

## CHAPTER 2: CONSTITUTIONAL LIMITATIONS

State and federal laws must abide by the U.S. Constitution, which provides a number of prohibitions on government bodies. Some of these prohibitions are found in the Bill of Rights and the Fourteenth Amendment to the U.S. Constitution and they limit a number of government behaviors. For example, according to the First Amendment, Congress (the federal legislative body) cannot pass laws abridging freedom of speech or press. This extends to state legislatures as well. Additionally, the Bill of Rights contains provisions that limit police behavior (Fourth Amendment search and seizure actions), prosecutor behavior (e.g., Sixth Amendment requirement that defendants know the charges against them and can call witnesses in their own behalf), and judicial behavior (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 equally to all.

Not only are prohibitions found in the amendments to the U.S. Constitution, but also within the document itself. These are the 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 of bills of attainder (legislative acts that authorize punishment without trial), and the prohibition of ex post facto laws (those that apply retroactively). All of these provisions, whether they give defendants rights or specifically prohibit a 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 criminal law. 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 and privacy. Generally, federal constitutional law is replicated at the state level, but it is necessary to include these provisions in state statutes so as to give them legitimacy for the states. 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, the definition of what actually counts as a retroactive law is still unclear. As early as 1854, in *Carpenter v. Pennsylvania* (58 U.S. 456), the U.S. Supreme Court limited ex post facto to criminal laws only, thereby negating any protection from retroactivity in civil cases. This was reinforced in *California Department of Corrections v. Morales* (519 U.S. 499, 1995). Additionally, in *Beazell 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 impose a heavy burden on the defendant.

Two examples of the use of ex post facto are found in Ohio case law, each with the same outcome (against the defendant), but from two different standpoints on the issue of retroactivity. These are *State v. Rush* (83 Ohio St. 3d 53, 1998) and *State v. Cook* (83 Ohio St. 3d 404, 1998).

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### ***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. Ohio’s new law was effective January 1, 1997, and it extended Ohio’s existing sex offender law that was originally enacted in 1963. In the older law, offender registration with law enforcement was required, but it did not extend to community notification or a designation 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 because he committed his crime before the law was effective. Ultimately, the Ohio Supreme Court ruled against him. First, the court stated that retroactive laws are permitted as long as they

are specified as such in the statute. Second, if the law was prospective only, it would have little effect, as sex offenders who committed their crimes prior to the effective date of the law would not be restricted by it. Since sex offenders have a high recidivism rate, according to the court, they need to be restrained by the new law – community safety requires it. Finally, the court ruled that the restrictions are civil, not criminal, in nature, based on the holding in the U.S. Supreme Court case *Kansas v. Hendricks* (517 U.S. 1153, 1996).

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### VOID-FOR-VAGUENESS

The term “void-for-vagueness” simply means that a law that is vague or unclear is not acceptable. Protection from vague laws is found under the due process clauses in the Fifth and Fourteenth Amendment. The text states that due process hopes to ensure that statutes are clear and understandable to those who must abide by them. In Ohio, there is no direct, distinct due process clause, apart from granting access to the courts:

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 Fourteenth Amendment state due process clause.

Void-for-vagueness applies not only in the definition of the law, but also in its enforcement. In other words, citizens must understand and be clear about what is prohibited and the government must understand and be clear about 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).

In the following Ohio case, a government official was taken to task about enforcement of a particular law. The defendant claimed that the law, as written, did not provide her due process. The case is *State v. Cowan* (103 Ohio St. 3d 144, 2003).

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#### ***State v. Cowan***

The dog warden had received numerous complaints regarding two dogs in a particular neighborhood. First, a man complained that his wife had been attacked by his neighbor’s dogs. Second, other neighbors complained about the dogs wandering the neighborhood. Both times, the deputy dog warden confronted the dogs’ owner and gave instructions regarding the restraint of the dogs under the “vicious dog” law, which involved secure confinement in a locked pen or a locked, fenced yard, etc. According to the Ohio Supreme Court, the Ohio Revised Code defined a “vicious” or “dangerous” dog:

...[a] "dangerous dog" [is] a dog that, without provocation...has chased or approached in either a menacing fashion or an apparent attitude of attack, or has attempted to bite or

otherwise endanger any person, while that dog is off the premises of its owner...and not under the reasonable control of its owner... or not physically restrained or confined in a locked pen which has a top, locked fenced yard, or other locked enclosure which has a top (Ohio Revised Code, § 955.11(A) (1) (a), 1998).

...[a] vicious dog [is] "a dog that, without provocation, meets any of the following...has killed or caused serious injury to any person...has caused injury, other than killing or serious injury, to any person, or has killed another dog (Ohio Revised Code, § 955.11 (A)(4)(a), 1998).

