CONSTITUTIONAL LAW – WINTER 2007

New Equal Protection

Creation and Expansion under the Warren Court

- Cases decided on both equal protection and due process grounds; strict scrutiny applied despite there being no suspect class or interference with a fundamental right
    - "fundamental interests" are somehow being interfered with in these cases – though not fundamental rights
    - **What is a fundamental interest?**
- Standard rhetoric: The state has no constitutional duty to provide a given service to everyone, but if the service be provided, it must be provided equally to everyone.
- Frequent point of distinction: *Shapiro v. Thompson*

Access to Courts

- *Griffin v. Illinois*. Constitutional right to transcripts on appeal for indigent criminal defenants. The state cannot deny an appeal to a criminal defendant solely based on his ability to pay.
    - State interest in not providing: saving money; administrative efficiency.
    - *Fairness.* Is it fair and just to deny transcripts to those who cannot pay when those with the means to pay are not denied?
    - *Economic burden.* "Transcripts – not a big ticket item"
- *Douglas v. California.* The government must provide indigent criminal defendants with free counsel on appeal, at least for their initial appeal.
    - No const'l right to appeal. Greater economic burden than transcripts.
- *Ross v. Moffitt.* This right to free counsel does not extend to discretionary review by courts of last resort.

Right to Vote in State Elections

- *Harper v. Virginia.* 944. Poll taxes are unconstitutional violations of equal protection.
    - "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. . . . [T]he right to vote is too precious, too fundamental to be so burdened or conditioned" by the requirement of paying a poll tax.
- *Kramer v. Union Free School District.* 945. Requirements of property ownership for voting are generally invalid.
    - Limitations on voting rights must be *necessary* to promote a *compelling* state interest. – "[T]he classifications must be tailored so that the exclusion of appellant [childless, living in parents' home] and members of his class is necessary to achieve the articulated state goal."

"Fundamental Interests" – Necessities of Life & Right to Travel

- *Shapiro v. Thompson* (1969)
    - right to receive welfare regardless of length of residency in a state

        - *otherwise the argument would extend to disallowing use of parks, schools, libraries, police and fire protection, etc.*
    - does not say that a state must offer welfare benefits; just that *welfare must be provided equally if it is provided at all.*
    - relevant interests
        - (1) right to travel
            - no specific textual home in the Const.; judicially developed
            - "right to make a fresh start"
            - one-year requirement may be burdensome; but so would having no welfare benefits at all, yet the latter is not unacceptable
            - that a state has disincentives to moving there is acceptable
        - (2) impacts only the poor
        - (3) necessities of life
        - all three of the above interests must be threatened for a law to be overturned under *Shapiro;* generally upheld otherwise
    - **strict scrutiny applied**
    - *What about access to shelter, or education? What other things are so fundamental that if the state provides them to some, the state cannot discriminate based on ability to pay?*
    - circa 1970 – shift from Warren court to Burger/Rehnquist court – fairly deferential review; felt that such decisions are best left to the legislature
- *Boddie v. Connecticut* (1971)
    - const'l right + judicial monopoly on machinery >> no denial of services based on ability to pay
    - fundamental nature of the marital relationship, combined with the monopoly that the courts have on the mechanisms for changing these relationships, require that the relevant fees be waived if they cannot be paid – *emphasis on violation of a constitutional right*

Containment (and Expansion) under Burger and Rehnquist Courts

Heightened scrutiny applied, despite lack of constitutional right or provision; lack of fundamental right

- often raises fundamental questions about the fairness of the judicial process

Dandridge v. Williams (1970)

- Rational basis review deemed appropriate because the law related to "economics and social welfare" – state is justified in allocating state resources (here: cap on welfare benefits regardless of family size)
- Here the court begins to distinguish *Shapiro v. Thompson*
    - *Shapiro* as having a tripartite basis
        - (1) Necessities of life
        - (2) Right to travel; "make a fresh start"

- (3) Impacts only the poor

Access to Courts

- *United States v. Kras* (1973) – p. 987
  - Sought waiver of fees for filing for bankruptcy (not granted)
  - Distinguished *Boddie* – courts do not have a monopoly on the mechanisms for clearing debt
    - no constitituional right implicated
    - only way to get a divorce is through the courts.
    - debt may be cleared via avenues other than the courts.

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- *Ortwein v. Schwab* (1973) – p. 991
  - No waiver for $25 filing fee required for a review of a reduction in welfare benefits
  - Denial or reduction in welfare benefits does not implicate a constitutional right.
    - judicial monopoly on dispute resolution alone is not enough. a constitutional right must be implicated.
- *MLB v. SLJ* (1996) – p. 992
  - concern over extending the waiver of filing fees established in *Griffin* to civil cases (rather than just criminal)
    - exception to the criminal requirement specifically limited to *parental status termination decrees*, not custody and visitation
  - strict scrutiny because it "involv[es] the State's authority to sever permanently a parent-child bond" – a constitutional right
  - state has a monopoly on the machinery; a fundamental interest is involved; burdens only the poor. (but *Shapiro* is not really relevant.)

Access to Vote

- *Ball v. James* (1981) – p. 948
  - Water district election of directors: voting limited to landowners in the district, power apportioned by acreage owned
  - Distinguished *Kramer, Harper*
    - Here: special purpose district with limited powers; no poll tax
      - Compare with normal governmental body, which has the power to levy taxes, enact laws, administer public services
    - (By implication: school boards do not serve a relevantly specific and limited purpose)

Access to "Fundamental Interests" – Education

- *Plyler v. Doe* (1982)
  - Aliens allowed to bring due process challenges – due process provides protection to all *persons*, not just citizens.
  - emphasized importance of education in maintaining our basic institutions – "fundamental role in maintaining the fabric of our society"

- *San Antonio Ind. School Dist. v. Rodriguez* (1973) – p. 999
    - Education held not to be a fundamental constitutional right
    - Taxation scheme allocated more funds to richer school districts.
        - Wealthy districts could tax themselves at a relatively low rate and wind up with a relatively high per-student education budget
    - There was no absolute denial of an education.
        - Absolute denial (e.g., *Plyler v. Doe*) – impermissible
        - All that is needed: opportunity to acquire "basic minimal skills" for enjoying free speech and participating in the political process
    - Suggested the political process could address the issue.
    - Marshall's dissent
        - "tiered approach" – sliding scale
            - the closer the "nexus" between the const'l guarantee and the nonconst'l interest, the greater the degree of judicial scrutiny that should be applied
            - characterizes the binary system used by the majority as crude (if predictable)
            - education is closely tied to 1st amdmt rights; only by protecting interests related to constitutional rights can that constitutional right ultimately be protected

