legitimate penological interest**.

> **For Example:** Bevis was a psychotic but competent prisoner who refused to take his medications. Prison guard Butthead forced Bevis to swallow his pills. This was not a denial of due process because it was **reasonably related to legitimate penological interests**. (*Washington v. Harper* (1990) 494 U.S. 210.)

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B. Substantive Due Process is a Fundamental Right

Substantive due process means that the government may not **arbitrarily deprive** an individual of rights without justification. There must at least be a legitimate purpose, and if fundamental rights are infringed there must generally be a compelling reason. **Substantive due process is a fundamental right**. This means that the government cannot arbitrarily deprive an individual's recognized rights, even if the rights at stake are not fundamental.

1) Due Process Demands Legitimate Government Purposes

A government act violates due process unless it is for a **legitimate purpose** within the rights and powers of the acting government body.

> **For Example:** California police arrest Bevis for violating a California statute that makes it a crime to kill a spotted owl anywhere in the world. But he killed the owl in Oregon. This violates due process because California does not have a legitimate purpose in enacting statutes that attempt to control behavior in other states.

2) Due Process Limits Court Jurisdiction over Individual

A state court violates due process when it attempts to exercise jurisdiction over a person that has **no legitimate connection** with that state. This concept is called the **personal jurisdiction** of the court, and it is better discussed in law school classes on **Civil Procedure**. But some mention of it here is appropriate because it is a concept that arises out of the due process guarantees of the 5th and 14th Amendments.

> **For Example:** An Oregon court issues a default judgment against Pennoyer, a resident of California, over an alleged debt. This violates due process because the authority of the Oregon courts does not extend to people living in other states absent some significant nexus between the person and the State. (*Pennoyer v. Neff* (1877) 95 U.S. 714.)

3) Due Process Violated by Arbitrary Government Actions

A government action violates due process if it is **arbitrary**. This means it **lacks a rational relationship** to the claimed goal or purpose of the action.

> **For Example:** To promote public safety California denies driver's licenses to everyone that is left-handed. Public safety is a legitimate state purpose, and driving is not a fundamental right. But this is an **arbitrary** action because there is **no rational relationship** between public safety and denying all left-handed people the right to drive. Therefore this action would violate due process.

4) Government Needs May Justify Deprivation

Conversely, the government may deny any person's rights to "life, liberty or property" if it is **justified by the government need**.

> **For Example:** City firemen dynamite Bevis' house in an emergency effort to stop a fire that is raging through his neighborhood. Stopping fires to protect public safety is a legitimate state purpose, and this is NOT **arbitrary** because removing the house would help stop the fire. Therefore this action would not violate due process.

Whether any particular act is justified depends on a **balancing** of the **government need** for the deprivation against the **seriousness of the injury** the deprivation will cause the individual.

5) Government Must Justify Denial of Fundamental Rights

Generally, as discussed earlier, the government may not deprive an individual of **fundamental rights** unless it can prove it is 1) **necessary** to attain 2) **compelling and legitimate government needs**. This strict scrutiny burden falls on government.

> **For Example:** State law allows voting officials to deny the right to vote to people who cannot prove they are literate. Bevis, the White voting registrar, denies Butthead, a Black man, the right to vote because he cannot spell "chrysanthemum." The **State has the burden** of proving this test is **necessary** to attain a **compelling government need** because voting is a fundamental right.

6) Individual Has Burden if Non-Fundamental Right Denied

As discussed earlier, individuals may stop the government from depriving them of **non-fundamental rights** by proving it is 1) **not rationally related** to a 2) **legitimate government need**. This burden is on the individual.

> **For Example:** DMV denies Butthead a driver's license because his hair is dyed blue. Driving is not a fundamental right so **Butthead has the burden** of proving this denial is **not rationally related** to any **legitimate government purpose**.

7) 14th Amendment Restricts States by Selective Incorporation

The Bill of Rights expressly prohibited the federal government from denying the people certain rights. It further guaranteed "due process" in the 5th Amendment. Later the 14th Amendment prohibited States from denying "due process" but did not designate exactly what rights that term guaranteed from State infringement.

Through a long process of judicial interpretation the Court has held that certain rights are the "fundamental" rights that must be protected from State infringement by the 14th Amendment's guarantee of due process. This piecemeal judicial process is called the **"selective incorporation"** approach.

The selective incorporation process is said to have "extended" the restrictions of the Bill of Rights to the States via the 14th Amendment guarantee of due process.

> **For Example:** One might say that, "The 1st Amendment, now extended to the States by the due process guarantees of the 14th Amendment, prohibits government from infringing upon the freedom of the press."

8) Historical Development of Due Process

The historical development of due process is confused and twisting. Understanding it is not important to succeed in law school. Nevertheless most casebooks (and consequently most law school professors) spend a considerable amount of time reviewing it.

The basic fact is that whether the Supreme Court finds the government has a **legitimate need** to restrict individual rights, and whether that need is **compelling**, is determined more by the politics and conditions of the times than by eternal and unchanging legal precepts. Likewise, whether a right is **fundamental** or not fundamental is a matter of the Court's political perspective.

As the United States has changed the Court's opinion has changed about what "due process" means. But, the Court is theoretically bound by its own past decisions (i.e. the doctrine of stare decisis). So each evolutionary change in the Court's position regarding due process has been accompanied by a legal rationalization that has at times been rather tortured.

In the end the only thing to understand what the Court NOW views as government's legitimate and compelling needs, and what the Court NOW views as the fundamental rights of the individual.