When the deputy dog warden came to investigate, he determined the dogs to be vicious based on complaints from the neighbors. The dogs were confiscated and the owner was arrested, charged, and convicted of owning a vicious dog. The owner argued that the deputy dog warden was able to make a unilateral decision about the viciousness of the dogs and that the owner was not afforded the opportunity to dispute that finding in front of a neutral party. Additionally, the owner argued that there was no method for appealing the dog warden's decision. The Ohio Supreme Court agreed, ruling that the statute was void-for-vagueness, thereby violating the owner's due process. The statute did not allow an owner to challenge the dog warden's decision and the owner becomes a criminal defendant due to the unilateral, unreviewed decision of one person.

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## EQUAL PROTECTION

The text discusses the equal protection clause of the U.S. Constitution as one that hopes to ensure fair and equal application of the law. After the Civil War, many states passed laws that discriminated against former slaves and the equal protection clause was written to guarantee that former slaves would be treated equally under law. 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. If this is the case, however, the law is subject to review by the courts. The text discusses three levels of scrutiny that laws such as these may endure. The lowest level of scrutiny is the rational basis level, followed by the intermediate and then strict scrutiny level. Generally, the courts have held that certain groups in society – "suspect groups" – are afforded more protection than others. According to the text, laws that affect the poor, elderly, or mentally disabled are afforded only the rational basis level of scrutiny. Intermediate level scrutiny is usually seen for laws based on gender, while strict scrutiny is reserved for those laws dealing with race or for laws that deal with "fundamental rights."

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 differentiate between the different suspect groups in society, it reviews laws with the three levels of scrutiny discussed above. In the following example, 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).

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### ***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 male defendant claimed that the law makes an unlawful distinction between same-sex and different-sex conduct, singling out solicitation that only involves male-on-male or female-on-female conduct. The Ohio Supreme Court agreed with the defendant, claiming that, by singling out same-sex conduct, the state was creating a “content-based classification,” which violates a fundamental right. As a result, the law was subject to the strict scrutiny level of review. Under this level, 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 felt that it was a compelling interest, but that it was not narrowly tailored. The court reasoned that different-sex solicitation could likely produce a violent response as well, but the law ignores this type of solicitation and only punishes same-sex solicitation. By singling out same-sex solicitation, the Ohio law violated the equal protection of the law.

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## **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 case involving hate speech is the subject of the next Ohio example. In this case, the defendant was challenging the constitutionality of Ohio's ethnic intimidation law. The case is *State v. Wyant* 64 Ohio St. 3d 566, 1992).

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### ***State v. Wyant***

Ohio's hate crime law is called "ethnic intimidation" and punishes a number of offenses if committed based on race or other factors. The law states that engaging in menacing, aggravated menacing, criminal damaging or endangering, criminal mischief, or telephone harassment for reasons of race, color, religion, or national origin is prohibited. The conduct is punishable by an offense of the next higher degree than the underlying offense (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. Aggravated menacing was defined as,

No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his immediate family (Ohio Revised Code, §2903.21 (A), 1974).

The defendant objected, claiming that the statute criminalizes thought and motive, thus violating his freedom of speech. In the ruling, the Ohio Supreme Court relied on two cases, each found in the text. The first case, *R.A.V. v. St. Paul* (505 U.S. 1094, 1992), involved White youths burning a cross in the yard of a Black family. The U.S. Supreme Court ruled that St. Paul's ordinance criminalizes viewpoints, however vicious they may be, but that it violates freedom of speech (see text). The second case, *State v. Mitchell* (169 Wis. 2d 153, 1992) involved a Wisconsin law that allowed sentence enhancements if a defendant "intentionally selects" his victim based on race, religion, color, etc. The enhancement was based on the underlying offense. The Wisconsin Supreme Court ruled that the statute punishes bigoted thought, which is unconstitutional. Due to these two cases, the Ohio Supreme Court ruled that Ohio's ethnic intimidation law punishes thoughts and motives – racial bias is a viewpoint, not an action – therefore, it violates the defendant's freedom of speech.

