Solution and Answer Guide

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Chapter 02: Constitutional Law

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# Critical Thinking Questions in Features

Adapting the Law to the Online Environment

1. One observer has said that the American legal system should evaluate social media companies based on how “they affect us as citizens, not only [on how] they affect us as consumers.” What is your opinion of this statement?

Solution

The person who made this statement clearly sees a “citizen” as having different motivations and concerns than a “consumer.” Presumably, a citizen is mostly concerned with the good of society as a whole, and therefore would be open to the idea of government regulation that restricted the negative influence of social media, regardless of the First Amendment. A consumer, by contrast, would be primarily concerned with having a marketplace that offers the widest possible varieties of freedom (of choice, of speech, etc.) and would for that reason be opposed to government regulation of social media. There is, however, an argument to be made that the citizens that make up a society benefit when the marketplace of ideas—whether they are subjectively “positive” or “negative”—is allowed to flourish in the absence of government regulation.

1. Tim Cook, Apple’s chief operating officer, has suggested that the United States Congress should pass a law limiting the ability of Apple and other tech countries to keep consumer data private. Why would a business executive make such a request?

Solution

Cook may have wanted to end a controversy that puts Apple squarely at odds with the federal government. After all, large companies such as Apple rely on favorable treatment from the government in regulatory matters, international trade agreements, and many other areas. Also, large corporations such as Apple sometimes gain an advantage over competitors when their industries are regulated. For example, Apple has significant resources with which to lobby Congress for favorable treatment, and it is better positioned to bear the costs of regulation than are other, smaller tech companies. Finally, Apple’s position as a champion of consumer privacy would be damaged if it “caved” and changed its stance without being forced to do so by a new federal law.

# Critical Thinking Questions in Cases

Case 2.1

1. What “dangerous conditions” might have prompted the city to enact the ordinances at issue in this case? Why?

Solution

As noted in the facts of the case, both ordinances at issue included an extensive rationale for their adoption, stating essentially that a geographically small city has the right to restrict a business from operating within the city when the restriction is for the safety of the city’s citizens and visitors.

As the basis for the city’s regulation, the appellate court referred to “the dangerous conditions” created by the irresponsible driving behavior of scooter renters, especially at night, amplified by the lack of training, supervision, and oversight practiced by the rental scooter businesses that “existed throughout the entire city.” The court paraphrased the expressive clauses in the ordinances more specifically:

* The City is geographically small and crowded and is being besieged by inexperienced scooter drivers seeking amusement and driving in a dangerous manner.
* The City is a tourist destination frequented by tens of thousands of individuals, and its streets are congested by scooters that are being driven illegally and in areas where they are not permitted.
* The City’s residents and visitors are put in dangerous situations as a result of the improper use of scooters, especially at night.
* City businesses have complained about numerous trespasses on their property by people driving scooters while being disruptive
* City police have been unable to cope with the situation and essential police resources are being drained.
* The City has been unable to control the situation through less restrictive means.

1. What is the likely economic impact of the ordinances on the businesses in the city? Discuss.

Solution

With the exception of the scooter rental businesses, the effect on the city’s economy is likely to be positive in light of the result in the Classy case.

The answer to the previous question contains the reasons in support of this outlook. With a ban on motorized scooters, the “small and crowded” city is not likely to be “besieged by inexperienced scooter drivers seeking amusement and driving in a dangerous manner.” The streets, filled with “tens of thousands” of tourists, will not be “congested by scooters that are being driven illegally and in areas where they are not permitted.” Residents and visitors will not be “put in dangerous situations as a result of the improper use of scooters, especially at night.” There will be an end to the “numerous trespasses” on business property “by people driving scooters while being disruptive.” And “essential police resources” will not be “drained,” at least not by irresponsible scooter drivers and riders. All of which bodes well for business.

Case 2.2

1. If this case had involved a small, private retail business that did not advertise nationally, would the result have been the same? Why or why not?