Fundamental Interests + Right to Travel

- *Memorial Hospital v. Maricopa County* (1974)
    - Struck down requirement of a year's residency in the county as a condition to receiving non-emergency hospitalization or medical care at the county's expense
        - doesn't impact only the poor – otherwise similar to *Shapiro.*
    - *Compelling interest* required when a classification penalizes people "who have exercised their constitutional right of migration"
- *Sosna v. Iowa* (1975)
    - Upheld state law req. of year's residence in the state to get a divorce – no discrimination based on wealth, or classification created as a budgetary measure – people would "eventually qualify"
        - distinguished *Shapiro* and *Maricopa County*
- *Saenz v. Roe* (1999) – p. 936
    - P&I - State retains discretion to discriminate between residents and nonresidents when it comes to "portable" benefits (tuition, voting, divorce), but not welfare
    - three-pronged right to travel
        - right to enter and leave
        - right to be treated "as a welcome visitor"
        - right of a citizen to be treated equally in his new State of residence

Takings

Four questions for analysis

1. Is there a "taking"?
    a. possessory or regulatory
2. Is it "property"?
3. Is the taking for "public use"?
    a. Government can only exercise eminent domain for public use
    b. public use = "rationally related to a conceivable public purpose"
4. Has there been "just compensation" for the taking?
    a. measured in terms of *loss to the owner*; gain to taker is irrelevant

Policy

1. Ensures that the gov't does not take some property and give it to others
2. Loss spreading: taking away one's property should be paid for by society

Possessory Takings

Loretto v. Teleprompter Manhattan CATV Corp (1982) – p. 575

- Any permanent physical occupation of an owner's property authorized by government constitutes a "taking," no matter how small the occupation.
    - even if the impact on the owner is minimal
    - "Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution."

"Temporary physical invasions" are subject to a "balancing process"

Regulatory Takings

Three general factors should be considered in evaluating whether a regulation is a taking

1. The economic impact of the regulation on the claimant
2. The extent to which the regulation has interfered with investment-backed expectations
3. The character of the government action

Four areas where the court has considered regulatory takings

1. Zoning ordinaces
2. Limits on conveyance of property
3. Conditions on development of property
4. Imposition of government liability

Pennsylvania Coal Co. v. Mahon (1922) – p. 578

- "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."

- "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Miller v. Schoene (1928) – p. 581
- "The state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public."
- "It will not do to say that the case is merely one of a conflict of two private interests and that the misfortune" of one party may not be shifted to another "by ordering the destruction of their property; for it is obvious that there may be . . . a preponderant public concern in the preservation of the one interest over the other."

Penn Central Transp. Co. v. New York City (1978) – p. 581
- No "set formula" for determining when "justice and fairness" require economic injuries to be compensated by the government
- "In instances in which a state tribunal reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests."
- Government actions that prohibited beneficial uses to which individual parcels had previously been devoted, thus causing "substantial individualized harm," have been upheld in the face of takings challenges (*Miller v. Schoene*)
- A "taking" =! a regulation that has denied a party the ability to "exploit a property interest . . . heretofore . . . believed [to be] available for development."

Lucas v. South Carolina Coastal Council (1992) – p. 585
- A land use regulation that "does not substantially advance legitimate state interests or denies an owner economically viable use of his land" violates the 5th amendment.
    - This is an example of rare general rule in takings jurisprudence; in past cases, regulations have deprived an owner of up to 95% of the value of his land without compensation from the government being required. Such regulations may or may not give rise to a need for compensation depending on the specifics of a given case.
- Regulation that deprives land of all economically beneficial use can only be maintained without compensating owners if the contemplated use interests were not part of the owner's title to the land.
    - **Except** when background principles of nuisance or property law demonstrate that the proscribed activity was not part of the owner's title to begin with. (587, 88)

Dolan v. City of Tigard (1994) – p. 591

- Simply requiring an owner to dedicate a portion of his land to a given governmental purpose would, "without question," constitute a taking
- There must be "rough proportionality" (a nexus) between the "legitimate state interest" and permit conditions exacted by a city (that require dedication of land for gov't purposes)

Tahoe-Sierra (p. 602)

- Moratoria on building – "no set formula" for how long would be a taking
- gov't action must be *reasonable*

Kelo (Supp. p. 62)

- taking private property >> private developer
    - must consider the plan "as a whole," not parcel by parcel
    - taking for stimulating economic development is a "public purpose"
        - the community benefits
- (this *is* a taking – the only question was whether it was a legitimate taking that satisfied the "public use" requirement)

Lingle v. Chevron (Supp. p. 57)

- "Substantially advances" test overruled

IN BRIEF

Possessory

- **(1)** any physical occupation is a taking requiring just compensation *(Loretto)*

Regulatory

- those regulations that interfere with or limit the ability of a private property owner to do what he wants with his property
- **(2)** deprivation of "all economically beneficial use" = taking *(Lucas)*
- **(3)** otherwise – "complex of factors"
    - no strict formula *(see Palazzolo, p. 598)*
    - economic effect?
    - interfere with reasonable investment-backed expectations? *(Penn Central)*
    - the character of the government action?
        - "a whole range of factors"
- *Palazzolo,* p. 599
    - what is the relevant parcel?
        - deprivation of economic value of a piece of the owner's land or the whole of it? (court declines to answer whether a given property can be split and its pieces be litigated separately.)

THE FIRST AMENDMENT

Free Speech Early Jurisprudence

- First amendment, more clearly than any other amendment, was intended to apply to only the federal government (until the 14th amendment was passed)

Schenck v. United States (1919) – p. 1153

- "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."
- *clear and present danger* test

Abrams v. United States (1919) – p. 1156

- Holmes' dissent – there was no *intent* in this case to cause insubordination/disloyalty/mutiny/etc.
    - marketplace of ideas – free exchange – bad ideas discredited during open discourse
        - "the truth rises to the top like the cream in a bottle of unhomogenized milk"
    - Only check on the expression of opinions should be when they "imminently threaten immediate interference with . . . the law" and "an immediate check is required to save the country"
        - restricts the jury's discretion from what it was in *Schenck*

Gitlow v. New York (1925) – p. 1159

- Holmes' dissent
    - Talking about the overthrow of government is okay; it's only a problem if such looks like it may actually result from the speech at issue

Whitney v. California (1927) – p. 1162

- Brandeis' concurrence
    - emphasis on reasonable grounds for suppression of speech deemed dangerous; that "the function of speech" is "to free men from the bondage of irrational fears"
    - Suggested constitutional standard?
        - "The fact that speech is likely to result in some violence or in destruction of property is not enough to justify its suppression. There must be the probability of serious injury to the State."
        - As long as there is an opportunity to respond in another way (e.g.,/i.e., a counterargument) then suppression is not justified

