

CHAPTER 2: CONSTITUTIONAL LIMITATIONS

State governments and the federal government must abide by the U.S. Constitution, which imposes a number of restrictions on governmental power. Some of these restrictions are found in the Bill of Rights and the Fourteenth Amendment to the U.S. Constitution. For example, according to the First Amendment, Congress (the federal legislative body) cannot pass laws abridging freedom of speech or press. This applies to state legislatures as well. Additionally, the Bill of Rights contains provisions that place restrictions on governmental actors, such as the police (Fourth Amendment search and seizure actions), prosecutors (e.g., Sixth Amendment requirement that defendants know the charges against them and can call witnesses in their own behalf), and judges (e.g., Eighth Amendment right against cruel and unusual punishment). Additionally, the Fifth Amendment's federal and the Fourteenth Amendment's state due process requirements encompass all other prohibitions, and the Fourteenth Amendment's Equal Protection clause guarantees that the law must be applied to everyone equally.

Restrictions are not only found in the amendments to the U.S. Constitution, but also within the document itself. These are a defendant's right to file a writ of habeas corpus (challenging the legality of a sentence or punishment), the right to a trial by jury, the prohibition against bills of attainder (legislative acts that authorize punishment of specific people or groups without trial), and the prohibition against ex post facto laws (those that criminalize behaviors retroactively). All of these provisions, whether they give defendants rights or specifically prohibit governmental action, are in place to ensure that there is a check on governmental power and that laws are passed and enforced fairly.

The text discusses five limitations on the kinds of criminal laws that can be enacted by states or the federal government. Three of these were discussed above – ex post facto, equal protection, freedom of speech. The other two are found under the umbrella of the due process clause – void-for-vagueness (or clarity) and privacy. Generally, federal constitutional law is replicated at the state level, but sometimes it is necessary to include these provisions in state constitutions so as to give them local legitimacy. This chapter will discuss each of these as they apply to the state of Ohio.

EX POST FACTO

Ohio's prohibition against retroactive laws is found in Article 2, § 28 of the Ohio Constitution:

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Although the prohibition against retroactive laws is found in both the federal and Ohio state constitutions, determining what constitutes a retroactive law can be difficult. As early as 1854, in *Carpenter v. Pennsylvania*, (58 U.S. 456), the U.S. Supreme Court limited the prohibition against ex post facto laws to criminal laws only, thereby denying civil litigants protection from retroactivity. Additionally, in *Bezell v. Ohio*, (1925), the U.S. Supreme Court defined what a retroactive law is:

...any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto.

The constitutional prohibition and the judicial interpretation of it rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused (269 U.S. 167, p. 170).

Despite this, the U.S. Supreme Court indicated that some ex post facto laws are permissible:

But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation and not to limit the legislative control of remedies and modes of procedure which do not affect matters of substance
(269 U.S. 167, p. 171).

Thus, some ex post facto laws are allowed as long as they do not burden a defendant's substantive rights. But the distinction between substantive, remedial, and procedural rights is not always clear. For example, in *California Department of Corrections v. Morales*, (519 U.S. 499, 1995), California had passed a law permitting the parole board to defer meeting to review a parole application for up to three years under certain circumstances. The defendant, however, had been convicted before that law was passed, and under the law in place when convicted, he would have been entitled to a yearly parole review. The U.S. Supreme Court found that the law was not an unconstitutional ex post facto law. The Court reasoned that a change in the law regarding the frequency of parole hearings did not increase the penalty for the defendant's crime, particularly given that when the deferred hearings were going to take place, the same substantive guidelines would be used to determine parole eligibility. Instead, the law merely changed the procedures used by the parole board.

The Ohio Supreme Court has had occasion to interpret the ex post facto clause found in Ohio's state constitution. Two examples include *State v. Rush*, (83 Ohio St. 3d 53, 1998) and *State v. Cook*, (83 Ohio St. 3d 404, 1998).