Solution

It is not likely that the result in this case would have been different even if the facts had involved a small, private retail business that did not advertise nationally. The intended impact of the decision in *Heart of Atlanta* was to uphold the constitutionality of the Civil Rights Act of 1964 and the power of Congress to regulate interstate commerce to stop local discriminatory practices. In the Supreme Court’s opinion, “The power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”

Thus, if the case had involved a small, local retail business, the Court would have found participation in interstate commerce based on the use of a phone, or a Facebook page (or other Internet presence), or sales to customers who traveled across state lines—or, as in *Wickard v. Filburn*, participation might have been based on any transaction that might otherwise have occurred in interstate commerce.

Case 2.3

1. Whose interests are advanced by the banning of certain types of advertising?

Solution

The government’s interests are advanced when certain ads are banned. For example, in the *Bad Frog* case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of “vulgar and profane” advertising from children’s sight arguably advanced the state’s interest in protecting children from those ads.

1. If Bad Frog had sought to use the offensive label to market toys instead of beer, would the court’s ruling likely have been the same? Explain your answer.

Solution

Probably not. The reasoning underlying the court’s decision in the case was, in part, that “the State’s prohibition of the labels . . . does not materially advance its asserted interests in insulating children from vulgarity . . . and is not narrowly tailored to the interest concerning children.” The court’s reasoning was supported in part by the fact that children cannot buy beer. If the labels advertised toys, however, the court’s reasoning might have been different.

# Chapter Review

Practice and Review

A state legislature enacted a statute that required any motorcycle operator or passenger on the state’s highways to wear a protective helmet. Jim Alderman, a licensed motorcycle operator, sued the state to block enforcement of the law. Alderman asserted that the statute violated the equal protection clause because it placed requirements on motorcyclists that were not imposed on other motorists. Using the information presented in the chapter, answer the following questions.

1. Why does this statute raise equal protection issues instead of substantive due process concerns?

Solution

When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

1. What are the three levels of scrutiny that the courts use in determining whether a law violates the equal protection clause?

Solution

The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are strict scrutiny (if fundamental rights are at stake), intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and the “rational basis” test (in matters of economic or social welfare).

1. Which level of scrutiny or test would apply to this situation? Why?

Solution

The court would likely apply the rational basis test, because the statute regulates a matter of social welfare by requiring helmets. Similar to seat-belt laws and speed limits, a helmet statute involves the state’s attempt to protect the welfare of its citizens. Thus, the court would consider it a matter a social welfare and require that it be rationally related to a legitimate government objective.

1. Under this standard or test, is the helmet statute constitutional? Why or why not?

Solution

The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

Practice and Review: Debate This

1. Legislation aimed at protecting people from themselves concerns the individual as well as the public in general. Protective helmet laws are just one example of such legislation. Should individuals be allowed to engage in unsafe activities if they choose to do so?

Solution

Certainly many will argue in favor of individual rights. If certain people wish to engage in risky activities such as riding motorcycles without a helmet, so be it. That should be their choice. No one is going to argue that motorcycle riders believe that there is zero danger when riding a motorcycle without a helmet. In other words, individuals should be free to make their own decisions and consequently, their own mistakes.

In contrast, there is a public policy issue involved. If a motorcyclist is injured in an accident because that motorcyclist was not wearing a protective helmet, society ends up paying in the form of increased medical care expenses, lost productivity, and even welfare for other family members. Thus, the state has an interest in protecting the public in general by limiting some individual rights.

Issue Spotters

1. South Dakota wants its citizens to conserve energy. To help reduce consumer consumption of electricity, the state passes a law that bans all advertising by power utilities within the state. What argument could the power utilities use as a defense to the enforcement of this state law?

Solution

Even if commercial speech is neither related to illegal activities nor misleading, it may be restricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this situation, however, the interest in energy conservation is substantial, but it could be achieved by less restrictive means. That would be the utilities’ defense against the enforcement of this state law.

1. Suppose that a state imposes a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies. Is this a violation of the equal protection clause if the only reason for the tax is to protect the local firms from out-of-state competition? Explain.

Solution

Yes. The tax would limit the liberty of some persons (out of state businesses), so it is subject to a review under the equal protection clause. Protecting local businesses from out-of-state competition is not a legitimate government objective. Thus, such a tax would violate the equal protection clause.