Unprotected Speech

Advocacy of Unlawful Action

Brandenburg v. Ohio (1969) – p. 1171

- Three-element test for incitement
    - (directed to producing) Imminent harm (or lawless action)
        - no mention of how serious this must be – remains arguable
        - what kind of evidence would support this?
            - previous violence within the movement that the speech is part of
            - previous violence caused by the specific speaker or speech
            -
    - Likelihood of producing illegal action
    - Intent to cause imminent illegality
- as long as there is the opportunity for counterargument, meting out punishment is unjustified
- Up until the point that the above test threshold is met, advocacy of illegal action is protected
    - Jury receives the test as instructions: "you can not convict unless you find…"
- consider the perspective of the one(s) who is/are targeted

Dennis v. United States (1951) – p. 1165

- Intent to overthrow the government "as speedily as circumstances would permit" satisfies the "clear and present danger" test

Libel

Major Questions

- Is a person a public figure?
    - has he pushed himself to prominence to affect the outcome of a public matter? (did he "thurst himself into the vortex of [a] public issue" or "engage the public's attention in an attempt to influence [the issue's] outcome?" – *Gertz,* 1293)
    - is he merely "prominent in social circles and often in the newspapers?" – *Firestone*, 1295
    - justification for treating public figures as public officials: they have greater access (than private individuals) to the channels of communication and can more easily respond to public threats to their reputation
- Is the matter a public concern?

(One can be a private figure for some matters, and a public figure for others.)
(How about a public figure with private concerns?)

Const'l standards:

- Public figures, public concern: plaintiff must show by clear and convincing evidence that the statements were false and published with actual malice. (*NYT v. Sullivan*, p. 1284)

    - actual malice = knowing falsehood; "high degree of awareness of [] probable falsity" (1289); "serious doubts as to the truth" of the publication; "reckless disregard"
- Private figures, public concern: Compensatory damages if plaintiff proves by a preponderance of the evidence the falsity of the statement(s) and negligence by the speaker. Punitive damages require proof of actual malice, knowledge of falsity, or reckless disregard for the truth. *Gertz v. Welch,* p. 1293
    - States can impose their own standards of liability (anything but liability w/o fault) - *Gertz v. Welch*, p. 1293
    - rationale for looser standard when the issue is of public concern: "strong interest in the free flow of commercial information" *Dun & Bradstreet* 1297
- Private figures, private concern: Punitive damages do not require proof of actual malice. *Dun & Bradstreet*

Beauharnais v. Illinois (1972)
- Issue: punishment of libel directed at "designated collectivities and flagrantly disseminated"
- State may punish those who "would incite violence and breaches of the peace"
- may not remain good law

New York Times v. Sullivan (1964)
Gertz v. Welch (1974)
Dun & Bradstreet (1985)

Obscenity
The Miller Test (*Miller v. California* (1973), p. 1208)
1. Whether "the average person, applying contemporary community" would find that the work, taken as a whole, appeals to the prurient interest;
    a. the people on the jury make the "prurient" decision in regard to their community's own standards, not the courts
        i. what is the extent of the community?
    b. no national standard
    c. what about the internets?!?@/
2. Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically described by the applicable law; and
    a. examples, p. 1209
        i. soft-core is protected, because it's not "patently offensive"
    b. the state should give examples of the prohibited kinds of material in its regulatory statute
3. Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value
    a. remains a decision to be finally made by the Supreme Court

New York v. Ferber (1982) – p. 1213

- Child pornography
- *Miller* test does not apply
- No clearly enunciated standard
    - "excessive focus on the genitals" -- ?

Fighting Words – Hostile Audiences – "Hate Speech" – Threatening Speech

Chaplinsky v. New Hampshire (1942) – p. 1174

- Fighting words – "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace" (1175)
    - epithets and personal abuse are not protected by the Constitution
- **later limited** to mean only *inciting an immediate breach of the peace*
    - "in-your-face words of provocation"

Gooding v. Wilson (1972) – p. 1177

- the "You son of a bitch, I'll choke you to death" case
- doctrine of overbreadth
    - a statute that proscribes not only unprotected speech, but also any signficant amount of speech protected under the 1st amendment, will be struck down as unconstitutional

R.A.V. v. City of St. Paul, MN (1992) – p. 1179

- Previously, state's authoritative finding that the speech falls within the fighting words exception would allow it to be regulated in nearly any way, so Scalia's opinion here is surprising
- **No content-based distinctions** even within the realm of unprotected speech
    - exceptions
        - "the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable"
        - discrimination is based on "secondary effects" of the speech, e.g., outlawing only those obscene live performances involving minors (harm to members of a sensitive group)

Virginia v. Black (2003) – p. 1193

- No cross-burning with the intent to intimidate (constitutionally upheld)
    - historical relationship between cross-burning and intimidation
    - political expression is okay!
- acceptable to outlaw only a specific kind of speech within a generally proscribable area when, as here, the specific kind of proscribable speech is "particularly virulent"
- struck down: provision that would treat the burning of a cross as *prima facie* evidence of intent to intimidate

Hostile Audience Problem

- speaker to whom the crowd is reacting violently; police arrest the speaker to quell the hostile audience
    - avoid possible breach of the peace
    - *Feiner v. New York* – it's okay to do that in certain circumstances
        - still good law?
            - short-term notice, "explosive situation," must respond quickly – removing the speaker may be the only option
            - otherwise maybe not
        - 1st amendment requires that if it's the audience that's the problem, not the speaker, then the police power should be used to quiet the audience and protect the speaker

Commercial Speech – the *Central Hudson* test
Bigelow v. Virginia – gave rise to protection of commercial speech

VA State Board of Pharmacy v. VA Citizens Consumer Council, Inc. (1976) – p. 1253
- Commercial speech is speech that "proposes a commercial transaction"
- Speech does not lose its 1st Amendment protection because money is spent to project it.
- Validity of the economic interests promoted by commercial speech
    - "*We may assume that the advertiser's interest is a purely economic one*"
        - Economic interests are relevant to the public
    - A free enterprise economy is the aggregate of "numerous private economic decisions;" it is in the public interest that those decisions be well informed
        - aiding proper allocation of resources >> aids "formation of intelligent opinions" about how the system should function or be altered
    - "Even if the 1st Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we would not say that the free flow of information does not serve that goal."
    - Protected speech cannot be *deceptive*, *misleading*, or *untruthful*

Bolger v. Youngs Drugs Products Corp. (1983) – p. 1258
- Speech (viz., publications) is not necessarily commercial merely by reason that:
    - they are "conceded to be advertisements"
    - they make "reference to a specific product"
    - they were distributed by an "economic motivation"
- But the three above factors together "provide strong support" for a conclusion that the speech is commercial.

