

The U.S. Constitution

- Distributes power between the federal and state/local governments
- Provides a framework for balancing public health and individual interests



1. Free Speech
2. Due Process
3. Equal Protection

Constitutional Rights

Constitutional Right #1

Free Speech

Question

Why is it difficult for the government to ban junk food advertisements within 1,000 feet of urban schools – but OK for the government to ban junk food advertisements in schools?





1st Amendment




The government "shall make no law . . . abridging the freedom of speech"

The First Amendment protects...

Advertising?




The Commercial Speech Test

- Does the restriction limit speech that is deceptive or related to illegal activity?
- Does the government have an important interest that it is trying to advance with the restriction?
- Does the restriction effectively advance that government interest?
- Does the restriction prohibit a lot more speech than is necessary to fix the problem?

Lorillard Tobacco Co. v. Reilly (U.S. 2001)

- Not only about deceptive speech. Not only about illegal activity.
- The government's interest in reducing youth tobacco use is substantial.
- The billboard ban effectively advances that goal.



BUT: The ban is too broad.

Requiring Point of Sale Health Warnings

The Compelled Speech Test

- Reasonable relationship: Are the required factual disclosures reasonably related to the government's interest in preventing consumer deception?
 - A warning has only indisputable facts
 - Findings based on strong research
 - Concluding that warning needed to protect health
 - Consumers will be deceived if no warning

Requiring Point of Sale Health Warnings



K – 12 Schools are Non-Public Forums

Advertising generally can be limited or prohibited without violating the First Amendment

The Non-public Forum Test

- Public property that is not traditionally designated as a place where public communication occurs:
 - E.g., military bases, post offices, k-12 schools
- The policy must be
 - Reasonable
 - Viewpoint neutral

Question

Why is it difficult for the government to ban junk food advertisements within 1,000 feet of urban schools – but OK for the government to ban junk food advertisements in schools?

Answer

Under the commercial speech test, a ban on junk food advertisements near urban schools is probably too broad.

A school is a non-public forum where the government has a lot of leeway to restrict speech.

Constitutional
Right #2

Due Process

Question

Why is it easier for the government to regulate smoking in public, trans fats in restaurants, and drunk driving than it is for the government to regulate contraception, abortion, or consensual sex between adults of the same gender?

Due Process (5th and 14th Amendments)

The government cannot deprive individuals of life, liberty, or property **without due process of law**

Substantive Due Process

Does the government have an **appropriate justification** for depriving someone of life, liberty, or property?

Fundamental Liberties



Heightened Scrutiny Test

Test:

Government action must be **narrowly tailored** or must be the least **restrictive alternative** to achieve an **important** or **compelling** goal

Examples:

Texas law criminalizing sexual intimacy between two people of the same gender.

Local ordinance forbidding the consumption of junk food in homes of families with small children?

Fundamental Liberties? No.



Rational Basis Test

Test:

Government action must be **reasonably related** to a **legitimate** government goal

Example:

Local ordinance prohibiting smoking in restaurants and bars.

Comparison

	Individual's interest is:	Government's goal must be:	Fit between action and goal must be:
RATIONAL BASIS TEST	minimal	legitimate	reasonable
HEIGHTENED SCRUTINY TEST	protected	important or compelling	narrowly tailored or least restrictive alternative

Question

Why is it easier for the government to regulate smoking in public, trans fats in restaurants, and drunk driving than it is for the government to regulate contraception, abortion, or consensual sex between adults of the same gender?

Answer

Substantive due process requires that:

- a regulation of smoking, restaurants, or driving need only be reasonably related to a legitimate government goal
- a regulation of contraception, abortion, or same-sex intimacy must be narrowly tailored to achieve a compelling government goal

Constitutional
Right #3

Equal Protection

Question

Why is it OK for the government pass a law that imposes menu labeling requirements on large chain restaurants but not smaller chains or independents?

Why is it difficult for the government to pass a law that bans a particular racial or ethnic minority from entering certain restaurants?

Equal Protection (5th & 14th Amendments)

The government shall not “deny to any person within its jurisdiction the **equal protection** of the laws”



Heightened Scrutiny Test

Test:

Government action must be **narrowly tailored** to achieve a **compelling** government goal

Example:

Ordinance restricting the number or density of fast food restaurants in largely African American or Latino neighborhoods?

Non-protected classifications

vs.

vs.

Rational Basis Test

Test:
Government action must be **reasonably related** to a **legitimate** government goal

Example:
Ordinance banning tobacco sales in pharmacies but not grocery stores.

Question

Why is it OK for the government pass a law that imposes menu labeling requirements on large chain restaurants but not smaller chains or independents?

Why is it difficult for the government to pass a law that bans a particular racial or ethnic minority from entering certain restaurants?

Answer

Equal protection requires that:

- A law discriminating against a certain category of business need only be reasonably related to a legitimate government goal
- Equal protection requires that a law discriminating against a racial or ethnic minority must be narrowly tailored to achieve a compelling government goal

- Federalism
- Preemption
- Constitutional Rights
 1. Free Speech
 2. Due Process
 3. Equal Protection

Questions?

public health
law & policy

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