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Constitutional Law

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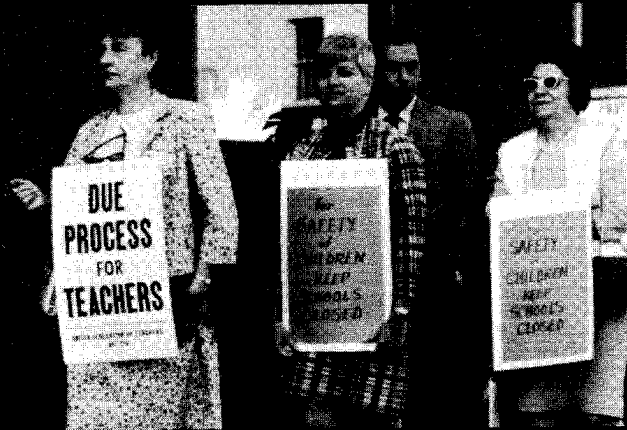


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Constitutional Law

THE SOURCE AND SEPARATION OF FEDERAL POWERS

Suppose that the President's Committee on Crime in the United States sent to Congress its findings about the increasing crime throughout the nation, together with suggestions for regulating such criminal activity. In response, Congress, believing that the Crime Committee was better qualified to recognize and correct this serious situation, passed a bill authorizing the President's Crime Committee to pass all laws defining and punishing criminal activity in the United States. The bill is now before the President, and he asks you, as one of his advisors, whether he should sign the bill into law. How would you advise him? Why?

The Constitution of the United States is the sole source of the powers of the federal government. After gaining their independence from English rule, the American colonies created a federal system of government, and provided for the powers of that government. The federal government must look to the Constitution for primary authorization of any action the government takes. There must be a provision in the Constitution permitting the exercise of any power which the federal government claims to possess before that power can lawfully be used.

Article I of the Constitution states that all legislative powers shall be possessed by the Congress of the United States. The power to define and punish criminal activity is a legislative power authorized by the "necessary and proper" clause of Article I, Section 8 of the Constitution.

That section gives Congress the power to pass all laws “necessary and proper” for making effective any other of the powers given to the federal government by the Constitution. The problem concerning the powers of the President’s Crime Committee, then, is whether Congress can *delegate* this legislative power to the Executive branch of the federal government.

The Constitution provides that the federal government be divided into three parts, the Executive branch, the Legislative branch, and the Judicial branch. Each branch possesses its own powers. Accompanying this three-part system is the doctrine of “Separation of Powers”. This doctrine was formed by the states to protect themselves from too strong a central government. Under the doctrine of “Separation of Powers” no branch of the government may delegate to any other branch any of its unique powers. The executive, legislative, and judicial powers are *exclusive* to those branches respectively, and any change in the distribution of these powers must be made by an amendment to the Constitution. (Congress can delegate its nonexclusive powers, but only under certain circumstances and by following strict rules).

Since the doctrine of “Separation of Powers” prohibits Congress from delegating its exclusive legislative powers to the Executive branch, and since there is no constitutional provision authorizing the President’s Crime Committee to make laws regarding criminal activities, the President should be advised to *veto* the proposed law. Unless changed by a constitutional amendment, the power of the Crime Committee should be limited to making recommendations to Congress regarding laws that the Committee thinks are necessary to control criminal activity in the United States. It is the exclusive province of Congress to pass such laws.

JUDICIAL REVIEW AND THE CONCEPT OF CONSTITUTIONALITY

Suppose that, in the previous situation, the President does not veto the bill. Suppose, further, that because of its new legislative power the Crime Committee passes a law which makes possession of any firearm by any person, without a permit issued by the Crime Committee, punishable by a maximum imprisonment of five years in a federal prison. You have been arrested and are being prosecuted for possession of a firearm in violation of the above regulation. What argument could you make to show that your actions may not be made a crime?

Article VI of the Constitution states that, "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. . . ." This provision is known as the "Supremacy Clause". It means that only those laws which are enacted under, and in accord with, the Constitution are valid laws. Since the Crime Committee has no express constitutional authority to create laws, the firearms law was not passed according to the Constitution, the supreme law of the land. The firearms law is therefore unconstitutional, and it has no real force of law.

A court of law would exercise its power of *judicial review* to determine whether the Constitution prohibits the Crime Committee from making it unlawful to possess firearms. "Judicial review" is not expressly

provided for in the Constitution. Early in its history, the United States Supreme Court created this power. The Supreme Court reasoned that since it is the duty of the courts to decide all cases properly before them on the basis of laws applicable to each case, the courts must first interpret and clarify those laws to determine their meaning. They must also determine if the law is in accord with the Constitution. This is called determining the “constitutionality” of a law, and when a law is not constitutional, that law cannot be applied.

THE EXECUTIVE POWERS OF THE UNITED STATES

The entire executive power of the United States is given to the President by Article II of the Constitution. The President has the authority to nominate and appoint, if approved by the Senate, all ambassadors, Supreme Court justices, and other United States officials whose appointments are not otherwise provided for by the Constitution.