Central Hudson Gas & Electric Corp. v. Public Service Commn. of NY (1980) – p. 1260

- Generally
    - Commecial speech = "expression related solely to the economic interest of the speaker"
    - "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."
    - "The 1st Amendment presumes that some accurate information is better than no information at all."
- Intermediate-esque level of scrutiny
    - "The State must assert a **substantial interest** to be achieved by restrictions on commercial speech."
        - "The regulatory technique must be in **proportional relation** to the interest involved."
        - "The restriction must **directly advance** the state interest involved."
            - "Ineffective" or "remote" support for the state interest is inadequate
    - "If the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." – *later modified to "**closely tailored**," a slightly looser standard*
- Four-part analysis
    - 1. Is the expression protected by the 1st Amendment?
        - commercial speech must concern *lawful activity* and *not be misleading*
    - 2. Is the asserted government interest substantial?
        - If not, analysis ends here
    - 3. Does the regulation directly advance the governmental interest?
        - what kind of evidence must the state produce?
            - statistical?
            - S.C. leans in some cases on evidence presented and conclusions reached in other cases (see *Lorrilard,* p. 1276)
            - not necessarily requiring *empirical data* (but it's good under *Liquormart*)
            - reference to studies and anecdotes is OK
            - "simple common sense" – *Lorrilard,* p. 1275, 3rd paragraph
    - 4. Is the regulation more extensive than necessary? (i.e., is there a *reasonable fit? – Liquormart,* p. 1272; is it *closely tailored? – Lorrillard Tobacco,* p. 1274) – need not be the *least restrictive* option (1275)
- Burden of justification on the party seeking to uphold the law

44 Liquormart, Inc. v. Rhode Island (1996) – p. 1271
Lorillard Tobacco Co. v. Reilly (2001) – p. 1274

Marginal Speech / Regulation of Secondary Effects
"Offensive" speech
- *Cohen v. California* (1971) – p. 1234
    - Jacket saying "Fuck the draft" worn into court
    - Privacy interests
        - Invading the privacy of a person's home is one thing, but "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech"
    - Breach of the peace? – no
        - Jacket's message was not directed toward any particular party
        - Exposure to any given person was brief
        - No one had actually complained

Zoning cases
- Note: these cases concern material that falls short of the *Miller* standard for obscenity

- *Young v. American Mini Theatres, Inc.* (1976) – p. 1223
    - Ordinance did not amount to total suppression of the speech at issue
        - deference to city's findings about the ordinance
    - content-based distinction permissible only because the law regulated *location*, not whether the adult theaters could operate at all
- *Renton v. Playtime Theatres* – p. 1225
    - Purpose of the law was to reduce crime and whatnot >> Court upheld the law as content-neutral not on the basis of its terms but its purpose
        - "secondary effects"

Broadcast media
- *Federal Communications Commn. v. Pacifica Foundation* (1978) – p. 1237
    - Privacy issues
        - Broadcast media is "invasive" of the "privacy of the home" – individual's right to be left alone outweighs the rights of the speaker/broadcaster
    - Narrow holding
        - emphasis on context; "a nuisance may be merely a right thing in the wrong place"
            - time of day; type of media; other content in the same program w/ the challenged content

    - FCC has a substantial interest in protecting children
        - "broadcasting is uniquely accessible to children"

Internet cases

- *Reno v. American Civil Liberties Union* (1997) – p. 1242
    - Telecommunications Act of 1996 = unconstitutional
    - why not follow *Pacifica?*
        - the Internet is not invasive the way broadcase media are
        - Accessing offensive content requires positive steps to be taken

- *Ashcroft v. ACLU* (2004) – p. 1245
    - Child Online Protection Act
        - Similar to the TA of '96, but punishes commercially posting any content that would be "harmful to minors" without age verification
        - Question of the Court: does COPA pass **strict scrutiny**? – **are there less restrictive alternatives**?
    - (Does this stuff meet the *Miller* definition of obscenity?)
    - Content-based restriction: gov't has burden of showing that the proposed alternatives will not be as effective as the challenged statute
    - Regulating the web must take the form of a total ban
        - it's constantly available; trying to regulate hours is meaningless
        - more like print media than broadcast media because of its noninvasive nature

Expressive Conduct

General questions

1. Is the statute aimed at the *conduct* or the *expression*?
2. (?)
3. Can the atty for the govt argue in good faith that the law is meant only to regulate conduct?

Conduct is analyzed as speech if (a) there is the intent to convey a particular message and (b) the message is likely to be understood by those who view it.

United States v. O'Brien (1968) – p. 1316

- burning draft registration card
    - putative gov't interest – efficient administration of the draft system
- **Test** for when a statute regulates conduct that has an expressive component
    - Is the statute otherwise within the constitutional power of the government?
    - Does the statute further an important or substantial government interest?

    - Is the governmental interest unrelated to the freedom of expression?
        - *interest related to the freedom of expression >> strict scrutiny – see* Texas v. Johnson
    - Is the incidental restriction on alleged 1st Amendment freedoms no greater than is essential to the furtherance of that interest?
        - "least restrictive alternative"

Texas v. Johnson (1989) – p. 1320
- "Johnson's political expression was restricted because of the content of the message he conveyed. *We must therefore subject the State's asserted interest . . . to 'the most exacting scrutiny.'*" (1322)
- "That the government may not prohibit expression simply because it disagrees with it message[] is not dependent on the particular mode in which one chooses to express an idea." . . . "We would be permitting a State to 'prescribe what shall be orthodox' . . ."

City of Erie v. Pap's A.M. (2000) – p. 1227
- Nude dancing is within the "outer ambit" of 1st Amendment protection
- Purpose of the law was to combat "negative secondary effects" – public health, safety, welfare *(1228)*
    - intrusion on free speech was "de minimis"
    - law was "content-neutral" – banned all public nudity, not just that in clubs
- Deference to the findings of the city council ("the individuals who would likely have [] first hand knowledge . . . and can make particularized, expert judgments about the [] harmful secondary effects")

Campaign Spending and Contributions
Buckley v. Valeo (1976) – p. 1325
- **Political spending = speech** *(O'Brien does not apply)*
- contributions vs. expenditures
    - **limits on contributions – okay**
        - "rough index of support" – a gesture, rather than being direct speech
    - **limits on expenditures – not okay**
        - relative to (on behalf of) election of a particular candidate
        - candidate's personal expenses
        - total expenditures by a campaign
- "The 1st Amdmt denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise." (1331)

Nixon v. Shrink Missouri Gov't. PAC (2000) – p. 1333
- test for determining whether a limit on contributions is too low
    - "Whether the contribution limitation [is] so radical in effect as to render political association ineffective, drive the sound of a

candidate's boice below the level of notice, and render contributions pointless"
- State campaign contribution limits upheld. (Ranging from $250 - $1000)

First National Bank of Boston v. Bellotti (1978) – p. 1338
- The First Amendment protects speech from all sources, including commercial sources. The source of the speech is irrelevant to a First-Amendment analysis; the First Amendment considers the speech itself.