Business Scenarios and Case Problems

1. **The Free Exercise Clause.** Thomas worked in the nonmilitary operations of a large firm that produced both military and nonmilitary goods. When the company discontinued the production of nonmilitary goods, Thomas was transferred to the plant producing military equipment. Thomas left his job, claiming that it violated his religious principles to participate in the manufacture of goods to be used in destroying life. In effect, he argued, the transfer to the military equipment plant forced him to quit his job. He was denied unemployment compensation by the state because he had not been effectively “discharged” by the employer but had voluntarily terminated his employment. Did the state’s denial of unemployment benefits to Thomas violate the free exercise clause of the First Amendment? Explain. (See *Business and the Bill of Rights*.)

Solution

Thomas has a constitutionally protected right to the free exercise of his religion. In denying his claim for unemployment benefits, the state violated this right. Employers are obligated to make reasonable accommodations for their employees’ beliefs that are openly and sincerely held, as were Thomas’s beliefs. By moving him to a department that made military goods, his employer effectively forced him to choose between his job and his religious principles. This unilateral decision on the part of the employer was the reason Thomas left his job and why the company was required to compensate Thomas for his resulting unemployment.

1. **Spotlight on Plagiarism—Due Process.** The Russ College of Engineering and Technology of Ohio University announced in a press conference that it had found “rampant and flagrant plagiarism” in the theses of mechanical engineering graduate students. Faculty singled out for “ignoring their ethical responsibilities” included Jay Gunasekera, chair of the department. Gunasekera was prohibited from advising students. He filed a suit against Dennis Irwin, the dean of Russ College, for violating his due process rights. What does due process require in these circumstances? Why? [*Gunasekera v. Irwin*, 551 F.3d 461 (6th Cir. 2009)] (See *Due Process and Equal Protection*.)

Solution

To adequately claim a due process violation, a plaintiff must allege that he was deprived of “life, liberty, or property” without due process of law. A faculty member’s academic reputation is a protected interest. The question is what process is due to deprive a faculty member of this interest and in this case whether Gunasekera was provided it. When an employer inflicts a public stigma on an employee, the only way that an employee can rectify the situation is through publicity. Gunasekera’s alleged injury was his public association with the plagiarism scandal. Here, the court reasoned that “a name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera’s name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved.” Thus the court held that Gunasekera was entitled to a public name-clearing hearing.

1. **Business Case Problem with Sample Answer—Freedom of Speech.** Mark Wooden sent an e-mail to an alderwoman for the city of St. Louis. Attached was a nineteen-minute audio that compared her to the biblical character Jezebel—she was a “bitch in the Sixth Ward,” spending too much time with the rich and powerful and too little time with the poor. In a menacing, maniacal tone, Wooden said that he was “dusting off a sawed-off shotgun,” called himself a “domestic terrorist,” and referred to the assassination of President John F. Kennedy, the murder of a federal judge, and the shooting of Congresswoman Gabrielle Giffords. Feeling threatened, the alderwoman called the police. Wooden was convicted of harassment under a state criminal statute. Was this conviction unconstitutional under the First Amendment? Discuss. [State of Missouri v. Wooden, 388 S.W.3d 522 (Mo. 2013)] (See Business and the Bill of Rights.)

**—For a sample answer to Problem 2-3, go to Appendix E.**

Solution

No, Wooden’s conviction was not unconstitutional. Certain speech is not protected under the First Amendment. Speech that violates criminal laws—threatening speech, for example—is not constitutionally protected. Other unprotected speech includes fighting words, or words that are likely to incite others to respond violently. And speech that harms the good reputation of another, or defamatory speech, is not protected under the First Amendment.

In his e-mail and audio notes to the alderwoman, Wooden discussed using a sawed-off shotgun, domestic terrorism, and the assassination and murder of politicians. He compared the alderwoman to the biblical character Jezebel, referring to her as a “bitch in the Sixth Ward.” These references caused the alderwoman to feel threatened. The First Amendment does not protect such threats, which in this case violated a state criminal statute. There was nothing unconstitutional about punishing Wooden for this unprotected speech.

In the actual case on which this problem is based, Wooden appealed his conviction, arguing that it violated his right to freedom of speech. Under the principles set out above, the Missouri Supreme Court affirmed the conviction.