Supreme Court justices may not be removed from office, except by *impeachment*, because their term is for the length of "good behavior". All other executive-appointed officials may be removed from office by the President, even if Senate approval was necessary for appointment. Officials appointed under an Act of Congress can be removed only as provided in that Act. The President also has the power to grant pardons and *reprieves* for offenses against the United States, except in cases of impeachment over which the House of Representatives has sole power.

The President has some power over the legislative process. He may propose legislation, and every Act of Congress must first be given to the President for his acceptance or veto. If not approved by the President, the legislation must then be passed by a favorable vote of two-thirds of each house of Congress before the bill becomes law. The President has ten days within which to sign a bill into law or veto it, and if this is not done within that period the bill automatically becomes law. However if Congress is to adjourn its session before the end of that 10 day period, and the President has not signed or vetoed the bill by the time Congress adjourns, the bill is automatically vetoed. This is called a "pocket veto".

The President is the "Commander-in-Chief" of the military and

militia, but the power to call the military into action, or to declare war, rests with Congress. However, in the event of an invasion, insurrection, or other national emergency, the President may order the military against foreign or domestic enemies—without a declaration of war by Congress.

The President can delegate his powers to members of the executive department, and to independent boards and agencies. However, before a power may be delegated it must actually be possessed by the President, and it must be delegable in nature. Such unique and exclusive powers as the veto power or the Commander-in-Chief powers are not delegable.

The President, with the approval of two-thirds of the Senate, has the power to make treaties with foreign nations. Any other action concerning foreign affairs is within the exclusive authority of Congress. According to the Constitution, treaties have equal status with other laws and legislation in the United States. A treaty must be made under the authority of the United States, and for a valid and proper international purpose. The provisions of a treaty cannot violate express provisions or rights found in the Constitution. If a treaty conflicts with an existing Act of Congress, the treaty controls.

THE LEGISLATIVE POWERS OF THE UNITED STATES

Article I, Section I of the Constitution states that all legislative powers granted by the Constitution to the federal government shall be possessed by the Congress of the United States, which shall consist of the Senate and the House of Representatives. Article I, Section 8 lists many of the powers which are expressly given to Congress. These express powers are called enumerated powers. Some of them are: the power to borrow money; the power to regulate commerce with foreign nations and among the states; the power to establish rules for naturalization of citizens; the power to coin money and punish counterfeiters; the power to establish post offices; the power to regulate patents and copyrights; the power to declare war, and raise, regulate, and support a militia, army, and navy; the power to govern the seat of the federal government (Washington, D. C.); the power to establish federal courts inferior to the Supreme Court; and the power to make all laws "necessary and proper" for carrying into effect any power given to the federal government by the Constitution. Other express powers are found scattered throughout the Constitution. Additionally, many of the amendments to the Constitution contain express grants of legislative authority. These amendments are the ones which give Congress the power to enforce their provisions by enacting appropriate and necessary legislation.

Congress also derives legislative authority in other ways. One of these ways is through the doctrine of implied powers. The "necessary and proper" clauses found in Article I and various amendments are the basis of this doctrine. The extent of Congressional power under the

doctrine of implied powers is broad. If the desired goal is within the scope of the Constitution, any legislation which is designed to achieve that goal, is consistent with the letter and spirit of the Constitution, and is not prohibited by it, is constitutional.

Another way Congress derives legislative authority is by the doctrine of *inherent sovereign powers*. According to this theory the United States has powers independent of the Constitution, which exist solely because it is a nation in a world of many nations. This doctrine has been used to justify the power of the federal government over foreign affairs. This doctrine is also the source of the federal government's power over admiralty and maritime matters. The federal government has no sovereign power over domestic affairs. Such power must be gained expressly or impliedly from the Constitution itself.

Can Congress delegate a legislative power to another branch of the federal government? (This was briefly discussed at the beginning of the unit in connection with the doctrine of "Separation of Powers.") Delegation of powers is permitted, subject to the following restrictions. Congress must actually possess the power which it wishes to delegate. Neither a whole power nor an exclusive or unique power can be delegated to another branch. Such nondelegable powers include the power to declare war, to admit new states to the Union, to impeach certain government officials, and to define and punish a crime. Every permissible delegation of legislative power must contain a standard or guideline for application of that power, but such standards can be broad, such as the requirement that a power be exercised for the public interest, convenience, or necessity. However, when the power delegated affects any of the provisions in the *Bill of Rights* there must be a detailed standard, to protect that right from governmental infringement.

THE TAXING POWER

Under the Constitution, Congress can impose *direct taxes*, *indirect taxes*, and foreign export taxes on activities over which Congress has been given express constitutional regulatory power, regardless of the reason for the tax. Congress can tax activities not expressly within its regulatory authority if the primary purpose of the tax is to raise revenue. Article I, Section 8 states that Congress shall have power to lay and collect taxes, to pay the debts of the United States, and to spend money for the common defense and general welfare of the United States, but that all taxes must be uniform throughout the United States. This re-

quirement of uniformity means that the tax must be applied by the same standards to all geographical areas. No preference may be given to any area.