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C. Procedural Due Process: The Right to Notice and a Hearing

Due process, as defined above, prohibits the government from depriving individuals of life, liberty or property rights unless it is done in a "reasonable manner." This requirement of "reasonable manner" is called **"Procedural Due Process."**

Procedural due process means that the government must generally provide **reasonable notice** and an opportunity for a **hearing** before depriving an individual of an interest in life, liberty or property. The opportunity for a hearing must be given at a meaningful time and in a meaningful manner, and this generally means **before** the government deprives the individual of his or her rights. (*Mullane v. Central Hanover Bank & Trust* 339 U.S. 306)

> **For Example:** Iowa revokes Butthead's driver's license without notice because his ex-wife Brunehilda has accused him of not paying Court-ordered child support. This is a denial of procedural due process because Butthead should have been given reasonable notice of the accusation and an opportunity to prove he had, in fact, paid the child support.

1) Exigent Circumstances May Justify Lack of Notice

The procedural requirements of notice and a hearing are **not fundamental rights**, and government may act to deny an individual's liberty or property rights without prior notice or a hearing where the government has an **important and legitimate reason** for acting without delay.

> **For Example:** Utah orders Bevis' restaurant closed immediately without notice because it has discovered serious health code violations. This is not a denial of procedural due process if it was necessary to protect the public safety.

A government deprivation of rights is less likely to be a denial of procedural due process when there is a means by which the **individual could seek a prompt administrative remedy**.

> **For Example:** Children's Protective Services takes Terri's children away from her on a finding that she is too ill to care for them. There is no denial of procedural due process, even though her fundamental right of parenthood is denied, if the State promptly assigns her an attorney and gives her a hearing where she can object to the government action.

2) Unnecessary Denial of Rights Without Notice Invalid

It violates procedural due process when government establishes **standing procedures** that **unnecessarily** and **predictably** cause individuals to be denied their rights without a hearing.

> **For Example:** Reza is put in a mental hospital and held for five months without a hearing because he is found wandering the streets in a disoriented state and State law presumes he has consented. This violates procedural due process because mental incompetents cannot give valid consent. The violation is **unnecessary** since procedures could easily be established to assign legal representation and provide a prompt hearing. (*Zinermon v. Burch* (1990) 494 U.S. 113.)

3) No Right to Notice and Hearing Before Legislative Acts

There generally is no violation of procedural due process when government adopts new laws, rules, ordinances or regulations of general application without giving all people affected advance notice and an opportunity to object. Such enactments are within the "legislative" role of government rather than "executive" acts that give rise to due process considerations because they are rules of general application that affect people that cannot be clearly identified.

> **For Example:** Idaho adopts new smog rules. Bevis is prevented from licensing his smoky old car. He objects he was not given notice the new rules were being considered or an opportunity to object before the Legislature. This is NOT a violation of procedural due process because this was a legislative act of government.

But when rules are adopted with the purpose of impacting **specific, identifiable individuals,** procedural due process may require giving them notice and an opportunity to be heard.

> **For Example:** City adopts new zoning rules deliberately to shut down Bevis' stinky rendering plant. Since the new rules are being adopted for the specific purpose of shutting Bevis down, due process requires that he be given advance notice and an opportunity to object.

4) Nature of Hearing Determined by Importance of Interest

Procedural due process demands that individuals be given a hearing. That means that they must be some meaningful opportunity to object against a deprivation of their rights. The exact nature of that hearing depends on the type of government action and the importance of the rights at stake.

Criminal Prosecutions. In the case of a criminal prosecution the trial of the defendant is often faced with a deprivation of liberty and the "hearing" and the nature of the hearing would be determined by the rules of **criminal procedure**. Among those provisions might be the right to a jury trial, a requirement of a finding of guilt beyond a reasonable doubt, etc.

Deprivation of Fundamental Rights. In the case of a deprivation of other **fundamental rights** the individual has a right to a **full, evidentiary hearing** before an **impartial decision maker** with the **assistance of counsel** and the power to conduct **discovery** and to **subpoena** and **confront witnesses.**

> **For Example:** Children's Protective Services takes away Terri's children on a finding that she is too ill to care for them. Terri has a right to a **full evidentiary hearing** because the government action threatens to deprive her of her **fundamental rights** as a parent.

Deprivation of Non-Fundamental Rights. In the case of deprivation of **non-fundamental rights** the individual's right to a hearing depends on three factors: 1) the importance of **the private interest** in having a more thorough hearing, 2) the importance of **the government interest** in having a more cursory hearing, and 3) the **risk of wrongful deprivation** if a more or less extensive hearing is provided. (*Mathews v. Eldridge* (1976) 424 U.S. 319.)

> **For Example:** Bevis' restaurant is cited and fined $100 for a health code violation when the health inspector finds rotten meat in his refrigerator. Bevis is only given an opportunity to submit a written statement of opposition to the citation and is refused an opportunity to orally deny that the meat was rotten. This would not violate procedural due process because he has already denied that the meat was rotten and oral argument wouldn't add anything to that denial.

5) Exercise of Eminent Domain Does Not Violate Due Process

Sometimes individual rights are denied based on irrebuttable presumptions. When a presumption is "irrebuttable" the individual has no means of challenging the presumption, so they are necessarily denied a hearing on the matter.

> **For Example:** DMV denies Doogie Howser a driver's license because he is only 10 years old, and state law presumes he is too young to drive. Does he have a right to a hearing so he can demonstrate his driving ability?

Whether procedural due process is violated by an irrebuttable presumption demands a **balancing** of the **burden government would incur** by providing individual determinations against the **nature of the right** at stake and the **benefits the individuals would likely enjoy** from being given a hearing.

> **For Example:** Federal law provides that coal miners suffering from black-lung disease are totally disabled and entitled to benefits. Elkhorn Mining challenges that it was denied

an opportunity to prove some of the miners are not totally disabled. Held: the law does not violate procedural due process because no fundamental right is involved and Congress could have entitled the miners to the very same benefits without finding that they were "totally disabled." (*Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1.)