State v. Rush

As indicated in Chapter 1, Ohio passed Senate Bill 2, effective July 1, 1996, to establish a revised felony sentencing system in the state. The legislation altered the sentences for some crimes – increasing some while decreasing others. Defendant Rush committed his crime prior to July 1, 1996, but was to be sentenced after the effective date. Rush petitioned to be sentenced under the new sentencing scheme, as the new punishment for his crime was now less than it was prior to the effective date of the guidelines. Rush was asking the court to apply the new punishment retroactively so that he could benefit from the new system. Rush felt that, since retroactivity would benefit him, the court would grant his request. However, the Ohio Supreme Court ruled that the Ohio General Assembly specifically indicated that Senate Bill 2 was prospective only, meaning that it applied only for those offenses committed on or after July 1, 1996. As a result, Rush was sentenced under the sentencing scheme that was in place when he committed his crime.

State v. Cook

In the mid-1990s, many states enacted new or more restrictive sex offender laws, modeled after “Megan’s Law” in New Jersey. Portions of Ohio’s new law went into effect in January 1, 1997, and it extended Ohio’s already existing sex offender law. In the older law, offender registration with law enforcement was required, but it did not require community notification or a designation of an offender as a “sexual

predator.” These two provisions were added in the 1997 law. Defendant Cook committed his offenses and was indicted in 1996, but was not sentenced until February 1997, after the new law was effective. At sentencing, the court designated him a “sexual predator” under the new law and Cook appealed, claiming a violation of ex post facto clause in the Ohio constitution because he committed his crime before the law was effective. Ultimately, the Ohio Supreme Court ruled against him. First, the court stated that laws are presumed to be prospective unless the legislature indicates that it intended the law to be retroactively applied.

In this case, the Ohio legislature had indicated that it intended the law to apply retroactively to sex offenders who had been convicted and sentenced before the law was passed, but who were still imprisoned. Nonetheless, the court explained that the prohibition against ex post facto laws in the Ohio constitution only applies to laws that effect substantive, but not remedial, rights. Because the designation and notification provisions were designed to protect the community, and were not intended to punish offenders, the court held that the law was remedial in nature. Thus it did not constitute the type of ex post facto law prohibited by the Ohio constitution even if it was retroactive. Finally, the court ruled that the law did not violate the ex post facto clause of the Federal Constitution because it was civil, not criminal, in nature, and the Federal Constitution only applies to criminal laws.

VOID-FOR-VAGUENESS

The term “void-for-vagueness” simply means that a law that is vague or unclear is not acceptable. A law is unconstitutionally vague if an ordinary person would not understand what conduct is prohibited. Protection from vague laws is derived from the due process clauses in the Fifth and Fourteenth Amendments of the federal Constitution and grounded in the idea that it is unfair to punish someone if they are never given clear notice about what they can and cannot do. The Ohio constitution does not contain a due process clause like the ones in the federal Constitution, apart from a so-called “open courts” provision which states:

All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay (Article 1, § 16).

Despite this, Ohio is bound by the due process clause in the federal Fourteenth Amendment.

Void-for-vagueness applies not only to the enactment of a law, but also to its enforcement. In other words, citizens must not only understand what is prohibited, state actors, such as police and prosecutors, must also be able to understand how to enforce the law. This was reinforced in the U.S. Supreme Court case *Kolender v. Lawson*, (461 U.S. 352, 1983):

...the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement (p. 357).

The Ohio Supreme Court has not been particularly receptive to void for vagueness arguments and has generally found that statutes passed by the Ohio legislature are not unclear. An example of this includes *Ohio v. Anderson*, discussed below.