Often, taxes are used to regulate an activity. If Congress otherwise has power to regulate the particular activity taxed, a tax on that activity is valid, even if the purpose of the tax is not to raise revenue. Thus, a tax may be enacted primarily for regulatory purposes even if the tax is so excessive that it becomes too costly to continue the activity. In that way Congress can prohibit certain conduct simply by placing a high tax on it. For example, Congress could place a tax on the production of tobacco, an activity within Congressional regulatory power, and thereby control the number of cigarettes produced in the United States. When Congress does not have the express or implied power to regulate the taxed activity, the regulatory tax will be valid only if its regulatory features are incidental to revenue-raising motives. The tax will fail if its regulatory purposes are dominant or exclusive.

THE MILITARY AND WAR POWERS

The Constitution gives Congress the power to declare war, and the power to organize and support the army, navy, and militia. Congress has broad authority under these powers. *Conscription* into the armed services is considered "necessary and proper" to raising the military. Congress has the power to impose economic controls in time of war. These controls, such as rent and price controls, can also be continued during the post-war period. Congress can violate private rights in time of war in the interest of national defense, such as by prohibiting civilians access to and from certain areas, or by the confiscation, use, or destruction of private property.

Congress can establish military courts and tribunals under its power to make rules for the regulation of the military. "Service-connected" offenses, such as a crime by a serviceman committed on a military post or an area under military control, are within the jurisdiction of military courts. Nonservice-connected offenses, such as those committed against a civilian by a serviceman on leave or off post, are within the jurisdiction of civilian courts. Military tribunals have no jurisdiction over civilians as long as the civilian courts are open and operating. Congress can also impose *martial law*, but only under circumstances of an actual invasion.

INVESTIGATORY POWERS

The investigatory power of Congress is implied from its general legislative power. Under this power Congress can compel witnesses to appear and testify before Congressional investigating committees, and Congress has the power to punish a witness who refuses to do so. This power is limited to investigations regarding matters which Congress has constitutional regulatory authority. The reason for this power is to give Congress the ability to gain all the information necessary to enact proper and useful legislation.

POWERS OVER PROPERTY

Article IV gives Congress the power to dispose of and make rules regarding land and other property belonging to the United States. This power is without limitation. The courts cannot review decisions concerning the administration of public lands. The methods used to dispose of public property must be appropriate to the nature of the property, and such disposal must be done in the public interest.

Another type of Congressional power over property is the power of eminent domain. This power allows the federal government to take private property for governmental purposes, if fair compensation is paid to the owner of the property. This power is implied because it is one of the inherent powers of a sovereign nation. Court review is limited to the fairness of the compensation paid, and does not extend to the "taking" itself. (Eminent domain is discussed more fully in the Real Property unit.)

THE POSTAL POWER

Congress has the express power to establish post offices and postal roads. Under this power Congress can classify mail for different rates, and impose reasonable restrictions on the use of the mails. Congress cannot withdraw the use of the mails from any citizen or group on any grounds, but may prohibit the use of the mails for any illegal activity. Also, Congress cannot regulate the mails in any way that deprives a person of any right guaranteed by the Constitution or Bill of Rights.

THE POWER OVER NATURALIZATION AND CITIZENSHIP

The Congressional power to establish rules of naturalization gives Congress authority over admission, exclusion, and deportation of aliens. Alien immigration into the United States is restricted by quotas, which specify the numbers of immigrants allowed and the countries from which those immigrants can come. Also, an alien trying to enter the United States may be denied entry if that person's presence in this country would be harmful to the interests of the United States. An alien already living in this country can be deported for this same reason, but only after that alien has been told the reason for the expulsion and been given a fair hearing before an executive or administrative tribunal.

According to the 14th Amendment any person born or naturalized in the United States is a citizen of the United States and the state in which that person lives. This provision extends to a person born in a foreign country to parents who are United States citizens. According to federal statute, if a person is born outside the United States, and only one parent is a United States citizen, that person can be an American citizen, but only if that person chooses to do so and lives continuously in the United States for five years between the 14th and 28th birthdays. The rights of native-born citizens and those naturalized in the United States are equal and the same.

THE COMMERCE POWER

The power to regulate foreign commerce belongs exclusively to the federal government. All trade with foreign nations and any American shipments on the high seas, including coastal transportation, such as between San Francisco and Los Angeles, are subject to federal regulation. The Constitution also gives the federal government the power to regulate "interstate" commerce. "Interstate" means between two or more states. Normally, only a state can regulate its "intrastate" commerce, but federal regulation of an intrastate activity is allowed when the activity has an appreciable effect on interstate commerce. "Intrastate" means the activity begins, ends, and takes place entirely within the state.

Government regulation in this area usually deals with branding, labeling, and packaging of goods; manufacturing standards; minimum wages and hours; the price of the goods sold; transportation of the goods from place of production to place of sale; method of sale; and quality of

goods. Congress also has the right to prevent interstate commerce from being used for harmful or illegal purposes.