For Example: Federal law denies Social Security survivor benefits to a widow and step-children from a marriage of less than nine months to a deceased wage-earner. The measure is intended to prevent sham "death-bed" marriages to secure survivor benefits. Salfi's husband died a month after she married him, and she challenges that she should have a right to show her marriage was not a sham. Held: the law does not violate procedural due process because no fundamental right is involved and the burden of providing hearings would outweigh the benefits the hearings might provide. (*Weinberger v. Salfi* (1975) 422 U.S. 749.)

Irrebuttable presumptions are more likely to violate procedural due process when **fundamental rights** are unnecessarily infringed.

For Example: Illinois has an irrebuttable statutory presumption that all **unmarried fathers** are unqualified to raise their own children. The presumption violates procedural due process because the **fundamental right of parenthood** is involved, and it would not be a serious burden to the State, compared to the interest at stake, to provide a hearing. (*Stanley v. Illinois* (1972) 405 U.S. 645.)

For Example: Connecticut has an irrebuttable statutory presumption that **unmarried students** are non-residents if they lived outside the state at any time in the year before they apply for admission to the state university. The "one-year" provision is not applied to married students. The presumption violates procedural due process because the **fundamental right of marriage** is involved, and it would not be a serious burden to the State to provide a hearing. (*Vlandis v. Kline* (1973) 412 U.S. 441.)

For Example: School district requires pregnant teachers to go on unpaid maternity leave five months before giving birth because they might be unable to perform all their duties. The rule violates procedural due process because the **fundamental right to conceive and bear children** is involved, and providing the teachers with an opportunity to prove they are able to perform their teaching duties would not be a serious burden to the district. (*Cleveland Board of Education v. LaFleur* (1974) 414 U.S. 632.)

But irrebuttable presumptions may not violate procedural due process when they express and further a substantial government need, even if fundamental rights are infringed.

For Example: After Bob married Carol she had unsafe sex with their neighbor, Ted. Later she gave birth to Alice. Ted has blood test results that show Alice is his daughter and not Bob's. Ted demands that he has a right to act as Alice's father. But California law has an irrebuttable presumption that a child born to a married woman is legally the daughter of her husband. And Bob, understandably, refuses to let Ted get anywhere near Alice. Ted demands an evidentiary hearing where he can use the blood-tests to prove he is Alice's father. But the Court denies the hearing based on the statutory presumption. This did not violate procedural due process, even though the fundamental right of parenthood is involved because the State has a substantial interest in defining the paternal relationship

and excluding the evidence of paternity here protects family integrity and privacy for Bob, Carol and Alice. (*Michael H. v. Gerald D.* (1989) 491 U.S. 110.)

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D. Government Fees, Fee Waivers and Due Process

Does it deny due process to charge a fee for governmental services? For example, does charging a fee for issuing a marriage license deny a fundamental right (marriage) to those who are too poor to pay the fee? The Courts have generally held that it is a denial of due process for government agencies to charge a fee for **important services**. Generally due process demands some procedure for indigent individuals to apply for **fee waivers.**

2. Takings

The 5th Amendment expressly forbids the government from taking private property without "just compensation." In many ways this clause does not add anything to the general guarantee of due process. But a few issues peculiar to "takings of property" that don't apply to other "due process" scenarios are worth discussion.

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A. Exercise of Eminent Domain Does Not Violate Due Process

The ownership of land or other property is not a fundamental right. Therefore due process is not violated when the government takes land or property from an individual in exchange for just compensation, as long as the government act is for a legitimate purpose. This process is called an **"exercise of eminent domain."**

Although the 14th Amendment indicates the "legitimate purpose" for a taking of private property must be a "public use" that term has been held by judicial interpretation to require a legitimate public purpose, even if the public purpose is private use of the property.

> **For Example:** Bevis owns an apartment complex in a slum area that City wants to improve with a new shopping mall. City purchases Bevis' complex for a fair price by exercising eminent domain. It then resells the complex to a developer who agrees to build the mall. The City does not violate due process by taking the land for private use (by developer) because the transfer to private use has a legitimate public purpose.

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B. Most Land Use Restrictions Are Not a "Taking" of Land

Common changes in property use restrictions such as licensing rules, zoning restrictions, sidewalk easements and setback restrictions are not a "taking" of land by the government that requires compensation to the property owner. There are three rationales for this.

First, the adoption of laws, ordinances and rules is a **legislative act** of government that does not "take" property from its owners, even though it might have the effect of reducing the value of property by restricting its use.

> **For Example:** California adopts new smog rules that prevent Bevis from being able to license his smoky old car. The State has not "taken" his car from him so he cannot demand compensation, even though the change in rules makes the car relatively worthless.

Second, use restrictions are **foreseeable**, and the price of the property at the time of purchase reflects the possibility such restrictions could be adopted in the future. Therefore the buyer has **already been compensated** to some extent through a lower price, and beyond that the buyer "**assumed the risk**" of these relatively foreseeable changes.

Third, this type of restriction often **improves the value** of property rather than reducing it, and the owner retains the beneficial use of the land. While the zoning change may temporarily reduce the property values, the new zoning may make the property more valuable after a while. In this case no "fair compensation" is due.

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C. Restrictions on Type of Use Are Not Generally a "Taking"

Restrictions changing the type of use for property are not generally a "taking", even if they are unforeseen, because the owner **retains substantial use** of the property for other purposes.

> **For Example:** City adopts new rules that change the zoning of the area where Bevis' rendering plant is located from "industrial" to "retail." Even though this puts Bevis out of the rendering business it is not a "taking" as long as he retains substantial use of the property for retail purposes.

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D. Restrictions that Violate Reasonable Expectations are a "Taking"

But extraordinary property use restrictions that **violate reasonable investment-backed expectations** are a taking of property and due process demands compensation of the property owners.

> **For Example:** Doofus owns a $500,000 residential lot on the beach where he intends to build a home like the many others that already exist along the same beach. The lot has no possible use except as a residential lot. Without warning the State Coastal Protection Commission adopts new rules that prevent Doofus from building and leave his lot completely worthless. Doofus has a right to demand reasonable compensation for his lot since 1) the property is worthless, 2) it cannot be used for any reasonable alternative purpose and 3) the Commission action violates reasonable investment expectations.

