

Constitutional Minute for 13 September 2022

Note: in lieu of a new Constitutional Minute this week, which I simply did not have time to write, I offer this essay from 2017. Back then I had time to write nearly weekly essays which normally ran 4-6 pages in length. This was one of the shorter ones.

Constitutional Corner - Constitutional Protest

Protests are as American as, well, apple pie and ice cream. Protests of the Stamp Act of 1765 were numerous and, shall we say, vigorous. If you were a tax collector, you quickly learned to leave town upon hearing news of a planned protest, and sometimes you returned to a shell of a home. The slow of foot were occasionally tarred and feathered.

And then there were the protests of a three pence tax on tea, and not just in Boston, there were “tea parties” held in several port cities in the colonies.

Protests were common, pre-Constitution, and were governed only by state law. Daniel Shay led protests that were initially effective but ultimately ignored, leading to rebellion and bloodshed.

Is there a right to protest enshrined in the Constitution? Not exactly. But many people associate a right of protest with the right of free speech, right of petition, and/or the right of assembly.

But is there a right to block traffic, destroy property, shout obscenities, assault police officers and citizens, all in the name of “petitioning the government for a redress of grievances?” Plainly, no.

But not too long ago, the Baltimore, Maryland, District Attorney, Marilyn Mosby, seemed to think so as she gave groups protesting the death of Freddie Grey, quote: “space to destroy.” She was severely criticized for this and disbarment charges were filed against her.

We were treated to protests of Donald Trump’s election, and now it seems we will be treated to protests over every act the new president takes.

On February 12th, Chicagoans will be treated to a new spectacle, “mooning” as a form of protest. If it serves no other purpose, the event will confirm, if any doubt remained, from which of their orifices these Progressives wish to speak.

Of course the event will receive wall-to-wall media coverage; the Left and the Media (but then I repeat myself) will ensure the spectacle cannot be ignored by the average citizen, even if they wish to. I anticipate that the evening news broadcasters will advise parents to avert the eyes of their children so that these idiots may be allowed to, quote: “speak” on the evening news.

When did displaying one’s bare butt become “speech?” Glad you asked. It hasn’t yet, but it may soon, no pun intended.

To the Framers of the Constitution, of course, speech was what came out of one's mouth, nothing more. The Framers were certainly aware of protests, many probably took part in some; but those protests were not considered speech. Those activities were covered under laws governing assembly, riot, etc.

The Supreme Court first created protection for "symbolic" speech as a First Amendment right in the 1931 case of ***Stromberg v. California***. The Court overturned a California statute that had prohibited the display of a red flag as a "sign, symbol or emblem of opposition to organized government."

Once you let the court create a class of constitutional protection, once you allow them to open that door, when can you shut it? You cannot.

In 1968, (***United States v. O'Brien***), the Court ruled that laws prohibiting the burning of draft cards were an unconstitutional infringement of "free speech."

In 1969 (***Tinker v. Des Moines Independent Community School District***), the Supreme Court ruled that a group of five high school students should be allowed to wear black armbands overlaid with a white peace sign as a symbolic protest over the Vietnam War.

In 1972 (***California v. LaRue***), the court ruled that nude dancing was to be protected as "free speech."

In 1989 (***Texas v. Johnson***), it was burning the American flag that was an expression of "speech."

In 1992 (***R.A.V. v. City of St. Paul***), they ruled that burning a cross on the lawn of a black family, while "reprehensible," the court was quick to add, was to be protected as symbolic speech.

Finally, in 2010 (***Citizens United v. Federal Election Commission***), the Court ruled that political campaign contributions by non-profit corporations were to be protected as well.

It is important to note that the Left typically has no problem with any of these activities being considered speech, except that last bit. That one, Citizens United, they just can't accept. The logic escapes me, but that is fairly indicative of progressive logic.

Once you have created the category of symbolic speech and given it First Amendment protection, what sort of human activity cannot be construed as "speech?"

When does protest of the government become unconstitutional?

As the saying goes, "your rights end at the tip of my nose." Your ability to express yourself in protest ends when my rights become infringed by your activity. Protesters can stand by the side of a road and wave their signs all day long; the moment they step into that road and block my way, we have a problem. The law generally recognizes that and makes such activity unlawful. But the enforcement of the law is very haphazard. Last November, 12 Black Lives Matter protestors were jailed for all of five days for blocking Interstate 95 in Richmond, Virginia. More recently, Virginia State Police discovered building materials that were apparently being stockpiled for a future demonstration in the same area.

But the Left is not interested in protests, per se, they insist on the “right” to disruptive protests, such as that which greeted Milo Yiannopoulos at Berkley (did the campus Republicans really expect the Left was going to let this guy speak? Of course not; free speech is only allowed by the Left when it comports with progressive theology).

One concern I have is the Resist Movement that seems to be gathering momentum across the country.

Nationwide protests are planned for the 17th of February. Organizers take great pride in quoting the Declaration of Independence as their motivation.

“This government is abusing our Muslim citizens, accepted immigrants, usurping the values of what is (sic) means to be American, and beginning a siege of Depotism (sic) on our press and our scientific and rational values.” Obviously the website was thrown together without much editing or even a spell check, but what’s the evidence of their claims? I ask. Apparently none is required to be a progressive.

They go on:

“we call for non-violent, citizen and private-sector led, strikes against the economy that props up this government.”

“The only way to bend this government, led by a self-proclaimed businessperson, is to unionize as citizens and bring the economy that powers this government to its knees.”

So let me get this straight: they want to “bring our economy to its knees, affecting everyone regardless of political persuasion, causing the closure of businesses across the country, workers sent home. All because they lost an election? Get serious. What these folks are proposing is sedition. They should be locked up and the key conveniently misplaced.

I don’t seen anyone on the Left condemning these people or their plans so I have to assume the Left is OK with it, which implicates them all in my estimation. I used to think dialogue between Right and Left was both necessary and possible. I still think it is necessary, I’m no longer sure it is possible.

There is not a shred of doubt in my mind that President Trump’s Executive Order is both legal and lawful, meaning Constitutional. I hope and pray that the majority of Americans see through this childishness, and, like the Occupy Movement, this soon vanishes from the landscape. Until it does, I see little hope for peace between Right and Left.