The fact that the federal government can regulate any commercial activity if that activity has an effect on interstate commerce has allowed federal regulation of whole industries, even though only a portion of that industry's production is moved in interstate commerce. It has also allowed regulation of purely intrastate products that are in competition with interstate goods because sale of intrastate goods may affect sale of interstate goods. An individual may be regulated. For example, farm production by a single farmer may be regulated, even if his production is strictly for his own use, since this, when multiplied by all single farmers doing the same thing, may affect the total national demand for farm goods. State-owned facilities, such as schools and hospitals, and state economic activities may be regulated if they are in competition with private companies engaged in interstate commerce.

The power of a state to regulate interstate commercial activities is limited by the federal power over those activities. Congress has absolute authority over the commerce area, and Congress can permit or prohibit state regulation of an activity. If Congress has said nothing about the regulation of an activity, a state may regulate the activity until Congress prohibits it from doing so. If Congress has passed legislation regulating a commercial activity, the state may supplement that legislation. In any event, state regulations cannot conflict with federal laws or unduly burden the free flow of interstate commerce, and, to the extent that they do, the state regulations are invalid. A state can regulate beyond federal limits, but only if no burden is imposed on interstate commerce.

STATE LEGISLATIVE POWER

Suppose California passed a law making it unlawful for any person under the age of eighteen to use any drug, medicine, or instrument for the purpose of preventing conception. Further, the law makes it unlawful for anyone to assist, counsel, or advise any one under 18 to commit such an act. Attached to this law is a provision for criminal penalties for offenders. Suppose that Mr. Thompson teaches a high school class in sex education. He is concerned about the new law and its effect on him as a teacher, and on his students. Mr. Thompson is considering bringing an action against the proper public official for a declaratory judgment, seeking to determine if the law deprives him and his students of any constitutional rights. What do you think? Is the law unconstitutional?

This situation involves two main questions. First, does the state have power to pass such a law, and, second, are any constitutional rights being denied Mr. Thompson and his students?

The legislative power of a state is not expressly mentioned in the Constitution. But legislative power is something that the authors of the Constitution held to be inherent in any sovereign government. They felt that this power was essential to a sovereign's ability to govern. By virtue of their sovereign status, states possess a legislative power, and the power of a state to pass legislation to protect public health, safety, morals, and welfare is called the police power. State "police power" legislation must have a reasonable relationship to public health, safety, morals, or welfare. Generally, courts have applied this requirement broadly, allowing the states much discretion in determining what is in the public good. Going back to the California statute, is there a reasonable relationship between the anti-contraceptive regulation and the state's interest in protecting

“public health, safety, morals, or welfare”? What is the legislature trying to regulate? Population? Moral behavior?

RESTRICTIONS ON THE LEGISLATIVE POWER OF THE STATE

When a state statute is challenged as unconstitutional the courts determine the validity of the statute based on constitutional interpretation. Through this process, over the years, certain standards necessary for a lawful exercise of legislative power have developed.

A statute cannot be *arbitrary* or irrational. This limitation is imposed on the states by the “due process” clause of the 14th Amendment to the Constitution, and on the federal government by the “due process” clause of the 5th Amendment. Thus, laws passed by either Congress or the states must meet a due-process standard. Courts ask if the statute is reasonable and fair in its attempt to regulate. If there is a reasonable relation between the law and the social policy it is attempting to enforce, a court will not impose its own opinion on whether that policy is a good one.

Another restriction on state legislative power is the “Contract Clause”. The “Contract Clause” of Article I, Section 10 says that no state can pass a law “impairing the obligation of contracts”. The purpose of this clause is not to establish the right to make a contract, but to protect people who have already made a contract from state laws that would interfere with their contractual obligations. Could Mr. Thompson argue that he has a contract with the Board of Education to teach a sex education class, and that the statute impairs that contractual obligation?

During the 19th century the Supreme Court often struck down state legislation as violating the contract clause. However, the contract clause today is rarely used to attack state legislation, because another clause of the 14th Amendment has developed as a means to protect personal rights. This clause says that no state can deny a person the “equal protection” of the law. Remember, the 14th Amendment only applies to the states. However, the Supreme Court has held that the “due process” clause of the 5th Amendment, which applies to the federal government, includes the “equal protection” theory. Therefore, the federal government is also bound by the “equal protection” clause.

The equal protection clause was originally limited to prohibiting racial discrimination. This was probably because the 14th Amendment was enacted immediately after the Civil War. Racial discrimination was

at this time a critical problem and the main target of the amendment. However, through judicial use and interpretation, the 14th Amendment now has a much greater scope. Its concepts have been applied to the changing circumstances of our society.

When courts apply the equal protection clause to state legislation, they look primarily at two factors: is the purpose of the statute reasonable when applied to the particular class or classes of citizens for which that law was designed, and does this particular class contain only those people who fit within the purpose of the legislation? This last requirement is probably the most difficult for a legislature to satisfy. The statute must be broad enough to reach the evil it is attempting to eliminate, and, at the same time, the statute must be narrow enough to exclude people not intended to be covered by it.