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E. Significant Forced Public Access is a Taking

While the law is very lenient regarding use restrictions, it is very strict when government forces a property owner to "share" the use of property. It is a "taking" of property that requires fair compensation whenever government forces an owner to **allow other people to enter or use** their property to any significant extent.

> **For Example:** New York City adopts an ordinance that apartment buildings must let cable TV companies mount satellite dishes on their roofs. This is a "taking" of property that requires fair compensation because it constitutes a **significant permanent trespass to property**. (*Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.)

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F. Rent Control with Eviction Restrictions Not a Forced Public Access

There is no "taking" when government adopts rent controls combined with restrictions on the ability of the property owner to evict renters because there is no physical invasion of the property. Even though the property owner is restricted from evicting the tenants, the property owner allowed the tenants onto the property in the first place and was not forced into the situation by government.

> **For Example:** Yee wanted to evict tenants from his mobile home park after the City of Escondido adopted rent controls, but State law prevented it. This was not a "taking" because Yee originally consented to allow the mobile homes onto his property. (*Yee v. City of Escondido* (1992) 503 U.S. 519.)

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G. Balancing Test Applies When Access Demanded for Use Permits

When government demands that a property owner agree to "share" or "dedicate" private property to public use as a requirement for issuance of a special use permit requested by the owner, a balancing test is used to evaluate whether there has been a "taking" that requires fair compensation.

This situation would arise when the owner applies for something like a building permit or zoning variance and the local government refuses to issue the permit or variance unless the owner agrees to let his or her property be used by the public.

1) Must Be Nexus to Requested Use

The Court must first consider whether there is a **nexus or logical connection** between the demand by the government and the special use permit requested by the owner.

> **For Example:** Bevis applies for a building permit to build a new house on an unimproved building lot that used to be farm land. City demands that as a requirement for the permit Bevis must dedicate a strip of land eight feet wide along the front edge of the property for use as a public sidewalk. This would be permissible because there is a logical connection between the request to build the house and City's demand that Bevis provide land for a public sidewalk.

2) Government Demand Must be Reasonable

Secondly, the Court must find on **balance** that the **government's demand** for public access to the owner's property is reasonable compared to the **expected benefit** the owner would enjoy from the requested use permit.

> **For Example:** Bevis applies for a building permit to add a second bathroom to his home. City refuses to issue the permit unless Bevis agrees to let his back yard be used as a public park. This would constitute a "taking" without fair compensation because the demand by City is unreasonable compared to the benefit Bevis stands to gain from the building permit.

While there is no exact ratio, there should be a **"rough proportionality"** between the benefit the private property owner seeks to gain and the impact the government's demand would have on them. (*Dolan v. City of Tigard* (1994) 512 U.S. 374.)

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H. Fair Compensation for Government Takings of Property

The basic rule of law is that "fair compensation" for a taking is measured by **the owner's loss** and not the benefit to the government or public.

> **For Example:** When flooding washed out the parking lot at the State park, the State used a vacant lot nearby as a temporary parking area under the mistaken notion it was State-owned land. Actually the lot was owned by Bevis, but he never used it for anything. When Bevis discovered the situation he demanded $500 a day, a fair estimate of what the use of the lot was worth to the State. But the State only has to pay Bevis for the loss the taking caused <u>him</u>, not for the benefit it enjoyed as a result.

And if government only takes control of private property temporarily it still must compensate the owner for the period of time use of the property was denied.

Chapter 10: Equal Protection Rights

The term **equal protection** was first used in the 14th Amendment which states in part,

> **"…nor shall any State … deny to any person within its jurisdiction the equal protection of the laws." (14th Amendment, 1868.)**

Equal protection is defined by judicial interpretation. The guarantee of equal protection is a close parallel to the guarantee of due process, and frequently there are situations in which the two guarantees overlap. But there are other situations where the application of the guarantee of equal protection significantly differs from the guarantee of due process.

> **EQUAL PROTECTION means that government may not 1) deliberately cause 2) similarly situated people to be 3) treated differently unless there is 4) proper justification.**

1. Judicial Extensions of Equal Protection Guarantees

Originally the 14th Amendment guarantee of equal protection was enacted primarily to protect the freed slaves from discrimination and oppression by States after the Civil War, and for a few years it was interpreted in that narrow concept. In is now broadly applied.

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A. Extension of Equal Protection to All People

By judicial interpretation the guarantee of equal protection has now been broadly **extended to a protection of all people** of every race and type. It has even been applied to **corporations**, invalidating a State law that singled out railroad companies for disparate treatment. (*Gulf, Colorado & Santa Fe Railroad Co. v. Ellis* (1897) 165 U.S. 150.)

However, the right to equal protection has NOT been extended to all groups of people in an equal manner. For groups that have been historically oppressed the denial of equal protection has been subjected to **strict scrutiny** in the same manner as a fundamental right. But for many other groups the denial of equal protection has been subjected to either the **rational relation test** or to a somewhat higher level of scrutiny that might be called a **persuasive justification.** This will be explained more below.

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B. Extension to Control Federal Government

By judicial interpretation the guarantee of equal protection has now been **extended to the federal government** as well as States. This is based on a holding that the 5th Amendment guarantee that the federal government will not deny due process implies a guarantee of equal protection. (*Vance v. Bradley* (1979) 440 U.S. 93.) The current view is that the 5th Amendment limits the federal government in the same way the 14th Amendment limits the States. (*Adarand Constructors, Inc. v. Pena* (1995) 515 U.S. 200, *Bolling v. Sharpe* (1954) 347 U.S. 497.)

