

# Mooting Legal Issues

Religion, Speech & Searches  
In America

# A Few Basic Points

- The Federal Constitution applies to the state and local governments via the 14<sup>th</sup> Amendment.
  - Thus, it is common to see a case described as involving both the 1<sup>st</sup> and 14<sup>th</sup> Amendments, when in fact the only constitutional issue involves the 1<sup>st</sup> and the 14<sup>th</sup> is being used to apply the Federal constitution to a state or local government.

# Facts

- The case you are mooted was an actual case already decided by either the Supreme Court or a Court of Appeals .
- The facts of your case can be found in the majority opinion or appellate briefs.
  - I would start here, then start looking at the other resources on the website, and then read the majority and dissenting opinions.
- Pick out only the most important when creating facts for oral argument.

# Arguments

- You have already begun this process.
- Arguments for each side can found in:
  - The various resources I have provided you
  - The opinions from the actual cases
  - Other sources if you wish to expand your search.

# Reading the Brief

- The brief is your best source for the facts.
  - Facts can be framed!
  - Example: in the religious display cases one side emphasizes their religious nature, the other side their historical nature.
- You are only responsible for understanding the cases assigned to you on the website.
- BUT you can always refer to other cases during your argument.
  - You can even do so without naming cases: “this Court has held . . . .”

# Concurring/Dissenting Opinions

- Note how many of the quotes come from concurring and dissenting opinions.
  - They are usually opinions written by Justices currently on the Court, and are included to remind these Justices of their views.
  - They are not precedent!
  - However, an earlier concurring opinion often is adopted by a majority of the Court.
    - Example: The Endorsement Test

# Church/State Relations

“Congress shall make no law **respecting** the establishment of religion”

- U.S. Constitution, First Amendment

# How to Interpret “Establishment”

- Strict Separation - “there should be a wall separating church and state.”
  - a strict application of the Lemon Test
- Neutrality – state cannot confer benefit or impose burden on religion
  - a less strict application of the first prong of Lemon, along the lines of O'Connor's Endorsement approach.
- Accommodation/Equality – recognize importance of religion in society and accommodate its presence in government.
  - religion and government can mix as long as no one is coerced and government treats religions equally

# Various Tests Applied by the Court

- Lemon Test: if “NO” to either, unconstitutional!
  - does the state have a secular purpose
  - would the state's action be perceived as endorsing religion
    - NOTE - there was a third element that is sometimes discussed as part of the second element.
- Endorsement Test
  - Similar to Lemon Test, asks whether reasonable observer sees government action as making non-believers feel like outsiders.
- Coercion Test
  - does the state's action coerce a person to take part in a religion or religious practice

# The Precedent

- Religious symbols on government property.
  - Lynch v. Donnelly
    - Religious symbol permissible so long as it is part of display that has an overriding secular message.
  - County of Allegheny v. ACLU
    - This case exposes the stark disagreements among the Justices about these types of cases.
  - Stone v. Graham
    - Ten Commandments is inherently religious and cannot be hung in classrooms. (for 10 Commandments Cases)

# The Precedent

- Van Orden v. Perry
  - This is the case being argued by group 1 but will be used by group 2.
  - 4 Justices apply coercion test → display can stay.
  - 4 Justices apply Endorsement Test → display must be removed
  - 1 Justice applies Endorsement Test → [see Wikipedia summary](#) of Breyer's concurrence.

# Steps to Analyzing a Speech Case (Traditional Public Forum)

- Is it speech?
- Does it fall within a category of non-speech?
  - something the Court deems to be without value.
- Does it regulate speech based on content?
  - If so, then apply Strict Scrutiny Test:
    - government must have a compelling interest and the regulation is necessary to sever that interest.
  - If not, then apply a lesser standard
    - government has important interest, regulation is substantially related to that interest, and ample alternative avenues to communicate remain.

# Public Forums

- Not all government property is held open for speech activity.
- In traditional public forums (streets, sidewalks, parks), government may only regulate speech on neutral basis.
  - If content-based, then strict scrutiny
- Non-public forum = government property not open for speech.
  - Speech can be regulated here so long as reasonable and viewpoint neutral.

# Categories of Non-Speech

- obscenity
- defamation,
- fraud,
- incitement
- speech integral to criminal conduct
- threats

# Speech “in” Schools

- "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."
  - Tinker v. Des Moines
- However, schools may limit speech that is disruptive to the educational mission of the school.

# Speech in School Created Forums

- Schools may also limit speech that takes place in forums it creates.
  - This is considered “school sponsored student expression.”
  - Thus, when a student writes in a school newspaper, that is considered school sponsored student speech and it can be censored if the speech is inconsistent with school's educational mission.

# The Precedent

- Tinker v. Des Moines
  - Students have free speech rights so long as their speech does not disrupt the educational mission of the school.
- Bethel v. Frasier
  - Indecent speech is disruptive of the school's educational mission.
- Hazelwood v. Kuhlmeier
  - Schools may control speech that takes place in school created forums.

# Precedent

- The “out of school speech” groups are the only ones arguing a case that was NOT heard by the Supreme Court.
  - For this reason, there is more precedent
  - Horizontal stare decisis!
- NOTE – in all three cases, if the speech is deemed to have taken place outside of school, then apply strict scrutiny because speech is being regulated due to its content!

# 4<sup>th</sup> Amendment

- “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause.”
  - U.S. Constitution, 4<sup>th</sup> Amendment
- Helpful terms:
  - Expectation of privacy – the more a reasonable person expects privacy in a given situation, the more likely a warrant will be necessary.
  - Exigent Circumstances – the harder it is to get a warrant in a given situation, the more likely a warrant will not be deemed as necessary. e.g. car searches
  - Checkpoint – police block road, stop cars for administrative purpose (keep drunk drivers off the road, stop illegal immigration)

# The Fourth Amendment

- The best way to think about the 4<sup>th</sup> Amendment is it requires a search warrant for searches, but then the Supreme Court has made numerous exceptions to this requirement.
- The exceptions include:
  - Plain View
  - Search Incident to Arrest
  - Hot Pursuit
  - Vehicles
  - Emergency Circumstances

# Fourth Amendment

- Does not apply if the police action is not considered a search.
- Requires probable cause before a search can be conducted.
  - “substantial chance” or “fair probability” of criminal activity
    - See Illinois v. Gates (1983)

# Issues in the Jardines

- The use of drug dogs
  - Is these even a search? Is there a threat to privacy? Are the dogs reliable?
- The use of drug dogs near a home
  - NOTE - another case was heard on the same day about the use of these dogs after car was pulled over for expired license plates.
  - Does past precedent allowing dogs at checkpoints apply to homes?

# Precedent

- Edmonds (2000) – use of dogs at checkpoint whose primary purpose was discovery of criminal activity unconstitutional.
  - Michigan v. Sitz – administrative checkpoints allowed → purpose keep roads safe.
  - U.S. v. Place – dogs allowed to sniff luggage at airports
- Kyllo (2001) – use of thermal imaging device unconstitutional without warrant.
  - Cannot use technology to see inside of house.

# Precedent

- Caballes (2005) -
  - Initial stop of the car was lawful = speeding.
  - No legitimate expectation of privacy to exterior of car
  - No expectation of privacy = no 4<sup>th</sup> Amendment interest.