- cf. *Austin v. Michigan State C.o.C.* (1990) – p. 1341
    - Law restricting corporate contributions and restrictions upheld
    - Court said that corporations could create a separate fund and solicit contributions to that fund, and spend from there

Randall v. Sorrell (2006) – Supp. p. 120
- Factors that led to the conclusion that the statutory limits on campaign contributions were too low (125)
    - 1. Record suggests that the limits will "signficantly restrict" the amount of campaign funding available
        - Court suggests that the purpose of the statute was to give incumbents a competitive advantage.
        - *fix:* statistical studies
    - 2. Since political parties are subject to the same limits, the statute threatens to harm the right to associate in a particular party
        - *fix:* allow political parties greater leeway
    - 3. Volunteers' expenses (travel, etc.) count toward their contribution limit
        - *fix:* abolish this provision
    - 4. Contribution limits are not adjusted for inflation
        - *fix:* adjust for inflation.
    - 5. no "special justification" for the low limits.

Public Forum Analysis
General rule: reasonable time, place, and manner restrictions are okay. Content-based restrictions are not. (Refined in *Perry*)

Hague v. CIO (1939) – p. 1343
- There are such things as traditional public forums in every community, e.g., parks, sidewalks, and streets
    - Determining whether other locations are also public forums: "It's the Sesame Street game. Is it like streets, sidewalks, and parks?"
    - government cannot ban speech, distribution of literature, etc.
    - regulations are okay; privilege "must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order"
- *Constitutional right of access* to traditional public forums

PEA v. PLEA (Perry) (1983) – p. 1346

- *Traditional public fora* – treated as under *Hague*
    - **Content based exclusions upheld only if**:
        - the reg is *necessary*
        - it serves a *compelling* state interest
        - the reg is *narrowly drawn*
    - t**ime, place, and manner restrictions okay if**:
        - they are *content-neutral*
        - *narrowly tailored* (not least restrictive alternative)
        - they serve a *significant* government interest
        - leave open *ample alternative channels* of communication
- *Designated public forums*– State is not required to maintain these forums, but as long as they do, they are treated the same as traditional
- *Other public property* (Non-public forum) is subject to different standards
    - Time, place and manner restrictions, and
    - State may impose other restrictions, reserving the forum for its intended purposes, "communicative or otherwise," as long as
        - the regs on speech are *reasonable* and
        - *not efforts to suppress views* that officials oppose
    - "the State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated." (Adderley, p. 1362)
    - *no narrow-tailoring requirement; no consideration of government alternatives*
- *Limited public fora* (*Good News Club v. Milford,* p. 1361, refining *Perry*)
    - state need not allow every type of speech
    - state may be justified in reserving a forum for certain groups or for the discussion of certain topics
        - still cannot discriminate on the basis of viewpoint
        - restriction must be reasonable in light of the purpose served by the forum

Kokinda, p. 1367

- Of sidewalks: non-'public thoroughfares' are non-public fora
- gov't acting as proprietor, not regulator or licensor, managing internal operations >> lower level of 1st Amdmt scrutiny; law upheld unless unreasonable, arbitrary, capricious, or invidious (1367)

Krishna v. Lee (1992)

- public forum is not created when the public may freely visit a place (airport is not a public forum)
    - A public forum has as "a principle purpose . . . the free exchange of ideas." (1369) They also have "immemorially . . . time out of mind" been held in the public trust and used for purposes of expressive activity. (1370)

- ban on leafletting in airports struck down (unreasonable)
- ban on soliciting money upheld

Hill v. Colorado (2000) – p.1351
Ward v. Rock Against Racism (1989) – p. 1358

Speech in State Schools
Tinker v. Des Moines Indp. Comm. Sch. Dist. (1969) – p. 1385
- School suspended students when they wore black armbands to class to protest the Vietnam War
- Suspension unconst'l w/ following factors:
    - "silent, passive, expression"
    - no interference with school work or "collision with the rights of other students"
- Administrators feared disruption in school
    - "Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."
- Banning a particular symbol is unconstitutional
    - other symbolic expression had been allowed – political buttons et al.
- Regulations could be upheld when "engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.'"

Bethel School District no. 403 v. Fraser (1986) – p. 1388
- Distinctions from *Tinker.* here:
    - (captive) audience of 600 for a speech
    - "graphic sexual metaphor" (cf. Tinker: political speech)
    - prior warning of possible problems with the speech had been given
    - some evidence of classroom disruption
- OK for school to prohibit "vulgar and offensive language"
    - young audiences
- "The process of educating our youth for citizenship in public schools is not confined to books . . . ; schools must teach by example the shared values of a civilized social order." (1389)

Hazelwood School District v. Kuhlmeier (1988) – p. 1390
- Two pages of a school newspaper cut from publication by the principal upon final review
- Reasons for so doing
    - Two articles dealt with subjects possibly inappropriate for immature audiences
        - One was about pregnant girls at the school – not identified by name but other identifying traits given – they had discussed their sexual histories w/ their boyfriends in the article – boyfriends not consulted

        - Another about divorce included a girl's comments sharply critical of her father – in the principal's version, the girl's name was included (even though it had been cut in a more recent edit)
    - Principal felt there was no time to make appropriate revisions without cancelling the publication, so he preferred to take out two pages (even though four other articles had to get cut that way too)
        - approved by supervisors
- Upheld
    - Newspaper was still considered part of school curriculum
    - School was a *publisher,* not a *passive conduit* for students' unimpeded free speech
    - School can distance itself from speech that is everything from "ungrammatical" to "unsuitable for immature audiences"
        - emotional maturity of the audience is a valid consideration
            - HS freshmen, "on the verge of discovering human sexuality," may not be an appropriate audience for topics such as divorce and pregnancy
    - Consistent with policy of general deference to the school system regarding education and regulation unless "the decision to censor . . . 'directly and sharply implicate[s]'" 1st Amendment rights

Board of Edu ITUFSD v. Pico (1982) – p. 1394
- regarding stock in school libraries
- purchase decisions
    - impossible to get all books >> more discretion in choosing what to obtain
- removal decisions
    - can only be based on vulgarity or inappropriateness for the (young, immature) audience
- *motivation test* – why was a given purchase/sale made?