1. **Equal Protection.** Abbott Laboratories licensed SmithKline Beecham Corp. to market an Abbott human immunodeficiency virus (HIV) drug in conjunction with one of SmithKline’s drugs. Abbott then increased the price of its drug fourfold, forcing SmithKline to increase its prices and thereby driving business to Abbott’s own combination drug. SmithKline filed a suit in a federal district court against Abbott. During jury selection, Abbott struck the only self-identified gay person among the potential jurors. (The pricing of HIV drugs is of considerable concern in the gay community.) Could the equal protection clause be applied to prohibit discrimination based on sexual orientation in jury selection? Discuss. [*SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014)] (See *Due Process and Equal Protection*.)

Solution

Yes, the equal protection clause can be applied to prohibit discrimination based on sexual orientation in jury selection. The appropriate level of scrutiny would be intermediate scrutiny. Under the equal protection clause of the Fourteenth Amendment, the government cannot enact a law or take another action that treats similarly situated individuals differently. If it does, a court examines the basis for the distinction. Intermediate scrutiny applies in cases involving discrimination based on gender. Under this test, a distinction must be substantially related to an important government objective.

Gays and lesbians were long excluded from participating in our government and the privileges of citizenship. A juror strike on the basis of sexual orientation tells the individual who has been struck, as well as the trial participants and the general public, that the judicial system still treats gays and lesbians differently. This deprives these individuals of the opportunity to participate in a democratic institution on the basis of a characteristic that has nothing to do with their fitness to serve.

In the actual case on which this problem is based, SmithKline challenged the strike. The judge denied the challenge. On SmithKline’s appeal, the U.S. Court of Appeals for the Ninth Circuit held that the equal protection clause prohibits discrimination based on sexual orientation in jury selection and requires that heightened scrutiny be applied to equal protection claims involving sexual orientation. The appellate court remanded the case for a new trial.

1. **Procedural Due Process.** Robert Brown applied for admission to the University of Kansas School of Law. Brown answered “no” to questions on the application asking if he had a criminal history and acknowledged that a false answer constituted “cause for . . . dismissal.” In fact, Brown had criminal convictions for domestic battery and driving under the influence. He was accepted for admission to the school. When school officials discovered his history, however, he was notified of their intent to dismiss him and given an opportunity to respond in writing. He demanded a hearing. The officials refused to grant Brown a hearing and then expelled him. Did the school’s actions deny Brown due process? Discuss. [*Brown v. University of Kansas*, 599 Fed. Appx. 833 (10th Cir. 2015)] (See *Due Process and Equal Protection*.)

Solution

No, the school’s actions did not deny Brown due process. Procedural due process requires that any government decision to take life, liberty, or property must be made fairly. The government must give a person proper notice and an opportunity to be heard. The government must use fair procedures—the person must have at least an opportunity to object to a proposed action before a fair, neutral decision maker.

In this problem, Robert Brown applied for admission to the University of Kansas School of Law. He answered “no” to the questions on the application about criminal history and acknowledged that a false answer constituted cause for dismissal. He was accepted for admission to the school. But Brown had previous criminal convictions for domestic battery and driving under the influence. When school officials discovered this history, Brown was notified of their intent to dismiss him and given an opportunity to respond in writing. He demanded a hearing. The officials refused, and expelled him. As for due process, Brown knew he could be dismissed for false answers on his application. The school gave Brown notice of its intent to expel him and gave him an opportunity to be heard (in writing). Due process does not require that any specific set of detailed procedures be followed as long as the procedures are fair.

In the actual case on which this problem is based, Brown filed a suit in a federal district court against the school, alleging denial of due process. From a judgment in the school’s favor, Brown appealed. The U.S. Court of Appeals for the Tenth Circuit affirmed, concluding that “the procedures afforded to Mr. Brown were fair.”

