

REVISITING CONSTITUTIONAL LAW  
AND  
HIGHER EDUCATION

Stetson Conference  
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I.

## WHY REVISIT?

Constitution as Foundation,  
Cornerstone, Keystone, and  
Framework

- “Statutes are designed to meet the fugitive exigencies of the hour.... *A constitution* states or ought to state not rules for the passing hour, but principles for an expanding future”.

--- Justice Benjamin Cardozo

- The cases which [the U.S. Supreme] Court is deciding influence the lowest court in the smallest state in the union. They create a frame within which the lower courts move, the frame within which all officialdom moves. . . .

--- Justice Felix Frankfurter

- The law is . . . the historical, living process of people legislating, adjudicating, administering, and negotiating the allocation of rights and duties.... [I]t strives to anticipate and give expression to what a people believes to be its collective destiny or ultimate meaning within a moral universe.

--- Richard Neuhaus

- The complexity of law is the complexity of life.

--- Walter Oberer

- Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit.

--- James Madison

## II.

# THE AMERICAN CONSTITUTIONS (and the American Constitutional System)

- Popular Sovereignty
- Dual Sovereigns
- Divided Powers
  - Vertical Distribution
  - Horizontal Distribution
- QUESTION 1 (see slide 9)

# Question 1

The first American constitution was:

1. The Articles of Confederation.
2. The Constitution of New Hampshire.
3. The Columbus Constitution for Hispaniola.
4. The Constitution of the United States of America.
5. The Constitution of Massachusetts.

# III.

## CENTRAL FUNCTIONS OF THE FEDERAL CONSTITUTION

- Establish federal structures and mechanisms
- Delineate and allocate federal powers
- Limit the powers of government (federal and state)

# IV.

## CHARACTERISTICS OF FEDERAL CONSTITUTION

- U.S. Constitution as **FUNDAMENTAL** law
- U.S. Constitution as **SUPREME** law
- U.S. Constitution as **“HARD”** law
  
- Comparison to state constitutions

# V.

## FEDERAL CONSTITUTION'S BASIC DISTINCTIONS

- Constitutional **POWERS** vs. constitutional **RIGHTS**
- **EGALITARIAN** rights vs. **LIBERTARIAN** rights
- **PUBLIC SECTOR** rights vs. **PRIVATE SECTOR** rights (see slide 18)
- **SUBSTANTIVE** rights vs. **PROCEDURAL** rights
- Example: Substantive and Procedural Due Process (see slides 15 & 16)
- QUESTION 2 (see slide 15)

# Substantive Due Process

Focus is on:

- The “substance” of government decisions, regardless of the procedures used to make the substantive decision.
- The standards that government establishes to guide private conduct or responsibility.
- E.g., no theft; no assault; no drug use.
- E.g., no selling cigarettes to minors; no smoking in public places.

# Procedural Due Process

Focus is on:

- The procedural aspects of government decisionmaking.
- The process that must be provided to a person before any final determination that he/she violated a standard.
- E.g., notice of alleged violation and facts supporting it.
- E.g., opportunity for a hearing before an impartial body.

# Question 2

The due process clause of the Fourteenth Amendment protects individuals by prohibiting government from:

1. invading personal privacy;
2. discriminating on the basis of certain characteristics such as race or gender;
3. depriving someone of liberty without first providing them procedural protections;
4. taking any of the actions in 1, 2, and 3 above;
5. taking any of the actions in 1 and 3 above.

# VI.

## FEDERAL CONSTITUTIONAL RIGHTS AND “STATE ACTION”

### Public Sector vs. Private Sector Rights)

- Question 3 (see slides 17 & 18)

## Question 3

A resident student at a private university regularly posts religious symbols and messages on the outside of the windows of his dorm room and on the outside of the door to his room. The symbols and messages are in plain view of passersby. Members of the residential life staff regularly remove the student's religious postings over his objection. What constitutional claims might the student have against the university?