The Establishment Clause

Generally
- Roger Williams' "wall of separation" idea – keep church/politics from correcting each other
- "respecting" sometimes read out of the phrase >> "no law establishing a religion"
- Endorsement test applies for things like holiday displays and concerts
- Coercion test applies for things like school graduations and other events

Lemon v. Kurtzman (1971) – p. 1498
- Test for a statute's violation of the establishment clause
    1. Does the statute have a secular legislative purpose?
        - "religious origin" may be ok (e.g., Sunday 'day of rest') - *McGowan*

2. Does it neither advance nor inhibit religion? (Is the primary effect to advance or inhibit religion?)
    - "effects" test
    - does "the practice under review in fact convey[] a message of endorsement or disapproval"? – *Lynch*, p. 1499
    - "for a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence." – *Amos,* p. 1501
3. Does it avoid "excessive government entanglement with religion?"
    - no administrative/political involvement – no "state surveillance"

- "Always start with the Lemon test"
    1. though there have been numerous calls for the Lemon test to be overruled

Mitchell v. Helms (2000) – p. 1527

- New test (via *Agostini*)
    1. Does the statute result in government indoctrination?
        i. no govt indoctrination if aid is generally available
        ii. divertability is ok; is content of aid impermissible?
            1. "where the aid would be suitable for use in a public school, it is also suitable for use in any private school"
    2. Does it define its recipients with reference to religion?
    3. Does it create excessive entanglement?
        i. *Lemon* ii and iii "folded" together

Zelman v. Simmons-Harris (2003) – p. 1538

- gov't program neutrality + direct assistance to citizens who themselves direct the govt aid to religious institutions >> "the program is not readily subject to challenge under the Establishment Clause" – p. 1542
    - here – parents can get vouchers redeemable @ the school of their choice!
    - aid to religious institutions *indirectly* by private recipients of gov't aid = OK
    - any 'financial incentives' that 'skew' the program toward religious schools?
- *Mueller* – tax deductions for relig. edu. expenses OK
- *Witters* – tuition aid to students @ relig. inst. OK
- O'Connor's concurrence
    - does the program afford "genuine nonreligious options?"
    - program should not divert "too significant" an amount of resources to religious purposes
- Souter's dissent
    - no gov't dollars should be spent in aid of religious education.

Allegheny v. ACLU (1989) – p. 1491

- Est'mt Clause, generally
    - Government may not:

        - promote or affiliate itself with any religious doctrine or organization
        - discriminate among persons on the basis of their religious beliefs
        - delegate a government power to a religious institution
        - involve itself too deeply in a religious institution's affairs
    - **Government may especially not:**
        - "endorse" religion, by purpose or in effect
            - preclude[s] government from (attempting to) convey a message that (a particular) religion or religious belief is favored or preferred *(O'Connor's concurrence)*
- Creche on the Grand Staircase of the Allegheny County Courthouse. Does the creche communicate a religious message? *(yes)*
    - Does anything in the display detract from the religious message? Is the overall impression that there is a government *endorsement* of (a particular) religion?
        - The symbolic endorsement test is applied "from the perspective of a hypothetical observer who is presumed to possess a certain level of information that all citizens might not share." (1488)
            - must create a sense of "inclusiveness" and an element recognizing the secular aspect
        - *e.g., a Christmas tree and a menorah next to a sign saluting liberty is okay – "overall holiday setting"*
        - *having the creche along with things like Santa's house and his reindeer would make it okay*
        - what is its setting? is it near a (gov't) building? on or in it? on its stairs? in a public park?
        - is there anything else displayed alongside the creche?
    - Is there a secular dimension to the creche or the other parts of the display?

Engel v. Vitale (1962) – p. 1514
- *No prayer in public schools*
    - nondenominational prayer (denominational neutrality) and optional observance are not enough.
- Reference to history in the reasoning: interest in escaping governmentally-composed prayer, a function of the state church, was one of the primary motivating factors for the American colonists to leave England
- "Each separate branch of the government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."

Abington School District v. Schempp (1963) – p. 1516
- Religious exercises prescribed as part of the curricular activities of students, conducted in school buildings, and supervised by teachers = no

Wallace v. Jaffree (1985) – id.

- A moment of silence in public schools for "meditation or voluntary prayer" = no
- Undecided: whether a moment of "silent reflection" would be permissible absent legislative history that indicated that the purpose was to reintroduce prayer to public schools

Lee v. Weisman (1992) – p. 1517
- Kennedy 'coercion' test
- Question
    - Can middle and high schools include prayer-reciting clerical members in their graduation ceremonies? (no)
- "Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense **obligatory**." (1517)
- "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices may, in a school context, appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." (1518)
- "For the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner that her conscience will not allow, the injury is no less real." (1518)
- must give "[]sufficient recognition to the real conflict of conscience faced by [a] young student"

Santa Fe Ind. School Dist. v. Doe (2000) – p. 1508
- use of "invocations" before football games – limited acceptable content for "solemnizing" the game
    - especial problems with silencing minorities through majoritarian review of content
- Would an objective observer, acquainted with the text, legislative history, and implementation of the statute, perceive it as a state endorsement of prayer in public schools?

Establishment vs. Free Speech

Generally
- accommodation vs. establishment

Widmar v. Vincent (1981) – p. 1502 (note case)
- state school refused to allow student groups use of its facilities for religious discussion or worship
- once the school was opened up afterhours to any group, a limited public forum was created >> no content-based or viewpoint discrimination *(establishment clause is school's defense – must keep religion and state separate; free speech is plaintiff's arg – discrimination against religious speech)*
- strict scrutiny: can allow the discrimination if (a) compelling interest, (b) no alternatives

- does the establishment clause concern constitute a compelling interest? (no)

Rosenberger v. Univ. of Virginia (1995) – p. 1504
- school must fund a Christian student group's newspaper
  - OK in part because the school staff advisor for the group did not participate in the group *(might have indicated entanglement)*
  - public forum = access to funds
    - university: "the newspaper is a religious activity, it's OK to exclude from funding; we don't wanna violate establishment clause"
    - the court: "this is viewpoint discrimination, which is even worse than content-based discrimination, and is presumptively unconstitutional"
      - accomodation, not establishment :D
- content-based discrim
  - may be permissible if it preserves the purposes of a limited forum
- viewpoint discrim
  - presumed impermissible when speech otherwise would be OK

Good News Club v. Milford (2001)
- A school cannot allow community groups to use its grounds but forbid religious groups (impermissible content-based restriction)

The Ten Commandments Cases

McCreary County v. ACLU (2005) – Supp. p. 148
- Display of the Ten Commandments on courthouse walls prohibited

- Requirement of neutrality among religions and between religion and nonreligion
  - Symbolic depictions of the Ten Commandments are probably okay, but a full display of the text is always explicitly religious – "an instrument of religion"
- Cannot make religion appear tied to status or respect
  - Court's displays' "sole common element" was highlighted religious passages in the displayed texts
  - no repudiation of previous objectionable display

- "Reasonable observer" test
  - Objective observer, acquainted with the text, legislative history, and implementation of the statute; "reasonable observers have reasonable memories" (previous displays factor into interpretation)

- Deliberate indeterminacy of the First Amendment: "Indeterminate edges are the kind to have in a constitution meant to endure, and to meet "exigencies which, if foreseen at all, must have been seem dimly, and which can be best provided for as they occur."