1. **The Commerce Clause.** Regency Transportation, Inc., operates a freight business throughout the eastern United States. Regency maintains its corporate headquarters, four warehouses, and a maintenance facility and terminal location for repairing and storing vehicles in Massachusetts. All of the vehicles in Regency’s fleet were bought in other states. Massachusetts imposes a use tax on all taxpayers subject to its jurisdiction, including those that do business in interstate commerce, as Regency does. When Massachusetts imposed the tax on the purchase price of each tractor and trailer in Regency’s fleet, the trucking firm challenged the assessment as discriminatory under the commerce clause. What is the chief consideration under the commerce clause when a state law affects interstate commerce? Is Massachusetts’s use tax valid? Explain. [*Regency Transportation, Inc. v. Commissioner of Revenue*, 473 Mass. 459, 42 N.E.3d 1133 (2016)] (See *The Constitutional Powers of Government.*)

Solution

Yes, Massachusetts’s use tax is valid under the commerce clause. When a state regulation that affects interstate commerce is challenged under the commerce clause, the court weighs the state’s interest in regulating the matter against the burden that the regulation places on interstate commerce. Because a court balances the interests involved, it is difficult to predict the outcome in a particular case. State laws that alter conditions of competition to favor in-state interests over out-of-state competitors in a market are considered discriminatory and usually invalidated.

In this problem, Regency Transportation, Inc., operates a freight business throughout the eastern United States. Regency maintains a headquarters, warehouses, and other facilities in Massachusetts. All of the vehicles in Regency’s fleet were bought in other states. When Massachusetts imposed a use tax on the purchase price of each tractor and trailer in Regency’s fleet, the trucking firm challenged the assessment as discriminatory under the commerce clause. But Massachusetts imposes the tax on all taxpayers subject to its jurisdiction, not only those that, like Regency, do business in interstate commerce. Hence, the tax is not discriminatory. As for the balancing test, Massachusetts presumably imposes the tax based on the benefits derived from a company’s using and storing vehicles in the state. The burden that the regulation places on interstate commerce seems slight weighed against the state’s interest in regulating this matter.

In the actual case on which this problem is based, Nichols filed a suit in a federal district court against TNI, alleging discrimination on the basis of sex. TNI filed a motion for summary judgment, which the court granted. But the U.S. Court of Appeals for the Eighth Circuit reversed. “Genuine issues of material fact remain.”

1. **Freedom of Speech.** Wandering Dago, Inc. (WD) operates a food truck in Albany, New York. WD brands itself and the food it sells with language generally viewed as ethnic slurs. Owners Andrea Loguidice and Brandon Snooks, however, view the branding as giving a “nod to their Italian heritage” and “weakening the derogatory force of the slur.” Twice, WD applied to participate as a vendor in a summer lunch program in a stateowned plaza. Both times, the New York State Office of General Services (OGS) denied the application because of WD’s branding. WD filed a suit in a federal district court against RoAnn Destito, the commissioner of OGS, contending that the agency had violated WD’s right to free speech. What principles apply to the government’s regulation of the content of speech? How do those principles apply in WD’s case? Explain. [*Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018)] (See *Business and the Bill of Rights*.)

Solution

The First Amendment to the U.S. Constitution protects the freedom of speech. Government regulation of speech is presumed to be unconstitutional. To “pass muster” under the free-speech clause, a law or government action that regulates the content of speech must serve a compelling state interest and must be narrowly tailored to achieve that interest.

In this problem, the government, through OGS, disfavored WD’s speech because of its branding. The agency may have labeled the branding offensive because of its perceived effect on the members of a certain ethnic group. The interest that the government sought to serve might have been a mandate of positive expression. But denying the business application of any vendor whose branding might demean or offend could silence dissent in the “marketplace of ideas.”

In some contexts, an ethnic slur might be hostile and involve conduct. A regulation of that conduct would arguably serve the interest of preventing immediate harm. For example, the government can regulate threats of violence, harassment, and fighting words. But WD’s speech did not fall into any of these categories.

WD’s use of ethnic slurs reflected its owners’ viewpoint about when and how such language should be used. There does not seem to be a sufficiently substantial compelling state interest to justify proscribing this viewpoint. By rejecting WD’s application only on the ground of the business’s branding, OGS impermissibly discriminated against WD’s expression of the owners’ viewpoint, and thereby violated the First Amendment.