Think back to the California statute. Does it satisfy these tests? What class of persons is this law designed to affect? Is that class sufficiently narrow enough? The statute states that all persons under 18 years of age cannot use contraceptives. The most reasonable purpose for such a statute is to protect the moral standards of persons under 18. Given this purpose, does the class of people to whom the legislation is meant to apply contain only people who fit within the purpose of the statute? What about people under 18 who are married? And what about the portion of the statute that prohibits counseling? What class of persons does that section apply to? Doesn't that class include doctors, teachers, even parents? Are only those persons to whom this statute was meant to apply subject to its penalties?

The basic requirement of the "equal protection" clause is that state laws must not be discriminatory in nature or application. Recently, however, the Supreme Court further expanded this requirement. It held that certain classifications are inherently discriminatory. These "suspect" classifications are ones based on race, national origin, and religion. The Court has also begun to examine the rights of the individual to determine whether certain rights are "fundamental" to all persons. When "suspect" classifications and "fundamental" rights are involved, the state must show a *compelling interest* before it can regulate them. No longer will a reasonable or rational justification for a state statute be sufficient. The state must meet a higher standard by showing that it has a vital reason for enacting the statute. Again, think back to the California statute. Is a classification based on age "suspect"? Do you think California has a "compelling interest" in such regulation? Is education considered a "fundamental" right? Does the fact that this statute restricts

the right to teach, and thus the ability to learn, conflict with any basic right to education?

It is not certain how far the Supreme Court will extend the equal protection theory. Some justices favor a narrow application of the clause, and argue that the Court should not use its opinions on social policy to overrule the opinions of the state legislatures. Other justices feel that the clause should be expanded to protect even more rights. Which do you think is the proper direction?

THE 1ST AMENDMENT RIGHT TO FREEDOM OF EXPRESSION

The Constitution guarantees that all citizens of the United States shall enjoy the rights of life, liberty, and property. Whenever any of these, or any other rights guaranteed by the Constitution, are denied or restricted by an exercise of governmental authority, such denial or restriction must satisfy constitutional standards. This is especially true in the area of the 1st Amendment rights.

The 1st Amendment freedoms are given a preferred position. The 1st Amendment is written in absolute terms. It says "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." At the time the 1st Amendment was written, this nation had just been through a revolution, and the authors of the Constitution fully realized how important freedom of expression had been in the success of the revolution. They believed that in a democratic form of government, in which the people initiate the decision-making process, it is necessary that there be a free exchange of ideas. They felt that this could only be achieved if people were free to express themselves without fear of governmental retaliation. The fact that free expression is essential to our political process demands that it be given special treatment.

THE SCOPE OF FREEDOM OF SPEECH

Is Mr. Thompson's sex education class worthy of protection by the 1st Amendment? Can the students claim that they are denied 1st Amendment protection when that subject is made unlawful? Suppose, instead of teaching sex education, that Mr. Thompson was telling the male students in his class how to escape military service. Suppose further that this occurred in 1968, when draft quotas were high and the United States involvement in the Vietnam war was escalating. Is the "public interest" any different in this situation than in the contraceptive case? Is one type of speech more deserving of protection than another?

In spite of the fact that the 1st Amendment is written in absolute terms, not all speech is given constitutional protection. Any spoken words which cause, or could cause, immediate and harmful consequences are not protected. For example, if someone falsely yells "Fire . . . Fire . . ." in a crowded theater, these words are not protected by the 1st Amendment, because these words could cause an immediate panic, and endanger many lives in the rush to leave the theater.

Generally, then, words which present a "clear and present danger" of causing violence, harm, rebellion, or any unlawful act can be restricted or made a crime by governmental legislation. When applying this "clear and present danger" test, courts examine the interests of the government in preserving itself, and the public safety and welfare. The greater the possible harm to these interests, the more likely restrictions on free speech will be allowed.

Another kind of speech which does not receive constitutional protection is speech which consists of "fighting" words. Suppose a young man is standing on a street corner, speaking about his anti-establishment political beliefs to anyone who will listen. People begin to gather around him and soon a small crowd has formed. Seeing that he has actually attracted listeners, the speaker becomes excited. He gets louder, and begins using profane and insulting words. He directs them at the crowd, challenging them. The crowd begins to respond with hostility, but the speaker continues his shouting.

At this point the police interfere and arrest the speaker. Has the speaker been denied his 1st Amendment right of free speech? The Supreme Court has held that emotionally charged words which are directed at a particular person or group of persons, and which cause or could cause violent reaction by those listeners, are "fighting" words. These words are not given constitutional protection. The police could therefore stop the man from speaking.

This doesn't mean, however, that speaking about controversial or unpopular topics is prohibited. The government must permit the speech and protect the speaker from a hostile crowd, if at all possible. Only when the police cannot protect a speaker from danger can the speaker be prevented from speaking.

TIME, PLACE, AND MANNER REGULATIONS

Not only is speech itself subject to restriction, but the time, place, and manner in which the words are spoken can be regulated. Usually these "time, place, and manner" regulations are local city or county ordinances concerning when and where rallies, assemblies, parades, and similar gatherings can be held. The government, at any level, has a valid interest in maintaining peace, order, and tranquility in the community. Therefore, "time, place, and manner" laws are generally upheld by courts, if the laws are reasonable and not vague. The regulations must be specific as to the time, place, and manner of speech that is prohibited. This allows protection of both free speech and public order to be accomplished at the same time.