Van Orden v. Perry (2005) – Supp. p. 164

- Display of Ten Commandments on TX State Capitol grounds allowed

- *Lemon* test deemed inapplicable (to a "passive monument" – monument 6' high, 3.5' wide; one of 17 monuments in the 22 acres surrounding the TX state capitol)
    - *Lemon* factors = "no more than helpful signposts"
- This display = an "acknowledgment[] of the role played by the Ten Commandments in our Nation's heritage," of a sort "common throughout America" (166)
- emphasis on *historical meaning* of the Ten Commandments
    - "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause." *(167)*

- *one could still make* Lemon *or Endorsement arguments*

Free Exercise

Employment Division v. Smith (1990) – p. 1464

- State law of general applicability (at least in the criminal context) – rational basis
    - *n o he i gh t en e d sc r ut i ny*
- Free exercise alone
- default rule (others not overruled)

Sherbert v. Verner (1963) – p. 1473

- Strict scrutiny for impingement on Free Exercise
- "Any incidental burden on the free exercise of appellant's religion may be justified by a '**compelling** interest in the regulation of a subject within the State's constitutional power to regulate.'"

- forcing choice between following religious conviction and being able to "put bread on the table" = bad: akin to imposing a fine on **π** for refusing to work on Saturdays
    - state alternative = carve out a religious exception ! ! (so the state law as it was was not *necessary*)
- **still good law** (but limited to unemployment benefits context)

Lukumi Babalu Aye v. Hialeah (1993) – p. 1478

- Generally applicable law: rational basis review
- Not neutral/not generally applicable law: strict scrutiny
    - *targets* religious exercise >> s.s.
- dispute
    - city had said that rational basis ought to apply (following *Smith*), pointing to legitimate interest in preventing animal sacrifices (and this is one way to do it)

    - court found that the law was so "gerrymandered" that almost all behavior was permissible except the practices of the Church of L.B.A.
        - slaughter was prohibited outside of areas zoned for slaughterhouse use, but kosher slaughter was OK
        - use of "sacrifice" and "ritual" in the ordinance; cannot sacrifice "in a public or private ritual or ceremony not for the primary purpose of food consumption"

- (1) Examine text of law
- (2) Examine effect of law

Threshold – does the law **substantially burden** free exercise?

- After *Smith,* general rule = rational basis; unless the law is not neutral/gen'l applicable >> strict scrutiny
- Exceptions
    - *Sherbert* – employment vs free exercise >> s.s.
    - "hybrid" cases – more than one constitutional right (*Yoder*) >> s.s.
    - law "targets" religion – *Babalu Aye*
- RFRA, 1993
    - sought to reinstate the s.s. test in *Sherbert*
    - declared unconstitutional (as applied to state officials) in . . .

more restrictive standards acceptable under t&s power than under § 5 of the 14th amdt

Locke v. Davey (2004) – p. 1482

- WA state program gives scholarships, conditioned on the recipients' not pursuing degrees that are "devotional in nature or designed to induce religious faith" while they are getting the scholarships (const'l)
- Establishment vs Free Exercise!
    - "play in the joints"
- WA said that allowing use of $ for religious degrees would violate state & fed Estmt clauses
    - not actually so, says the SC – see *Zelman v. Simmons-Harris* (1483) – private choices break the link between funds & religious training
- there is no "animus" or "hostility" toward religion here (cf. *Babalu Aye*)
    - look to history of the relevant state constitution, legislative history, etc

free exercise does not impose upon states the affirmative duty to subsidize private religious education (e.g., in the form of vouchers)

Cutter v. Wilkinson (2005) – Supp. p. 143

- addressed the successor to RFRA – the RLUIPA
- strict scrutiny required when a law burdens the free exercise of religion of a person being incarcerated
    - upheld on a *facial challenge* – law claimed to be unconstitutional on its face, not as applied in a particular circumstance
        - the SC reviewed only for establishment clause violation because the 6th Circuit hadn't addressed any of the other claims

    - RLUIPA "alleviates exceptional government-created burdens on private religious exercise" (144–145)
        - accomodating =! establishing . . .
- possible taxing & spending/c.c. issues?
    - see Thomas's concurrence
    - funding conditioned on acceptance of the RLUIPA
- *Congress can statutorily establish a strict scrutiny standard under certain conditions*

Gonzales v. O Centro Espirita (2006) – Supp. p. 147
- RFRA applied to the feds (compelling interest test)
- members of the *O Centro* church wanted to use *hoasca* as a sacrament – *hoasca* contains hallucinogenic Schedule I substances
    - use is okay – gov't's "invocation of the general characteristics of Schedule I substances does not carry the day"

State Action Requirement of the 14th Amendment

Does not apply to private actors; "no *state* shall deprive . . ."
- two exceptions where it applies to private actors
    - public function
        - priv. actors performing functions traditionally performed by the state (e.g., company town, municipal park in trust)
        - "liberty" provision in the due process clause has been considered a window through which right-of-privacy and free-speech claims can be made (makes 1st amdt apply to states via the 14th)
    - entanglement/official involvement

Public Function

The Civil Rights Cases – U.S. v. Stanley (1883) – p. 469
- established that § 5 powers are remedial

Marsh v. Alabama (1946) – p. 474
- Company town case
- "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and const'l rights of those who use it."
- free speech favored over property rights

Terry v. Adams (1953) – p. 479
- private organization has ~60 years' effective control over Democratic party in TX
- compelled to allow blacks to participate

Evans v. Newton (1966) – p. 480
- park bequeathed to city; benefactor said: "for whites only"

- impermissible: "integral part" of the city's activities; maintained by city; granted tax exemption
- didn't matter that as of the suit, the park had gone back to a private trustee – still had predominantly municipal character

Amalgamated Food Employees Union v. Logan Valley Plaza (1968) – p. 482
- allowed 'peaceful picketing' of a business in a publicly-accessible shopping center when picketing is 'directly related' to the use of the shopping center property

Lloyd Corp v. Tanner (1972) – p. 484
- distinguished *Logan Valley* – no longer is there a right to enter privately owned shopping centers and picket/handbill/exercise 1st amdt rights generally (handbills were re: Vietnam War)

Hudgens v. National Labor Relations Board (1976) – p. 485
- no 1st amdt rights under 14th amdt in privately owned, enclosed shopping malls – *Logan Valley* explicitly overruled
- parking lots still OK

DeShaney v. Winnebago Cty Dept of Soc Svcs (1989) – p. 1011
- The Due Process Clause does not impose a special duty on the State to provide services to the public for protection against private actors if the State did not create those harms