In the actual case on which this problem is based, the court rejected WD’s contention and entered a judgment in the defendants’ favor. A state intermediate appellate court reversed, holding, based in part on the points stated above, that OGS violated WD’s right to freedom of speech. The appellate court concluded that WD was entitled to an injunction denying WD’s future lunch program applications because of the use of ethnic slurs in its branding.

1. **A Question of Ethics—Free Speech.** Michael Mayfield, the president of Mendo Mill and Lumber Co., in California, received a “notice of a legal claim” from Edward Starski. The “claim” alleged that a stack of lumber had fallen on a customer as a result of a Mendo employee’s “incompetence.” The “notice” presented a settlement offer on the customer’s behalf in exchange for a release of liability for Mendo. In a follow-up phone conversation with Mayfield, Starski said that he was an attorney—which, in fact, he was not. Starski was arrested and charged with violating a state criminal statute that prohibited the unauthorized practice of law. [*People v. Starski*, 7 Cal.App.5th 215, 212 Cal. Rptr.3d 622 (1 Dist. Div. 2 2017)] (See *Business and the Bill of Rights*.)
2. Starski argued that “creating an illusion” that he was an attorney was protected by the First Amendment. Is Starski correct? Explain.
3. Identify, discuss, and resolve the conflict between the right to free speech and the government’s regulation of the practice of law.

Solution

1. No. The First Amendment guarantees the freedom of speech for individuals against interference by the government. To protect citizens from those who would abuse the right, speech is subject to reasonable restrictions. Speech that violates criminal laws is not constitutionally protected.

In this problem, Michael Mayfield received a “notice of a legal claim” from Edward Starski. The “claim” alleged that a stack of lumber fell on a customer at Mayfield’s company as a result of “incompetence” of one of Mayfield’s employees. The “notice” included a settlement offer on the customer’s behalf in exchange for a release of liability. In a conversation with Mayfield, Starski stated that he was an attorney—when, in fact, he was not. He was arrested and charged with violating a state statute that prohibited the unlawful practice of law. He argued that “creating an illusion” he was an attorney fell within the protection of the First Amendment. He is wrong. It is within the government’s power to restrict speech to frustrate a false claim made to accomplish a fraud. And the interest of the government in regulating the practice of law is part of its interest in protecting the public.

In the actual case on which this problem is based, the court convicted Starski of the charge. On appeal, a state intermediate appellate court affirmed the conviction. Responding to his free speech defense, the court concluded, that Starski was wrong.

1. The question concerns the extent to which the government can regulate the practice of law without infringing on certain rights. The rights at issue include the right of a person to exercise free speech, and the rights of the public to be protected from misleading or deceptive speech, and to have access to competent legal representation.

In recognition of a person’s right to exercise free speech, the government might choose not to prohibit the unauthorized practice of law. This would deny the public’s right to be protected from misleading or deceptive speech. The government might choose to prohibit the practice of law entirely, but this would deprive the public of legal representation of all kinds in all circumstances. So, the government must strike a balance that protects the public and individual rights.

The government generally prohibits the unauthorized practice of law—the practice of law by those who have not met the state’s competency standards to be licensed as attorneys. The government also sanctions persons who have not met the standards from misrepresenting their status to practice law.

The government’s objective is to ensure that those performing legal services do so competently, without infringing on the rights to free speech, to be protected from misleading or deceptive speech, and to have access to competent legal representation. The regulation protects the public and goes no further than necessary, in recognition of the rights at issue.

Critical Thinking and Writing Assignments

1. **Business Law Writing.** Puerto Rico enacted a law that required specific labels on cement sold in Puerto Rico and imposed fines for any violations of these requirements. The law prohibited the sale or distribution of cement manufactured outside Puerto Rico that does not carry a required label warning and barred that cement from being used in government-financed construction projects.

Antilles Cement Corp., a Puerto Rican firm that imports foreign cement, filed a complaint in federal court. Antilles claimed that this law violated the dormant commerce clause. (The dormant commerce clause doctrine applies not only to commerce among the states and U.S. territories, but also to international commerce.) Write three paragraphs discussing whether the Puerto Rican law violates the dormant commerce clause. Explain your reasons. (See The Constitutional Powers of Government.)