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C. Extension to Control Private Individuals and Companies

The 13th Amendment (prohibiting slavery), 15th Amendment (prohibiting discrimination based on race, color, and prior condition of servitude) and 14th Amendments all empower Congress to adopt "appropriate" laws to prohibit denial of equal protection by anybody, including private individuals and companies. To the extent Congress has enacted such laws, they are controlling.

Further, the more private individuals and companies employ the use of government property, funds, protections, and mechanisms in their activities, the more likely it is their acts are seen as "government acts" and they may be prohibited from denying equal protection, even if Congress has not enacted specific statutes.

2. Only Deliberate Discrimination Prohibited

The Constitutional guarantee of equal protection prohibits only **deliberately discriminatory treatment** of a group of people by the government.

> **For Example:** Hernandez was convicted of a crime by a jury after the prosecutor used peremptory challenges to systematically exclude all jurors of Mexican descent. The conviction was overturned as unconstitutional because Hernandez had a right to a representative jury and he was denied that by **deliberate discriminatory treatment** by a government agent (the prosecutor). (*Hernandez v. Texas* (1954) 347 U.S. 475. Also see *J.E.B. v. Alabama ex rel. T.B.* (1994) 511 U.S. 127.)

Mere **coincidental impact is not enough**. The mere fact that government action has a disparate impact on a particular group is insufficient to constitute a violation of equal protection,

> **For Example:** City adopts an urban renewal plan for a dilapidated neighborhood exclusively inhabited by Black people that would destroy all existing dwellings and replace them with a convention center. This does not violate equal protection unless it can be shown that the actual purpose of the plan is to oppress the Blacks and NOT simply to improve the neighborhood in a manner that coincidentally has a harsh impact on the local Black population. (See for example *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252.)

It violates equal protection to deliberately **keep a law because it causes discrimination** even if the law was **not originally adopted for that purpose**.

> **For Example:** County elects Commissioners "at large" rather than by district. That prevents Black people, a minority overall but a majority in some districts, from ever being able to elect any Black people to any of the County Commissioner positions. The county originally adopted the "at large" approach without any intent to discriminate. But County now deliberately keeps the at large procedure in place because it prevents Black people from having a voice in local government. That violates equal protection. (*Rogers v. Lodge* (1982) 458 U.S. 613.)

A law that appears impartial violates equal protection if it is **applied in a manner intended to discriminate**.

> **For Example:** City requires business permits to operate a laundry. City issues permits to 80 applicants that are not of Chinese descent, but denies permits to all 200 applicants of Chinese descent. The permit law is unconstitutional, despite its apparent fairness, because it is being used to deny equal protection. (*Yick Wo v. Hopkins* (1886) 118 U.S. 356.)

And a law that appears impartial may be **deliberately designed to discriminate**.

> **For Example:** The Oklahoma constitution denies the right to vote to anyone that cannot read and write a certain text UNLESS they or their ancestors could vote before January 1, 1866. The law is unconstitutional because the purpose and effect is to disenfranchise all Blacks because they and their ancestors could not vote until the 15th Amendment was adopted in 1870! (*Guinn v. United States* (1815) 238 U.S. 347.)

And a group may be denied equal protection **by members of their own group.**

> **For Example:** Mary is in charge of selecting the county grand jury panel. She deliberately tries to keep women off the panel because she thinks men are smarter. Lucy is indicted by a grand jury which is primarily composed of men because the panel has disproportionately fewer women. Lucy's right to equal protection were violated. (See *Castaneda v. Partida* (1977) 430 U.S. 482.)

3. Similarly Situated People Distinguished from Reasonable Classifications

If a group of people is singled out for discriminatory treatment, there obviously is something different about them that allows the group to be identified as a group. But that **difference does not justify disparate treatment unless** the difference between them and other people is **reasonably related** to a **legitimate government purpose.** It **violates equal protection** to discriminate against a group based on an unreasonable classification.

> **For Example:** Kansas passes a law that no one who has ever been convicted of a felony can buy a gun. Preventing crime is a **legitimate state purpose**, owning a gun is **not a fundamental right** and there is a **rational relationship** between preventing people that have committed felonies in the past from getting guns that might be used in future crimes. Therefore this classification is reasonable and not a violation of equal protection.

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A. Discrimination for Improper Purpose is Invalid Per Se

A classification is **unreasonable per se** if it is intended to serve an **improper government purpose.**

> **For Example:** Arizona denied people that were not U.S. citizens welfare benefits unless they had been in the U.S. for 15 years. This law is rationally related to the government purpose of reducing spending, and welfare benefits are not a fundamental right. But it is

improper for a state to infringe on Congress' plenary power over immigration and naturalization. Since the State has no authority to restrain immigration, the law violates equal protection. (*Graham v. Richardson* (1971) 403 U.S. 365.)

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B. Over-Inclusive Classifications are Unreasonable

And no matter how legitimate a government purpose may be, a classification is **unreasonable** if it is an **over-inclusive.** An unreasonable over-inclusive classification is one that **unnecessarily includes** people that are not the cause of the problems the classification is intended to remedy.

> **For Example:** Nebraska prohibits everyone who has ever been arrested from buying a gun. Preventing crime is a legitimate state purpose, owning a gun is not a fundamental right and there is a rational relationship between restricting access to guns and preventing crime. But the classification established by this law is **over-inclusive** because it **unnecessarily includes** people that were arrested but never convicted of any crime. Therefore the classification is unreasonable and a violation of equal protection.

C. Under-Inclusive Classifications are Unreasonable

Further, a classification is **unreasonable** if it is an **under-inclusive.** An unreasonable under-inclusive classification is one that **unnecessarily excludes** people that are equally affected by the problems the classification is intended to remedy.

> **For Example:** Since some students cannot afford to go to college, Congress passes a law that scholarships will be given to all needy students unless they are homosexuals. Congress has legitimate authority to "tax and spend" to promote education, and there is a rational relationship between providing scholarships and promoting education. But the classification established by this law is **under-inclusive** because it **unnecessarily excludes** equally needy students that are homosexuals. Therefore the classification is unreasonable and a violation of equal protection.