## Question 3 (cont.)

1. The student would have a viable claim against the university for violating his federal First Amendment rights.

2. The student would not have a viable claim under the First Amendment, but would have a viable claim against the university under the state constitution's freedom of speech and religion clauses.

3. The student would have a viable claim against the university under the federal First Amendment if the institution is a private secular institution, but not if it is a private religious institution.

4. The student would not have any viable First Amendment or state constitutional rights claim against the university but would have a viable claim against the residential life staff members who removed the symbols and messages.

5. The student would not have any viable First Amendment or state constitutional rights claim against the University or against residential life staff members.

## VI. (cont.)

- Public Sector
- Private Sector
- Comparison to State Constitutions

# VII.

## The American Constitutions and Education

(Provisions on **education** in the federal Constitution and state constitutions)

- Federal Constitution: 1<sup>st</sup> look
- State constitutions
  - --- education powers
  - --- education rights
  - --- example: Massachusetts

# Massachusetts Constitution

## Chapter V, Section II.

**Wisdom**, and **knowledge**, as well as **virtue**, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of **education** in the various parts of the country . . . , it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all **seminaries** of them; especially the **university** at Cambridge, public **schools** and grammar schools in the towns; to encourage private societies and public institutions . . . for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private **charity**, **industry** and frugality, **honesty** and punctuality in their dealings; **sincerity**, **good humor**, and all social affections, and generous sentiments among the people.

## VII. (cont.)

- Federal Constitution: 2<sup>nd</sup> look
  - Federal constitutional powers and education
    - express powers
    - implied powers
  - Federal constitutional rights and education  
(N.B.: state action doctrine)
- Interrelationship between federal and state constitutions
  - state sovereignty
  - federal supremacy

# VIII.

## FEDERAL AND STATE CONSTITUTIONS AND HIGHER EDUCATION LAW (Constitutional Law in Practice)

- From Constitution to Constitutional Law:  
a process of interpretation
- Federal law/state law mix and supremacy  
--- QUESTION 4 (see slide 24)  
  
--- ILLUSTRATION (see slide 24)

## Question 4

Assume that the Department of Homeland Security, acting pursuant to anti-terrorism legislation passed by Congress, promulgates a regulation requiring colleges and universities to monitor certain e-mail sent and received on their computer networks. In some states, however, there are provisions in the state constitution that protect personal privacy and would prohibit institutions in these states from monitoring e-mail as required by the Department's regulation. How should this conflict between laws be resolved?

## Question 4 (cont.)

1. The state constitutional provision would trump the federal regulation because a constitution is higher, more fundamental, law than an administrative regulation.
2. The state constitutional provision would trump the federal regulation because the federal Constitution protects the sovereignty of the states over personal matters such as privacy.
3. The federal regulation would trump the state constitutional provision because federal law trumps any state law that conflicts with the federal law.
4. The federal regulation would trump the state constitutional provision because the regulation was enacted after the constitutional provision; in the case of conflict, the enactment that is later in time prevails over the earlier enactment.
5. Which law prevails must be determined on a case-by-case basis by balancing the federal interests at stake in the particular case against the state interests.

# Illustration: The Hierarchy of Law

Federal Constitution

Federal Statutes

Federal Administrative Regulations

State Constitution

State and Local Statutes and Ordinances

State and Local Admin. Regulations

State Common Law

Internal Law of the University

## VIII. (cont.)

- Public institution/private institution dichotomy
- Secular institution/religious institution dichotomy
- ILLUSTRATION (see slide 28)

# Illustration: The Higher Education Law Universe

Public Education

Private Education

Higher  
Education

|  |   |  |
|--|---|--|
| Public<br>Colleges,<br>Universities, and<br>Community Colleges | Private<br>Secular<br>Colleges<br>and<br>Universities | Private<br>Relig-<br>iously<br>Affiliated<br>Colleges<br>and<br>Universities |
|--|---|--|

## VIII (cont.)

- The James Madison synthesis: again

Justice is the end of government. It is the end of civil society. It ever has been, and ever will be, pursued, until it be obtained, or until liberty be lost in the pursuit.

--- James Madison