Ohio v. Anderson

The defendant owned a pit bull, a mixed breed dog that varies in size and shape from animal to animal. He was charged with failing to confine a vicious dog and to obtain liability insurance for it in violation of a state statute. In relevant part, the statute defined a vicious dog as “any dog that...[b]elongs to a breed that is commonly known as a pit bull dog.” The defendant argued, and the court of appeals agreed, that because there is no standardized definition of a pit bull, an ordinary citizen would be unable to determine how to comply with the statute and officials would be unable to administer it in a fair and impartial fashion. The Ohio Supreme Court reversed, finding that even though there was no “statistically quantifiable method to distinguish a pit bull” from other dogs, the statute was not void for vagueness. The court noted that the defendant had a heavy burden if he wished to prove that the statute was vague-- he had to show that it was so unclear that he could not reasonably understand it. Moreover, despite some imprecision about the size and shape of pit bulls, the breed commonly possesses other distinctive physical features, such as short hair, muscularity, and an exceptionally strong bite, that could be observed or discovered by an ordinary owner. In addition, the breed possesses certain behavioral attributes, including a history of “frenzy” and a high tolerance for pain. These features, coupled with the fact that most owners obtain information about a dog when acquiring one, make it possible for the average citizen to determine if he owns a pit bull with only a minimal degree of effort and for officials to enforce the statute fairly. Nonetheless, in a subsequent case, the Ohio Supreme Court ruled that the vicious dog statute was unconstitutional to the extent it failed to provide a dog owner with an appeals process. *State v. Cowan*, 103 Ohio St. 3d 144 (2003).

EQUAL PROTECTION

The text discusses the equal protection clause of the U.S. Constitution as one that mandates fair and equal application of the law. After the Civil War, the equal protection clause was written to guarantee that former slaves would be treated equally. Despite this, many states continued to discriminate against Blacks by forcing them, among other things, to utilize separate public facilities than Whites. This policy of “separate but equal” was upheld by the U.S. Supreme Court in *Plessy v. Ferguson*, (163 U.S. 537, 1896), but ultimately struck down in *Brown v. Board of Education*, (347 U.S. 483, 1953).

Although *Brown* was a step in the right direction for equal protection, laws can still be passed that apply to a particular race, gender, nationality, etc. When challenged, however, such laws are subject to review by the courts. The text discusses three different levels of scrutiny that courts use to analyze these laws. The higher the level of scrutiny used by the court, the harder it will be for the state to show that the law is constitutional. The highest level of review is strict scrutiny, followed by intermediate scrutiny and then rational basis review. Generally, the courts have held that certain groups in society – “suspect groups” – have historically been subject to discriminatory laws, including blacks. Accordingly, laws that are directed at racial groups are subject to strict scrutiny in order to make sure that such groups are being treated fairly. In addition, strict scrutiny is used when laws deal with rights that have been deemed “fundamental,” such as speech, voting and privacy. Intermediate scrutiny is used to analyze laws dealing with gender. Lastly, laws that affect the poor, elderly, or mentally disabled are subject to rational basis review.

Ohio’s constitution contains an equal protection provision:

All political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they may deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly (Article 1, § 2).

Although the Ohio constitution does not specifically discuss using different levels of review for laws aimed at different groups (nor does the Federal Constitution for that matter) the Ohio Supreme Court

uses the three levels of scrutiny discussed above. In the following case, , the Ohio Supreme Court was called upon to review a law that singled out same-sex solicitation. This case is *State v. Thompson*, (95 Ohio St. 3d 264, 2002).

State v. Thompson

In this case, the male defendant solicited a male jogger, in violation of the law. The law specified that, no person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard (Ohio Revised Code, §2907.07 (B), 1972).

The defendant claimed that the law made an unlawful distinction between same-sex and different-sex conduct, singling out same-sex solicitation for different legal treatment than solicitation between genders, which was only subject to laws providing that “just asking” was not illegal. Although laws that make classifications based on gender are usually subject to intermediate scrutiny, because the statute essentially restricted same-sex speech it also dealt with a fundamental right, and was thus subject to strict scrutiny. , Pursuant to strict scrutiny, a law must serve a compelling governmental interest and must be narrowly tailored to serve that interest. The state tried to justify its distinction, claiming that same-sex solicitation was more likely to result in a violent response from the victim; thus, it was necessary to make the law applicable to same-sex conduct only. The Ohio Supreme Court reasoned that this was a compelling interest, but that the law was not narrowly tailored. The court explained that different-sex solicitation could likely produce a violent response as well, but the law ignored this type of solicitation and only punished same-sex solicitation. Therefore the law was underinclusive and it violated the equal protection clauses of the Federal and Ohio Constitutions.