Government Involvement

Shelley v. Kraemer (1948) – p. 487
- A contract is only state action if it is being enforced through the state's power.
- The actions of the state courts are state actions.
- *discussion*
  - general
    - never overruled, but never followed "for what might seem to be the general principle on which it rests"
    - european courts generally follow *Shelley* strictly – anything enforced by courts is state action of consitutional character.
    - here, enforcement of rights and laws does not always equal state action.
  - poss. pts of distinx
    - willing buyer & seller – willing parties – objections came from 3rd parties
    - here - *restrictive covenant* similar to *zoning*
      - private purpose functions as public function of zoning
    - racial elements

Burton v. Wilmington Parking Authority (1961) – p. 495

- A statute established the Authority, which owned a building leased to a private tenant, a restaurant; the restaurant's actions were considered state actions.
- Factors
    - the lease to a private tenant was part of the statutory purpose.
    - building had indicia of its status as publicly-owned property.
    - building was dedicated to public uses.
    - government profited from the restaurant and its discriminatory practices.

Moose Lodge No. 107 v. Irvis (1972) – p. 497
- State liquor license is not state involvement
- distinguishing *Burton*
    - private land
    - private club

Rendell-Baker v. Kohn (1982) – p. 501
- Government subsidy alone is not government action
    - "mere fact" of gov't funding = nonono assez
- Here: no compulsion or influence from any state regulation
    - 'focused state approval' required
        - provision in bylaws; stated policy; clause in a contract with the state
    - decision to fire teachers unrelated to state approval.

- "Public function" is not enough – must be "traditionally the exclusive prerogative of the state"
- discussion
    - private school & state officials accused of violating **π**'s due process & 1st amdt rights
    - public schools were sending "problem students" to the private school
    - private school gets >90% funding from the state
    - argument for 'state action'
        - priv school undertaking a statutory duty of the State
        - 'symbiotic relationship;' school depends on state for survival
        - educating kids at taxpayer expense
        - regulatory control

Blum v. Yaretsky (1982) – p. 504
- three ways to be 'state action'
    - "nexus" test
        - regulation alone is not enough
    - coercive power/significant encouragement
        - e.g., 'affirmative commands'
    - "traditionally the exclusive prerogative"

- state's regulatory response to private actions and decisions does not make the state responsible for the private actions

Jackson v. Metropolitan Edison Co. (1974) – p. 476
- A private business subject to extensive government regulation is not a state actor.

Entwinement

Brentwood Academy v. TN Secondary School Athletic Assn. (2001) – p. 512
- "Necessarily fact-bound inquiry"
- ". . . if the membership consisted entirely of institutions located within the same State, many of them public institutions created by the same sovereign."

- Public officials perform most or all Association functions
  - control of intramural sports; 'seen to regulate in lieu of the State Bork of Education'

- discussion
  - Association fined a school $3,000; placed school's athletic program on two-year probation; etc >> claim of due process violation
  - comparison to *Tarkanian*
    - NCAA – organization of several hundred member institutions from many different states (no state action)
    - here – only public/private school officials *from a single state*; predominantly pub officials (84%)

Elevent Amendment Jurisprudence

Court seeks to preserve the vision of federalism under which the states (generally) remain immune from suits by citizens.
- 1890 – *Hans* case – held that 11th amdt also bars actions by citizens of a State from suing that same State. (counter to the text of the amdt)
- (1) State officials can be sued in court even when the State cannot itself be sued. *(Ex parte Young)*
  - includes injunctive relief that implicates State policy.
  - includes damages, but not when $ would come from the State treasury.
- (2) States may voluntarily waive immunity in a given case.
- (3) 14th amdt § 5 abrogates States' immunity; equal protection and due process give rise to citizen suits against the State against the State's will.

Commerce Clause (1788)
11th Amendment (1794)
14th Amendment (1868)

11th amdt trumps the commerce power, because the 11th amdt comes later. 14th amdt (under certain circumstances, if it meets judicially-developed rules) trumps the 11th amdt.

RULES

- (1) Congress must make its intent to abrogate the sovereign immunity of the States clear.
- (2) Must be a *proper exercise* of power under § 5 of the 14th amdt. (broadly speaking, remedial powers, not substantive rights)

Fitzpatrick v. Bitzer (1976) – p. 224

- first case establishing Congress' power to abrogate states' immunity under § 5

Seminole Tribe v. Florida (1996) – p. 226

- Congress could not give the federal courts jurisdiction over Indian claims against the State regarding gaming agreements
- Congress had rested its authority to act on the Commerce Clause; 11th amdt supercedes Commerce Clause >> no go.
- no expansion of fed cts' jurisdiction beyond Article III - *Marbury*

Board of Trustees v. Garrett (2001) – p. 239

- ADA Title I – rests, in part, on Equal Protection grounds
    - employers must make "reasonable accomodations" without "undue hardship"
    - disabilities >> *rational basis review*
- Is this valid § 5 legislation?!
    - 1) must be a *violation* of 14th amendment (to invoke its remedial powers)
    - 2) must show a *pattern of violations*
        - must be more than a 'handful'
    - 3) must be "proportionate" to the violation(s)
- The issue of *cost* almost always provides States with a rational basis for discriminating against the disabled. The statute goes well beyond the Constitutional requirements

Nevada Dept of HR v. Hibbs (2003) – p. 246

- Family & Medical Leave Act (FMLA) – provided 12 weeks of leave from work for pregnancy, emergency medical issues – on behalf of spouse
- gender-based discrimination >> *intermediate scrutiny* – easier to justify law under § 5
    - maternity vs. paternity leave – far fewer states offer paternity leave, providing incentive to hire men because of lesser liability for giving leave – "widespread pattern of violation"
- proportionate?
    - yes – 'across-the-board, routine employment benefit for all eligible employees'

Tennessee v. Lane (2004) – p. 251

- ADA Title II – access to public benefits, services, facilities

- Inclusion of other rights, e.g., 6th amdt access to courts, right to travel, whatever >> strict scrutiny
- widespread pattern of violations…
- q.
    - is it appropriate for congress to pass nationally applicable legislation when the violations have been found in only some states?
    - effect of law may be limited to states that have a relevant history of violations
- ADA: where discrimination has been found against indivs. with disabilities
    - education, transportation, communication, recreational, institutionalization, health services, voting, access to public services
    - → "appropriate subject for prophylactic legislation"

U.S. v. Georgia (2006) – Supp p. 27
- Was there a constitutional violation?
    - yes → state can be sued
    - no → statute deals with discrimination involving heightened scrutiny or fundamental right?
        - yes → state can be sued
        - no → only can be sued if Congress finds pervasive unconstitutional state conduct