Solution

The court ruled that like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. The law requiring companies that sell cement in Puerto Rico to place certain labels on their products is clearly an attempt to regulate the cement market. The law imposed labeling regulations that affect transactions between the citizens of Puerto Rico and private companies. State laws that on their face discriminate against foreign commerce are almost always invalid, and this Puerto Rican law is such a law. The discriminatory labeling requirement placed sellers of cement manufactured outside Puerto Rico at a competitive disadvantage. This law therefore contravenes the dormant commerce clause.

1. **Time-Limited Group Assignment—Free Speech and Equal Protection.** For many years, New York City has had to deal with the vandalism and defacement of public property caused by unauthorized graffiti. In an effort to stop the damage, the city banned the sale of aerosol spray-paint cans and broad-tipped indelible markers to persons under twenty-one years of age. The new rules also prohibited people from possessing these items on property other than their own. Within a year, five people under age twenty-one were cited for violations of these regulations, and nearly nine hundred individuals were arrested for actually making graffiti.

Lindsey Vincenty and other artists wished to create graffiti on legal surfaces, such as canvas, wood, and clothing. Unable to buy supplies in the city or to carry them in the city if they were bought elsewhere, Vincenty and others filed a lawsuit on behalf of themselves and other young artists against Michael Bloomberg, the city’s mayor, and others. The plaintiffs claimed that, among other things, the new rules violated their right to freedom of speech. (See *The Constitutional Powers of Government*.)

1. One group will argue in favor of the plaintiffs and provide several reasons why the court should hold that the city’s new rules violate the plaintiffs’ freedom of speech.
2. Another group will develop a counterargument that outlines the reasons why the new rules do not violate free speech rights.
3. A third group will argue that the city’s ban violates the equal protection clause because it applies only to persons under age twenty-one.

Solution

1. The rules in this problem regulate the content of expression. Such rules must serve a compelling governmental interest and must be narrowly written to achieve that interest. In other words, for the rules to be valid, a compelling governmental interest must be furthered only by those rules. To make this determination, the government’s interest is balanced against the individual’s constitutional right to be free of the rules. For example, a city has a legitimate interest in banning the littering of its public areas with paper, but that does not justify a prohibition against the public distribution of handbills, even if the recipients often just toss them into the street. In this problem, the prohibition against young adults' possession of spray paint and markers in public places imposes a substantial burden on innocent expression because it applies even when the individuals have a legitimate purpose for the supplies. The contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti also undercuts any claim that the interest in eliminating illegal graffiti could not be achieved as effectively by other means.

2. The rules in this problem do not regulate the content of expression—they are not aimed at suppressing the expressive conduct of young adults but only of that conduct being fostered on unsuspecting and unwilling audiences. The restrictions are instead aimed at combating the societal problem of criminal graffiti. In other words, the rules are content neutral. Even if they were not entirely content neutral, expression is always subject to reasonable restrictions. Of course, a balance must be struck between the government’s obligation to protect its citizens and those citizens’ exercise of their right. But the rules at the center of this problem meet that standard. Young adults have other creative outlets and other means of artistic expression available.

3. Under the equal protection clause of the Fourteenth Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws.” This clause requires a review of the substance of the rules. If they limit the liberty of some person but not others, they may violate the equal protection clause. Here, the rules apply only to persons under the age of twenty-one. To succeed on an equal protection claim, opponents should argue that the rules should be subject to strict scrutiny—that the age restriction is similar to restrictions based on race, national origin, or citizenship. Under this standard, the rules must be necessary to promote a compelling governmental interest. The argument would be that they are not necessary—there are other means that could accomplish this objective more effectively.

Alternatively, opponents could argue that the rules should be subject to intermediate scrutiny—that the age restriction is similar to restrictions based on gender or legitimacy. Under this level of scrutiny, the restrictions must be substantially related to an important government objective. In this problem, the contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti undermines any claim that the restrictions are substantially related to the interest in eliminating illegal graffiti. If neither of these arguments is successful, opponents could cite these same numbers to argue that the rules are not valid because there is no rational basis on which their restrictions on certain persons relate to a legitimate government interest.