4. Equal Protection Requires People to be Treated the Same

It violates the guarantee of equal protection to treat any group **differently without justification**, whether the "different" treatment is better, the same or worse than other groups are treated, because the individual has a **right to be treated the same** as everyone else.

> **For Example:** Brown was not allowed to go to the school near her home in Topeka, Kansas because she was Black and that school was one reserved for White children. Instead, she had to go to another school that was considered "separate but equal." Whether it was really equal, or even better, was irrelevant because the policy denied Brown to be treated the same as everyone else. So the school policy of "separate but equal" was unconstitutional. (*Brown v. Board of Education of Topeka* (1954) 347 U.S. 483.)

5. Whether Disparate Treatment is Justified Depends on Situation

Whether the government is justified in treating a group of people different from others depends on the situation. Unequal treatment always raises issues of both equal protection and due process.

Whether disparate treatment of a group is justified depends on 1) the **government purpose**, 2) the **importance of the rights** the government is infringing, and 2) the **classification criteria** by which government has divided the people into groups.

The government must, of course have a **legitimate purpose** in every case. But if a **fundamental right** is being infringed by government, **due process** requires the government to prove its action meets **strict scrutiny**, as discussed in the prior chapter. In this case the government must have a **compelling purpose**. This is discussed further below.

And if the government has divided people into groups along lines that have been used **historically for oppression**, the classification is **inherently suspect** and will be subjected to a **strict scrutiny** test. These **suspect classes** are discussed below.

But when **no fundamental right** is being infringed, and the group being discriminated against is **not a suspect group,** the government only has to have a **rationally related purpose**, or in some cases a **significant need** because of important considerations.

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A. Fundamental Rights Raise Overriding Due Process Considerations

When the government deprives any group of **fundamental rights**, the due process considerations are often overriding because government has the burden of meeting the **strict scrutiny** standard of showing the deprivation is **necessary** to attain a **compelling and legitimate government need**. This was discussed in the preceding chapter.

> **For Example:** To discriminate against Jehovah's Witnesses, Village makes it a crime for anyone to go from door to door discussing religion. This is an equal protection issue because it discriminates against the Jehovah's Witnesses as a group while other people such as vacuum cleaner salesmen are still allowed to go from door to door. But freedom of speech and religion are fundamental rights while the Jehovah's Witnesses are NOT a "suspect class." So the due process considerations are overriding, and this might be better viewed as a due process issue raising 1st Amendment considerations.

The situations when **due process issues override equal protection issues** most often arise when discrimination is based on:

1. **Religion** (e.g. discrimination against Moslems, Jehovah's Witnesses, etc.),
2. **Affiliation** (e.g. discrimination against Communists, the NAACP, etc.),
3. **Marital status** (e.g. denying contraceptives to unmarried people),
4. **Speech** (e.g. injunction against anti-abortion pickets),

In contrast, situations when **equal protection issues override due process issues** most often arise when there is **no fundamental right** at stake. And this is especially true if the group is defined by inalienable characteristics (e.g. racial features, ancestry, sex).

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B. Discrimination Using Suspect Group Requires Compelling Reason

When government classifies people using **unalienable characteristics** that have historically been used as a basis for **oppression**, the classification is inherently suspect. These are called **"suspect groups"**.

The Courts have generally recognized the **suspect groups** to be those based on:

1. **Race** (or color or previous condition of servitude),
2. **National origin** (i.e. ancestry),
3. **Alienage** (i.e. United States citizenship).

Whenever government uses one of these **suspect groups** to discriminate it has the burden of proving the classification meets **strict scrutiny** because it is 1) **necessary** and 2) **narrowly drawn** to attain a 3) **compelling** and 4) **legitimate government purpose**. This is true whether the discrimination is **to harm or benefit** the suspect group.

1) The Government Must have a Compelling Purpose

> **For Example:** Virginia convicted Mr. and Mrs. Loving of the crime of being married to each other because she was Black and he was White and that was illegal in Virginia unless you were descended from Pocahontas (Seriously, I am not making this up!). The purpose of the Virginia law was to prevent the breeding of "mongrel children." Since the law was based on race, an **unalienable characteristic**, this was a **suspect classification** and the law was unconstitutional because Virginia had **no compelling need** to promote "racial purity." (*Loving v. Virginia* (1967) 388 U.S. 1.)

2) Use of a Suspect Class Must be Necessary

Government discrimination using a suspect group is **not necessary** if 1) the government could accomplish the same goal **without discrimination**, or 2) it is **not clearly probable** that the discriminatory treatment **will actually accomplish** the intended purpose.

> **For Example:** A Florida court took Mrs. Palmore's little girl away from her and sent her to live with the natural father, Mr. Sidoti, because she was White and had married a Black man. The decision was for the "best interests of the child" because a little White girl in a home with a Black stepfather in Florida might experience prejudice in future. This ruling was based on a suspect classification, race, so strict scrutiny applied. The state action was unconstitutional because there was no showing that the girl had actually faced any social problems. Therefore, the state action was **not necessary.** (*Palmore v. Sidoti* (1984) 466 U.S. 429.)

3) State Sovereignty Exception

Considerations of **state sovereignty** allow states to discriminate on the basis of **alienage** when it comes to important positions in the government.

> **For Example:** West Virginia law requires all Superior Court judges to be United States citizens. Even though the use of citizenship is a suspect classification (i.e. alienage), states have **compelling reasons** to require people in significant state positions to be U.S. citizens.

But state sovereignty considerations do not justify requiring citizenship for less important State occupations.

> **For Example:** Texas requires notary publics to be U.S. citizens. This violates equal protection because the functions of a notary public are clerical and ministerial and have no relationship to significant state policies and operations. (*Bernal v. Fainter* (1984) 467 U.S. 216.)

