

McCormick Foundation Civics Program

2010 First Amendment Summer Institute

Freedom of Speech: Time, Place & Manner Restrictions

Shawn Healy

Director of Educational Programs
Civics Program



Freedom of Speech

- **First Amendment:** “Congress shall make no law...abridging...the freedom of speech...”

- **Three Tiers of Scrutiny:**
 - Upper Tier: Strict Scrutiny
 - Pure speech

 - Middle Tier: Intermediate Scrutiny
 - Speech plus
 - Commercial speech

 - Lower Tier: Reasonableness
 - Time, place, and manner restrictions
 - Non-public forums

Freedom of Speech: Public Forum Analysis

- **Traditional Public Forum:** Existed since “time of mind, “ i.e., a public park—content based restrictions highly suspect
- **Limited (or Designated) Public Forum:** Established by government policy and practice; they may be limited to the class of content for which the forum is established—time, place and manner restrictions are permissible, but content based restrictions must be narrowly drawn and serve a compelling state interest
- **Nonpublic Forum:** Regulation must be reasonable and not an attempt to silence expression because public officials oppose the speaker’s view

Freedom of Speech

○ Pure Speech:

- Forcing an individual to articulate or disseminate the government's message
- Compelling an individual to disclose his or her position on an issue
- Viewpoint or content-based discrimination
- Regulation aimed at the suppression of expression
- Regulation of expression in a public forum other than content neutral time, place, and manner restrictions
- Test:
 1. Regulation is presumptively unconstitutional and the government must establish its constitutionality
 2. The government must establish a compelling interest
 3. The government must show that the regulation is the least restrictive alternative

Freedom of Speech

○ Speech Plus:

- Combination of speech and non-speech elements
 1. There is an intent to deliver a message
 2. It is likely that the message will be understood by the intended audience
- If both of these conditions are not met, this activity is not considered expression and therefore falls into the lowest tier of scrutiny
- Test: Government regulation is permissible when...
 1. It is within the constitutional power of government
 2. It furthers an important or substantive government interest
 3. The regulation is not related to the suppression of expression
 4. The incidental impact on expression is no greater than necessary to further that interest

Freedom of Speech

- Content-Neutral Time, Place and Manner Restrictions in a Public Forum:
 - Test: Government may impose generally applicable, reasonable time, place and manner restrictions when...
 1. The regulated speech is not content-specific
 2. The restrictions are narrowly-tailored and serve a significant government interest
 3. The restrictions leave ample alternative means to convey the message

Freedom of Speech

- Expression in a Nonpublic Forum (Conduct):
 - Test: Reasonableness...
 1. The burden is on the attacking party to show that the regulation is arbitrary
 2. The test is met if there is a reasonable connection between the policy the government has chosen and the problem it is intended to address
 3. The policy need not be the best alternative, but merely a reasonable one
 4. Does not trigger First Amendment scrutiny, but may be challenged on due process grounds, specifically on the basis of vagueness, where a reasonably intelligent person has adequate notice of what the statute prohibits

Time, Place, and Manner Restrictions

○ Group Exercise:

1. Review the fact pattern of the assigned Supreme Court case and apply the three-pronged test for time, place and manner restrictions to determine the constitutionality of the regulation under scrutiny
2. If the said regulation fails any part of the test, how can it be modified to satisfy all three prongs?
3. Construct a model policy that meets the time, place and manner test for one of four assigned government restrictions on expressive activities
4. Report your findings to the class

Time, Place, and Manner Restrictions

○ Group Exercise Discussion:

1. Review the fact pattern of the assigned case and apply the three-pronged test for time, place and manner restrictions to determine the constitutionality of the regulation under scrutiny
 - Police Dept. of Chicago v. Mosley* (1972)
 - Ward v. Rock Against Racism* (1989)
 - Madsen v. Women's Health Center, Inc.* (1994)
 - Million Youth March, Inc. v. Safir* (1998)
2. If the said regulation fails any part of the test, how can it be modified to satisfy all three prongs?

Time, Place, and Manner Restrictions

○ Group Exercise Discussion Continued:

3. Construct a model policy that meets the time, place and manner test for one of four assigned government restrictions on expressive activities
 - Limits on the noise level of speech
 - Cap on the number of protesters who may occupy a given forum
 - Ban on early morning or late evening demonstrations
 - Restrictions on the size and placement of signs on government property

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Questions?