Often, "time, place, and manner" statutes require that before a person or group of persons may speak or assemble in a public place, a permit or license to do so must be obtained from the proper public official. Such licensing statutes must have objective standards by which the official can determine whether a permit is required. The statute cannot give the official the discretion to decide whether the speech is for a good cause, and grant or deny the permit on that basis. The official cannot be given the power to stop speech before it has even begun. That is called a *prior restraint* and generally prior restraints of speech are not allowed. If the speech should not receive constitutional protection, the proper laws can be enforced after the speech has begun. But to halt speech before it is spoken goes against the principles of the 1st Amendment.

SYMBOLIC SPEECH

There are ways of expressing ideas other than by speaking or writing. Thoughts may be conveyed by words aided by conduct, or by conduct alone. Whether that kind of conduct is protected by the 1st Amendment depends primarily on the type of conduct involved. It depends on how closely the conduct can be equated with speech. For

example, carrying signs in a picket line is an action that actually conveys a written message. Such conduct is very close to “pure” speech. Burning an American flag to protest war has little physical connection with speech, but the action may convey as clear and meaningful a message as actual speech. The factors considered when deciding whether the conduct involved should receive 1st Amendment protection are: is the conduct lawful, and how great is the public interest in preventing that type of conduct? The governmental interests involved are weighed against the individual’s right to express himself in a particular manner.

As examples, consider the following two situations, taken from actual cases. The first case involves burning a draft card as a protest against the draft. The protestor was arrested for violating a law prohibiting the destruction of draft cards. The Supreme Court found that the protestor’s conduct was not speech. The court stated, “[W]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” Once the court found that protection of speech was not at issue, it then considered the governmental interest involved; which was the maintenance and regulation of the draft system, in which draft cards play an indispensable part. Because of this government interest, the Court ruled that the protestor’s 1st Amendment rights were not violated. Do you agree? Is burning a draft card the same as verbal speech?

The other case involved high school students who wore black armbands to school in a protest against war. They were violating an order by the school board which prohibited wearing armbands. In this case, the Supreme Court held that the use of armbands was “closely akin to pure speech”, and was therefore entitled to protection under the 1st Amendment. The counterbalancing interest in this case was the maintenance of discipline over the students. The Court ruled that in order to restrict free speech the school must show that the “forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the schools”. The Supreme Court felt that the school had not made a showing of “compelling interest”.

In this area of “symbolic” speech, there are no clear guidelines about what conduct is equal to speech, and what conduct is not. But when the conduct is found to be equal to speech, it is protected by the 1st Amendment unless the counterbalancing interest is compelling. If the

counterbalancing interest is found to be compelling, the restriction of free speech can be no greater than necessary to preserve that interest.

DEFAMATION

Does the right to freedom of speech allow someone to speak lies and false statements about another person? Does speech deserve protection when it invades another's privacy? Suppose that the father of one of the students in Mr. Thompson's class announced on a local radio talk show that Mr. Thompson was corrupting the minds of his students, and that he was weird, sick, strange, and perverted. The effect of these false statements was very damaging to Mr. Thompson's reputation in the community and to his career as a teacher. Is the man's speech nevertheless protected by the 1st Amendment? Should it be?

Most people would agree that the ethical and moral answer to the question just asked is "no". The Supreme Court has so held. Defamation is not given constitutional protection. Because defamation is a *tort*, the person defamed can sue the speaker for monetary compensation for any harm caused by the lies. In fact, defamation is important primarily in the area of tort law, not constitutional law. Defamation has been mentioned here only to show that it is an area of law which does involve consideration of the 1st Amendment right of free speech. (For a complete discussion of defamation, see the unit on Tort Law.)

OBSCENITY

The Supreme Court has ruled that obscenity is not "speech", and therefore does not receive 1st Amendment protection. Although the Supreme Court rationale for this decision has never been clearly stated, it stems from the government's interest in protecting public morals and welfare. Do you think the government should be able to decide morality through legislation? Should obscenity be given constitutional protection?

The definition of obscenity contains three elements: (1) that the primary theme of the material taken as a whole appeals to a *prurient* interest in sex; (2) that the material is offensive because it affronts the community's standards relating to the description or representation of sexual matters; and (3) that the material has no redeeming social value. Obscenity laws must comply with this test before any form of expression can be deemed obscene and unlawful.

The material, whether it is a book, a movie, a speech, a dance or anything else, must satisfy all three parts of the definition before it can

be called obscene. Usually the third part of the definition is the most difficult to satisfy. This is because nearly everything can have some “social value” to someone. Books, movies, dancing, and the like are considered to be forms of art, and everyone has their own opinion about the nature of “good” art.

Because of this “no redeeming social value” requirement, it is generally very difficult to apply obscenity laws. However, recognizing this problem, the Supreme Court has ruled that when it was questionable whether the material had any social value, the material could be classified as obscenity if it was advertised so as to appeal to erotic interests. The Supreme Court is not only concerned about the material itself, but also with the way in which the material is sold or advertised.