4) National Security Considerations Frequently Compelling

Protection of **national security** is frequently held to be a **compelling government purpose** that justifies disparate treatment against a suspect class.

> **For Example:** Federal agents refused to let any passengers of Middle Eastern descent board airplanes after the September 11 terrorist attack on the World Trade Center. Although this is deliberate discrimination based on race and/or national origin, it might NOT be unconstitutional because public safety and national security are compelling state interests. (See *Hirabayashi v. United States* (1943) 320 U.S. 81 and *Korematsu v. United States* (1944) 323 U.S. 214.)

5) Racial Affirmative Action Requires Compelling Need

Government may deliberately discriminate in favor of a suspect class through an affirmative action program if there are **judicial, legislative or administrative findings of fact** that **specific past constitutional or statutory violations** create a **compelling need** to vindicate the rights of the victims of discrimination and erase its effects. Such programs demand **strict scrutiny.**

> **For Example:** The University of California at Davis admits 100 new medical students each year. 84 students are admitted based on grades and test scores. The 16 remaining admissions are given to the best qualified of the remaining applicants as long as they were not White. Bakke, a White man, is denied admission in favor of non-White applicants with lower grades and test scores. This violated Bakke's right to equal protection because the University used a **suspect class without any factual findings** that it was justified by **past constitutional or statutory violations**. The University had no history of discrimination that needed to be rectified, and "societal discrimination" elsewhere did not justify racial discrimination by the University. (*Regents of the University of California v. Bakke* (1978) 438 U.S. 265.)

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C. Use of Quasi-Suspect Group Requires Persuasive Justification

In comparison to the "suspect groups" discussed above there are other groups that are considered to be "quasi-suspect" groups that are also "inherently suspect". The **quasi-suspect groups** are people distinguished by **unalienable characteristics** that have historically been subjected to **oppression**, if not to the same extent as the suspect groups.

The Courts have generally recognized the **quasi-suspect groups** to be those based on:

1. **Sex** (i.e. gender, male and female), and
2. **Illegitimacy** (i.e. non-marital children).

When government uses a **quasi-suspect group** to discriminate it has the burden of presenting a **persuasive justification** because the classification is 1) **substantially necessary** to promote a 2) **significant government need**.

1) Government Must Show Persuasive Justification

Government **has the burden** of showing an **exceedingly persuasive justification** any time it treats women differently from men. (*Mississippi University for Women v. Hogan* (1982) 458 U.S. 718.)

> **For Example:** Idaho required probate courts to pick male heirs to be executors of estates instead of female heirs. The purpose of the law was to simplify the selection of executors when two people of opposite sexes both wanted to be appointed. The law was unconstitutional because it was an arbitrary discrimination against women adopted to solve a minor court problem. (*Reed v. Reed* (1971) 404 U.S. 71.)

> **For Example:** Federal law denied the **husbands** of female soldiers medical benefits unless they demonstrated they depended on their wives but gave the **wives** of male soldiers the same benefits on an assumption they were dependent on their husbands. This practice was unconstitutional because it was not substantially necessary to address any significant government need. (*Frontiero v. Richardson* (1973) 411 U.S. 677.)

> **For Example:** Oklahoma allowed women to buy beer at the age of 18 but required males to be 21. This was unconstitutional because there was no substantial reason for letting women buy beer at a younger age than men. (*Craig v. Boren* (1976) 429 U.S. 190.)

2) No Violation if Women Treated Same as Men

Equal protection is not denied when government **treats both sexes the same**.

> **For Example:** The California disability insurance program would not pay for disabilities women suffered as a result of pregnancy. This did not deny equal protection, even though these disabilities were peculiar to women, because the program didn't pay for any medical problems peculiar to men, either. (*Geduldig v. Aiello* (1974) 417 U.S. 484.)

3) No Violation if Actuarial Differences Ignored

Equal protection is not denied when government treats women the same as men even though **women face different actuarial probabilities than men**.

> **For Example:** The Civil Rights Act of 1964 required government pension programs to treat women the same as men, actuarially, even though they have different actuarial probabilities with respect to health problems and life expectancy. That did not violate equal protection because women were treated the same as men. (*City of Los Angeles v. Manhart* (1978) 435 U.S. 702.)

4) No Violation if a Crime Necessarily Applies Only to Men

Equal protection is not denied when government **defines a sex crime** that can only men can be charged with because it requires "sexual intercourse."

> **For Example:** Michael M. was charged with statutory rape because the State wanted to prevent men from getting young girls pregnant. The law did not violate equal protection, even though only a man could be charged with the crime, because it was **substantially related to a significant public need**. (*Michael M. v. Superior Court* (1981) 450 U.S. 464.)

5) Sex Based Affirmative Action Requires Persuasive Reason

Equal protection is not denied when government establishes **affirmative action programs** based on sex to **rectify past Constitutional or statutory violations**, but **persuasive justification** is necessary to show they are **substantially related** to **important government goals**. (*Mississippi University for Women v. Hogan*, supra, p. 87.) This **persuasive justification** standard is a **lower standard** than the **strict scrutiny** that applies affirmative action programs based on race.

6) Discrimination by Legitimacy Requires Important Reason

A government classification based on the legitimacy of a person's birth (i.e. whether they were born to married parents) is not subject to strict scrutiny but must be **substantially related** to an **important state interest**. But even if the state has an important interest, it cannot establish rules that unnecessarily deny the individual's rights.

> **For Example:** Illinois denied Trimble a share of his intestate father's estate because he was **illegitimate** and his father 1) **never acknowledged** he was Trimble's father and 2) **refused to marry** Trimble's mother. This violated equal protection because the State **unnecessarily** put all of Trimble's rights under the father's control and **denied him any alternative means** by which he could perfect his claim against the estate. (*Trimble v. Gordon* (1977) 430 U.S. 762.)