FREEDOM OF SPEECH

Freedom of speech is considered one of the most fundamental rights, both at the federal and state level. Ohio’s free speech protection is found in Article 1, § 11 of its constitution:

Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

As indicated in the text, freedom of speech encompasses a wide range of conduct -- fighting words, obscenity, hate speech, flag burning, etc. As mentioned in Chapter 1 and in the text, an Ohio obscenity law was the subject of a famous quote by Justice Potter Stewart in *Jacobellis v. Ohio*, 378 U.S. 184 (1964). When defining obscenity, Stewart declared, “...I know it when I see it” (p. 198).

An interesting issue involving hate speech is the subject of the next Ohio example. There, a defendant challenged the constitutionality of Ohio’s ethnic intimidation law. The cases are *State v. Wyant*, 64 Ohio St. 3d 566, (1992) and *State v. Wyant* 68 Ohio St.3d 162 (1994).

State v. Wyant

Ohio's hate crime law is called the "ethnic intimidation" law. The law creates a penalty enhancement for menacing crimes if they are committed because of the race, religion or national origin of the victim. The conduct becomes punishable as an offense of the next higher degree than the offense that was committed (Ohio Revised Code, §2929.12, 1987). In this case, the defendant and his family were utilizing a campground space when a black couple began to utilize the space next to them. During the evening, the couple complained repeatedly of a loud radio being used by the defendant. As a result of the complaints, the defendant stated, in presence of the couple, "we didn't have this problem until those n moved in next to us," "I ought to shoot that black mother," and "I ought to kick his black a—." The couple complained and the defendant was charged with ethnic intimidation based on aggravated menacing.

On appeal, the defendant argued, and the Ohio Supreme Court agreed, that the statute criminalized thought and motive, and thus violated his freedom of speech.

A year later, the Federal Supreme Court ruled in the case of *Wisconsin v. Mitchell* 508 U.S. 476 (1993) a case which is found in the text. It involved a Wisconsin law that, like Ohio's ethnic intimidation statute, allowed sentence enhancements if a defendant "intentionally selects" his victim on the basis of race, religion, color, etc. As explained in the text, that statute was upheld because even though speech was involved, the law was aimed at conduct, not at speech. As a result, the federal Supreme Court vacated the Ohio Supreme Court's decision in *State v. Wyant*, and instructed it to revisit the decision in *Wyant* light of the ruling in *Wisconsin v. Mitchell*.

Thus, in a second case called *State v. Wyant*, 68 Ohio St. 3d 162, (1994), the Ohio Supreme Court summarily vacated its earlier decision, ruling that Ohio's ethnic intimidation law was constitutional for the same reasons that the Federal Supreme Court found that Wisconsin's statute was Constitutional

PRIVACY

The right to privacy is not explicitly mentioned in the U.S. Constitution, but it is inferred from the Fourth and Ninth Amendments. As a result, what is considered "private" can be highly subjective, depending on who is making and enforcing the law. The text discusses a number of privacy issues, including birth control, abortion, and same-sex relationships. The following case of *State ex. rel Keller v. Cox*, 85 Ohio St. 3d 279 (1999), discusses privacy with regard to personal information.

State ex. rel. Keller v. Cox

Pursuant to Ohio's open records act, the attorney for a defendant in a federal lawsuit requested the personnel file and internal affairs records for a detective in a county sheriff's office who was going to be a witness in the federal case. When the sheriff's office refused, she filed a writ of mandamus in state court seeking to compel production of the documents. The Ohio Supreme Court ruled that the records need not be provided for a number of reasons, including that the requested records, which included information such as the names of the detective's children and spouse, home address, telephone number, medical benefits, and the like were protected by a constitutional right to privacy and should not be provided to a defendant who might "use such information to achieve nefarious ends."