FREEDOM OF RELIGION

The people who originally settled the American colonies did so to escape religious persecution by government. These colonists wanted to be free to practice their own religious beliefs. As a result, the authors of the Constitution were very aware of the danger of allowing governmental regulation of religion. This awareness led to the 1st Amendment’s two-part protection of the freedom of religion.

The federal government can “make no law respecting an establishment of religion or prohibiting the free exercise thereof”. The first part, called the “Establishment Clause”, means that the federal government cannot establish a national religion and require all United States citizens to join. It also means that the federal government cannot pass legislation which in any way favors one religion over another. The second part, called the “Free Exercise Clause”, means that the federal government cannot prevent anyone from practicing a particular religion or no religion at all.

The Supreme Court follows three guidelines when deciding whether legislation unconstitutionally crosses what Thomas Jefferson called the “wall of separation between church and state”. First, the legislation must have a “secular” (nonreligious) purpose. Second, the legislation must neither advance nor inhibit religion. Third, it must not involve the federal government in an “excessive entanglement” with religion. Consider the following example.

Suppose a state provided for the payment of state tax money to parents to reimburse them for bussing their children to parochial schools. Would this statute violate the establishment clause? The use of

these state funds could be considered governmental support of religious schools, or the funds could be considered to be indistinguishable from other state funds used to protect children. After all, aren't government funds used to pay the police who direct traffic and help children cross the streets? Could the police refuse to help children because the children were on their way to a parochial school? If firemen were called to put out a fire, could they refuse because it was a parochial school?

These examples show that even though the Supreme Court has a clear three-part test to use, the test is usually hard to apply in particular cases. That is why Supreme Court decisions in this area may sometimes seem inconsistent. The Court has allowed government-supported busing for children going to parochial schools, not to favor religion, but merely to help the children get to school safely. The Court has disallowed prayers in public schools because it is not proper for the government to tell people how and when to pray. The Court has allowed a "released-time" program, which permitted public school children to leave their classes for off-campus religious instruction, but disallowed a similar program in which the religious instruction was given on the public school grounds. The Supreme Court has approved government aid to parochial school children for lunches and nonreligious textbooks, because such aid does not favor religion, but furthers the education and welfare of the children. On the other hand, the Supreme Court has held that governmental aid to parochial schools for teachers' salaries and other expenses would be promoting and favoring religion.

What about the part of the Constitution allowing the free exercise of religion? How far can the government go in restricting this right? Suppose a religion used an unlawful narcotic drug as an essential sacrament in its religious ceremony. Suppose the drug was essential to this ceremony. Could the government stop the members of this religion from using the drug? Would that be prohibiting the free exercise of religion? Is there a difference between religious belief and religious practice?

For many years, the Supreme Court held that the right to free exercise meant free exercise of religious beliefs, but that acts done in the practice of religion had to comply with the laws. Is this what the 1st Amendment intended? Recently the Supreme Court held that such a rule made the 1st Amendment meaningless. Now, the government cannot restrict or prevent acts done in the practice of religion unless the government shows a "compelling interest". What would be a "compelling interest" in the drug-sacrament case? In similar cases both state and federal courts have held that the government's interest in enforcing its

drug laws and in preventing the misuse of drugs is “compelling”. Therefore, in almost every case, the government can stop the use of drugs in the practice of a religion.

THE RIGHTS TO EQUALITY AND PRIVACY

The 14th Amendment has already been discussed with regard to how due process and equal protection are used by the courts to protect basic liberties and to insure fair treatment of all citizens under the law. However, the primary purpose of the 14th Amendment was to prohibit discrimination on the basis of race. Although this amendment was enacted immediately after the Civil War, it was not until late in the 19th century that the Supreme Court began applying it. At that time the Court said that although all races were equal, they did not have to function together in society. This was the Supreme Court's "separate but equal" policy. It was not until 1954, some 90 years after the Civil War, that the Supreme Court finally held that racial equality was impossible in a segregated society. Any discrimination on the basis of race is "suspect", and denies an individual the equal protection of the law. Only a "compelling" governmental interest can justify discrimination. Can you think of any governmental interests that would justify racial segregation?

In recent years, the Supreme Court's decisions have outlawed most forms of racial discrimination. These decisions have been reinforced by congressional legislation. Now, anti-discrimination laws apply to all but the most private places, such as a person's living room or a privately owned country club.

When someone is being discriminated against, that person can stop the discrimination in one of two ways. A private lawsuit can be brought against the people or organization practicing discrimination, or governmental agencies set up to enforce civil rights can be asked for assistance.

It is often easier for a citizen to complain to one of these agencies, and let it bring the lawsuit, than to file an independent private lawsuit. With either method, if discrimination is proven, it will be ordered stopped.

The Constitution does not expressly guarantee the right of privacy. Its origin has never been limited to one particular source. The right of privacy is one of the “fundamental” rights possessed by all human beings. Nevertheless, the Constitution does imply a right of privacy. The 4th Amendment protects all citizens from unreasonable searches. Privacy is also protected by the due-process clause of the 5th and 14th Amendments.