> **For Example:** Pennsylvania denied illegitimate children child support at any time in their life unless they had proven their paternity before the age of six. In contrast, legitimate children could seek child support at any age. This was a violation of equal protection because the 6-year limitation was **not substantially related to an important state interest**. (*Clark v. Jeter* (1988) 486 U.S. 456.)

7) No Violation if Reasonable Alternatives Provided

But states have important reasons to limit claims against the estates of deceased men by strangers claiming to be their illegitimate children. These limits do not deny equal protection if they provide **reasonable alternatives** by which the illegitimate child might prove their claims.

> **For Example:** New York denied Lalli a claim against his father's estate because he was illegitimate and had not proven his paternity during his father's lifetime. This was not a violation of equal protection because the state had a **substantial interest** in preventing claims against the estates of men after they were dead and unable to deny the allegations. And, Lalli had failed to pursue a **reasonable alternative** by proving his paternity while the father was still alive. (*Lalli v. Lalli* (1978) 439 U.S. 259.)

8) No Violation if Father of Illegitimate Child Abandons

Likewise, the State may afford different rights to the mother of an illegitimate child than are afforded to the father where the two are **not similarly situated** because the father has abandoned the child and made no effort to maintain a paternal role.

> **For Example:** Bevis gets Brunehilda pregnant and then leaves town before little Doofus is born. Later Brunehilda marries Butthead and he wants to adopt Doofus. Butthead adopts Doofus under a State law that gives the unmarried mother the sole power of consent if an illegitimate child's father abandons. Bevis comes back to town and challenges the adoption. The law giving the unmarried mother the sole power of consent when the father abandons is not a violation of equal protection because the mother and father are **no longer "similarly situated"** people after he abandons the child. (See *Quilloin v. Walcott* (1978) 434 U.S. 246 and *Lehr v. Robertson* (1983) 463 U.S. 248.)

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D. Use of Disability, Age or Sexual Orientation Needs Rational Purpose

Government rules or actions using classifications based on physical or mental ability, age or sexual orientation are not subjected to strict scrutiny where they **do not infringe a fundamental right**. Rather, these only require a **rational relation** between the government action and some **legitimate government purpose**. This is he same test that is applied to every other type of classification except for the suspect classes and quasi-suspect classes discussed above.

1) Age and Physical or Mental Ability Not Inherently Suspect

Laws designed to treat blind, disabled, elderly and mentally retarded differently from other people are not inherently suspect or subjected to strict scrutiny because government has historically tried to help and protect these groups of people rather than oppress them. Such laws must only be **rationally related to some legitimate government purpose**.

> **For Example:** A Texas town denied a special use permit to a group home for mentally retarded adults on a claim that it would be a danger to the public. But the town allowed other groups of adults to live together without any permits at all such as fraternities, dormitories, apartments, hospitals, nursing homes, etc. Therefore, the prohibition of group

homes for the mentally retarded was based on irrational prejudices against them instead of some rational relation to a legitimate public concern. (*City of Cleburne v. Cleburne Living Center* (1985) 473 U.S. 432.)

For Example: Kentucky allows involuntary commitment of the mentally retarded to institutions based on a lower standard of proof (clear and convincing evidence) than it requires for involuntary commitment of the mentally ill (beyond a reasonable doubt). This did not violate equal protection because the State had a rational reason for the lower standard of proof – mental retardation is a permanent, stable condition easier to diagnose than mental illness. (*Heller v. Doe* (1993) 509 U.S. 312.)

2) No Strict Scrutiny When Law Based on Sexual Orientation

Laws based on sexual orientation are not subject to strict scrutiny and must only be rationally related to a legitimate government purpose. Note that "sexual orientation" is a different focus from "homosexual acts."

For Example: An amendment to the Colorado constitution prohibits any law, rule, action or court injunction that would prevent homosexuals, lesbians and bisexuals from being discriminated against. This violated equal protection because allowing homosexuals to be discriminated against was not rationally related to any government purpose. (*Romer v. Evans* (1996) 517 U.S. 620.)

Chapter 11: Conclusion

This outline provides a summarized explanation of the black letter law and bright line rules of **CONSTITUTIONAL LAW**.

Black letter law means statutes and basic rules of broad theoretical application. And **bright line rules** are those decisional rules or logical guidelines created by the courts for the determination of close cases.

To make the explanation here simple and avoid unnecessary confusion some of the details and minor splits of authority have been ignored or avoided in this outline. But the foregoing reflects about ninety percent of everything you should know to succeed in law school, and more than enough explanation of the rules of law for you to pass any bar examination.

Among the materials that have been excluded from this outline are legal theories that have been widely abandoned, extreme minority views, rare exceptions, fact-bound cases, history of the law's development, most cases, highly unusual situations and dwelling on subtle distinctions. These issues and concepts are either unnecessary for your legal education, OR your professor will direct them to your attention.

Each professor of law, in every subject, holds a keen interest in narrow areas of the law of personal interest. Frequently this interest is based on their own legal education or their experiences in the courts. When your professor expounds on an area of law given summary treatment in this outline it will be necessary for you to consult authoritative reference materials such as hornbooks to gain a greater understanding.

If your professor is adamant about some theoretical concept note that proclivity and modify your explanation of the law as necessary to humor those proclivities. But, you will find the bar examiners far less interested in such marginal issues and much more concerned with the breadth of your knowledge of the rules of law set forth herein.

Other than those cases where a professor demands further knowledge in a narrow area, the foregoing should be entirely sufficient to impart an adequate **understanding** of **Constitutional Law**. However, mere **understanding is NOT ENOUGH** for you to succeed. Law school and the bar examinations require **both understanding** and ability to **explain the application** of the **law to the facts and facts to the law**.

This outline is NOT written for the purpose of explaining to you how you should explain the law on your examinations. You are urged to consult Nailing the Bar's **"How to Write Constitutional Law, Criminal Procedure and Civil Procedure Law School Exams"**. Information about that publication is available at the back of this outline.

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