REFERENCES

Ohio Revised Code - <http://codes.ohio.gov/>

Beazell v. Ohio, 269 U.S. 167 (1925)

Brown v. Board of Education, 347 U.S. 483 (1953).

California Department of Corrections v. Morales, 514 U.S. 499 (1995).

Carpenter v. Pennsylvania, 58 U.S. 456 (1854) Jacobellis v. Ohio, 378 U.S. 184 (1964)

Kolender v. Lawson, 461 U.S. 352 (1983)

Plessy v. Ferguson, 163 U.S. 537 (1896)

State v. Anderson, 57 Ohio St.3d 168 (1991)

State v. Cook, 83 Ohio St. 3d 404 (1998)

State v. Cowan, 103 Ohio St. 3d 144 (2003) State v. Rush, 83 Ohio St. 3d 53 (1998)

State v. Thompson, 95 Ohio St. 3d 264 (2002)

State v. Wyant, 64 Ohio St. 3d 566, (1992)

State v. Wyant, 68 Ohio St. 3d 162 (1994)

State ex. rel Keller v. Cox, 85 Ohio St. 3d 279 (1999)

Wisconsin v. Mitchell, 508 U.S. 476 (1993)

REVIEW QUESTIONS

1. What was the first U.S. Supreme Court case to rule that ex post facto applies to criminal cases only?
 - a. Stanley v. Georgia
 - b. Carpenter v. Pennsylvania
 - c. Kolendar v. Lawson
 - d. R.A.V. v. St. Paul
2. For what reason did the Ohio Supreme Court rule that Ohio's sex offender statute can be retroactive?
 - a. it is a civil penalty, not a criminal punishment
 - b. the law was remedial rather than substantive
 - c. sex offenders have fewer rights than other offenders
 - d. a and b only
 - e. a, b, and c are correct
3. For what reason did the Ohio Supreme Court find that Ohio's "vicious dog" law was not void for vagueness?
 - a. it did not provide dog owners with an opportunity to refute a dog warden's decision
 - b. the definition of a pit bull as a vicious dog was clear enough for the average citizen to understand
 - c. it was not clear about how dog owners must restrain their dangerous dogs
 - d. it did not allow the judge to sentence the defendant to jail
4. In State v. Thompson, what level of scrutiny was utilized by the Ohio Supreme Court when reviewing the same-sex solicitation statute?
 - a. rational basis
 - b. intermediate
 - c. strict
 - d. legitimate

DISCUSSION QUESTION

The purpose of hate crime laws is to punish more severely those crimes committed due to a certain victim characteristic, such as race. Most states and the federal government have their own hate crime laws, but they are not consistent. For instance, Ohio's ethnic intimidation law applies to race, color, religion, and national origin, while the federal government's hate crime law applies to race, color, religion, national origin, ethnicity, gender, sexual orientation, and disability. Should hate crime laws be limited in scope, like Ohio's law, or should hate crime laws should be expansive, like the federal law? Are some groups are more deserving of hate crime legislation than others? Explain. Do such laws pose a real threat to freedom of speech? Why or why not? When answering this question, consider the functions that Emerson argues are central to democracy and that are protected by freedom of speech (discussed in the text).

WEB RESOURCES

- www.legislature.state.oh.us/constitution.pdf - for access to Ohio's constitution
- www.ohio.gov/ohio/ohiolaws.html - website of the Ohio state government, with links to the Ohio Revised Code
- www.law.cornell.edu/constitution/constitution.overview.html - U.S. Constitution website
- <http://www.acluohio.org/> - website for the Ohio chapter of the American Civil Liberties Union, an advocacy devoted to constitutional issues, including free speech
- http://www.fed-soc.org/chapters/countries.201,states.38/chaptersList_ByCountriesStates.asp - website for the Ohio chapter of the Federalist Society, an advocacy group devoted to constitutional issues