There has never been an attempt to list or define all the rights protected by due process. Many of them were listed in the Bill of Rights, but it is clear that these rights were not intended to be exclusive. The 9th Amendment reads, “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” In the past very little use has been made of this amendment, but the 9th Amendment does support the argument that people have rights not mentioned in the Constitution. Privacy is among these fundamental “natural” rights, which belong to all humans.

THE RIGHTS TO CITIZENSHIP, VOTE, AND TRAVEL

The basic right of citizenship has already been discussed in connection with congressional legislative power. Citizenship is a source of all other rights possessed by United States citizens. The rights of a native-born citizen and a naturalized citizen are the same.

At one time, Congress had the power to take away a person's citizenship. The only requirement was that Congress not violate due process by acting unreasonably. Congress today cannot *expatriate* a native born United States citizen or a citizen naturalized within the United States, unless that person voluntarily gives up citizenship. However, citizenship can be taken from a naturalized citizen if citizenship was obtained by lying about past activities that reflect on moral character or by lying when renouncing a previous citizenship.

Closely related to citizenship is the right to vote. All United States citizens have the right to vote in both federal and state elections. The 15th Amendment says that the right to vote cannot be denied because of race. The 19th Amendment guarantees that sex cannot be a basis for denying the right to vote. The 26th Amendment lowers the federal voting age to 18 years, and many states have also lowered state voting age to 18. Poll taxes, which impose a fee upon voting and thus discriminate against the poor, were outlawed by the 24th Amendment.

At one time, a state could require proof of a voter's ability to read

and write English, but, due to federal legislation, states can no longer use these “literacy tests”, or any other test of knowledge, to keep someone from voting. Nor can states impose property-owning requirements on voting. Many states have residency requirements for voting in state and local elections. In federal elections, anyone who has lived in one place for more than 30 days can vote.

Before World War I, Americans were free to travel anywhere in the world, without governmental restrictions. Few nations required *passports*. However, since the late 1930’s, Congress has passed legislation which requires a passport for travel outside the western hemisphere. Nearly all foreign nations also require travelers to possess passports and *visas*.

Originally, the State Department had complete control over who received passports. If the State Department felt that issuing a passport to a particular individual was contrary to the best interests of the United States, it could refuse to do so. Now, after several Supreme Court decisions, every citizen has the right to a passport on demand. However, the Supreme Court has allowed the State Department to place geographical area restrictions on where a citizen may travel. This is to protect the United States from serious international incidents and confrontations, which could result from the presence or actions of Americans in certain foreign countries.

United States citizens also have a right to interstate travel within the United States. The primary sources of this right are the “privileges and immunities” clauses of the 14th Amendment and Article IV, Section 2 of the Constitution. The right to travel is also considered to be a fundamental natural right possessed by all human beings.

GLOSSARY

<i>arbitrary</i>	not done in accordance with reason or judgment; based on one's own pleasure or preference.
<i>Bill of Rights</i>	the first ten amendments to the United States Constitution, which guarantee certain individual and personal rights.
<i>compelling interest</i>	a strong and justifiable reason.
<i>conscription</i>	compulsory enrollment of labor or resources into government service; the drafting of men into the armed forces.
<i>declaratory judgment</i>	a judgment which declares the rights of the parties, or expresses the opinion of the court on a question of law, without ordering anything to be done. It can be asked for even though no actual wrong or harm has been suffered.
<i>delegate</i>	a transfer of authority by one person to another; entrusting another with a power.
<i>direct tax</i>	a tax that is imposed directly on property according to its value; under federal law, a tax that must be apportioned among the states according to population.
<i>exclusive</i>	vested in one person alone; belonging only to one person or group of persons.
<i>expatriate</i>	to exile a person from his native land; the act of taking away citizenship.
<i>impeachment</i>	to bring a public official before the proper court on a charge of wrong doing; a criminal proceeding against a public officer.

<i>indirect tax</i>	a tax imposed on the happening of an event as distinguished from its tangible results; a tax upon a right or privilege.
<i>inherent sovereign power</i>	power or authority possessed by a sovereign without being derived from another; a natural and inborn power existing in a sovereign.
<i>judicial review</i>	the power of a court to examine governmental action for the purpose of determining its correctness or constitutionality.
<i>martial law</i>	temporary rule by military authorities over the civilian population.
<i>passport</i>	a government document granting permission to a citizen to travel in certain specified foreign countries and certifying his identity and citizenship.
<i>prior restraint</i>	the obstruction, hindrance, or prevention of action before it has begun.
<i>prurient</i>	having lustful thoughts or longings; lustful.
<i>reprieve</i>	to postpone or withdraw a sentence of punishment for an interval of time.
<i>sovereign</i>	a state or governmental body; the supreme political authority.
<i>tort</i>	a wrong committed upon the person or property of another; a private or civil wrong or injury.
<i>veto</i>	the constitutional right or power to reject legislation passed by another branch of the government.
<i>visa</i>	a mark stamped or written on a passport showing that it has been examined by the proper official of a country, and granting entry into that country.