

Charleston School of Law

From the Selected Works of William L Want

March 12, 2011

Making Sense of Free Speech Ruling, Decision on Gay Marriage

William L Want



Available at: https://works.bepress.com/william_want/8/

Making sense of free speech ruling, decision on gay marriage

BY BILLY WANT

Two recent news items involving constitutional law have left many people, including lawyers, baffled. As a professor of constitutional law, I thought I would try to offer some explanation. The items are the Supreme Court's decision to uphold the Westboro Baptist Church's right to demonstrate at military funerals and the decision by the Obama Justice Department not to defend the Defense of Marriage Act.

The Westboro Baptist Church consists principally of members of a family from Topeka, Kansas. Its mission is to denigrate gays which it has pursued by demonstrating at funerals of American soldiers, expressing the view that military deaths show divine contempt for America's tolerance of homosexuality.



Want

The U.S. Supreme Court by an 8-1 vote on March 2 upheld Westboro's right to engage in this activity on First Amendment grounds, noting that the demonstration took place on public streets and could not be seen or heard from where the funeral occurred.

The First Amendment forbids the government's abridgement of free speech. This right is considered fundamental to our democracy and has been broadly interpreted with exceptions for only a few categories of speech, such as fighting words that lead immediately to violence.

While it is understandable that most people are repulsed by speech of this sort and would like it censored, they overlook that the censor would be the government itself, and that this is what the First Amendment is all about — preventing the government from determining what speech is allowed. Once government is given this authority, we are on the road to government that has more in common with Egypt under Mubarak and Libya under Gaddafi than the free society that we enjoy.

In our system, the remedy for hateful speech is considered to be speech that rebuts it. The hateful speech is exposed for what it is and doesn't thrive in an underground movement not invited into the political process.

The other news item was the announcement by the Obama Justice Department on February 23 that it would not defend in court the Defense of Marriage Act (DOMA). DOMA is aimed at combating gay marriage by denying numerous federal benefits to same sex married couples that are afforded to heterosexual married couples.

While the Justice Department's principal duty is to represent the government in litigation, the Obama Justice Department's decision on DOMA is not unprecedented. To judge its appropriateness in this instance, one must examine the basis for the decision.

The Fourteenth Amendment of the Constitution prevents the government from denying people equal protection of the laws. This protection has not been interpreted strictly by the Su-

preme Court in the typical case because of the Fourteenth Amendment's purpose and because practically all laws establish classes of people who are treated differently.

The Supreme Court normally applies what is called the "rational basis" test and upholds a law where people are treated differently as long as there is a minimal rational basis for the different treatment. But where laws treat people differently based on certain suspect classifications such as race, gender or nationality, the court applies a higher level of scrutiny and assumes the law is invalid unless the state proves a "compelling" or "substantial" state purpose.

Several Supreme Court decisions in the last decade have ruled that greater than rational basis scrutiny is required for classifications based on sexual orientation. It is on this basis that the Obama Justice Department believes DOMA is unconstitutional.

Clearly, the Justice Department should normally defend the federal government in litigation. Rules gov-

erning lawyers' conduct, however, forbid them from making claims in court that they believe are wholly lacking in merit. Also, the president and his Cabinet heads are sworn to uphold the Constitution. Further, the Justice Department, unlike a private law firm, is part of an administration that must formulate national policy as well as litigate cases.

I think it is appropriate in the rare case for the Justice Department to withdraw from defending a law where there is some combination of it believing the law is unconstitutional, its legal position lacks merit and would be at loggerheads with an important administration policy position. The House of Representatives will employ its own lawyers to defend DOMA, as it should. I believe the issue should ultimately be determined by the courts and not the administration.

Billy Want is a professor at the Charleston School of Law and a former senior litigator at the U.S. Justice Department.