Soon after the *Wyant* case, Wisconsin petitioned the U.S. Supreme Court to review the decision of the Wisconsin Supreme Court. In that case, the Court ruled that Wisconsin's statute did indeed punish an act, not a thought, and overturned the decision of the Wisconsin Supreme Court, claiming that no free speech rights were violated with the law (*Wisconsin v. Mitchell*, 508 U.S. 476, 1993). In the meantime, the state of Ohio asked the U.S. Supreme Court to review the Ohio Supreme Court's decision in the *Wyant* case. In *Ohio v. Wyant*, the U.S. Supreme Court vacated the Ohio Supreme Court's ruling, stating that, in the wake of *Wisconsin v. Mitchell*, the Ohio Supreme Court must now review its decision about Ohio's ethnic intimidation law. Thus, in a second case called *State v. Wyant* (68 Ohio St. 3d 162, 1994), the Ohio Supreme Court vacated its

earlier decision, ruling that Ohio's ethnic intimidation law was constitutional for the same reasons outlined in *Wisconsin v. Mitchell*.

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## PRIVACY

The right to privacy is not explicitly mentioned in the U.S. Constitution, but it is inferred in the Fourth Amendment and Ninth Amendment. As a result, what is considered "private" is usually subjective, depending on who is making and enforcing the laws. The text discusses a number of privacy issues, including birth control, abortion, and same-sex relationships. The following Ohio example discusses an issue that has received much attention – pornography. This case is *State v. Meadows* 28 Ohio St. 3d 43 (1986).

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### ***State v. Meadows***

This case deals with an Ohio law that prohibits possession and distribution of child pornography (Ohio Revised Code, 2907.322(A)(5), 1984). This case involves competing views found in two U.S. Supreme Court cases. In *Stanley v. Georgia* (394 U.S. 557, 1969), the U.S. Supreme Court ruled that possession of obscene materials in the privacy of one's home is not a crime. In *New York v. Ferber* (456 U.S. 942, 1982), the Court ruled that possession of child pornography in the privacy of one's home is not protected, due to the state's interest in protecting child victims. In the Ohio case, the defendant was convicted of violating Ohio's child pornography law. He objected, claiming he had a right to view the pornography in the privacy of his home. The Ohio Supreme Court ultimately ruled that the law was not a violation of privacy, citing the *Ferber* decision. The court ruled that,

Unlike the obscene materials considered in *Stanley*...child pornography involves, by its nature, the physical, mental and sexual abuse, seduction and harmful exploitation of children. The depictions sought to be banned by the state are but memorializations of cruel mistreatment and unlawful conduct. Additionally, such material would continue to exploit and victimize the children shown by haunting them in the future... We believe the interests of the state in protecting the privacy, health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest of safeguarding the future of society as a whole, comprise exactly the type of "compelling reasons" justifying a "very limited" First Amendment intrusion envisioned by the *Stanley* court. At the same time, the cost to the individual possessor's right of free speech, privacy and thought, caused by the state's banning of visual mementos from an episode of sexual abuse of a child, is slight. Moreover, the content value of such material is trifling and alternative means of simulation exist (p. 50).

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## REFERENCES

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

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

*California Department of Corrections v. Morales* 519 U.S. 499 (1995).

*Carpenter v. Pennsylvania* 58 U.S. 456 (1854)

*Jacobellis v. Ohio* 378 U.S. 184 (1964)

*Kansas v. Hendricks* 517 U.S. 1153 (1996)

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

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

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

*State v. Cowan* 103 Ohio St. 3d 144 (2003)

*State v. Meadows* 28 Ohio St. 3d 43 (1986)

*State v. Rush* 83 Ohio St. 3d 53 (1998)

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

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

### 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. *Kansas v. Hendricks*
  - 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. Ohio has an interest in protecting the community from sex offenders
  - 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 rule that Ohio's "vicious dog" law was void for vagueness?
  - a. it did not provide dog owners with an opportunity to refute a dog warden's decision
  - b. it did not define what a "vicious" dog was



- 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
5. What was the decision in *State v. Meadows*?
- a. a person cannot possess child pornography in the privacy of his own home
  - b. Ohio's ethnic intimidation statute was ruled constitutional
  - c. Ohio's sentencing guidelines violated the ex post facto protection
  - d. hate crime laws cannot punish thought, only action

### 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. Do you feel that hate crime laws should be limited in scope, like Ohio's law, or do you feel that hate crime laws should be expansive, like the federal law? Do you feel that some groups are more deserving of hate crime legislation than others? Explain.

### WEB RESOURCES

- [www.sconet.state.oh.us/Sentencing\\_Commission/Publications/SB2.pdf](http://www.sconet.state.oh.us/Sentencing_Commission/Publications/SB2.pdf) - information from the Ohio Supreme Court's website about Senate Bill 2, enacted in 1996.
- [www.legislature.state.oh.us/constitution.pdf](http://www.legislature.state.oh.us/constitution.pdf) - for access to Ohio's constitution
- [www.ohio.gov/ohio/ohiolaws.html](http://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](http://www.law.cornell.edu/constitution/constitution.overview.html) - U.S. Constitution website