THE INTERSECTION OF THE FIRST AND FOURTEENTH AMENDMENTS

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Prohibitions against the Unauthorized Practice of Law (UPL) rely on the dubious, if not outlandish assertion that the practice of law encompasses greater elements of "conduct," as opposed to "speech." Based on this classification UPL prohibitions are held by State Supreme Courts to be exempt from protections of the First Amendment. The classification of communications regarding legal information as "conduct," rather than "speech," allows State Bars to evade Strict Scrutiny review of UPL prohibitions.

Unsurprisingly and quite correctly, virtually every attack against UPL prohibitions relies on First Amendment protections. Although State Supreme Courts consistently uphold the prohibitions to protect the earning power of lawyers in their States, the U.S. Supreme Court has adopted a more balanced and rational approach. In NAACP v Button, 371 U.S. 415 (1963) the U.S. Supreme Court held that under the "guise" of professional regulation, States may not escape constitutional constraints.

In that case, the Court held that Virginia's UPL prohibition against solicitation by the NAACP violated the First Amendment right of political expression. Notably, Virginia had adopted its UPL "scheme" as part of a massive illegal plan of State resistance directed at violating the U.S. Supreme Court's opinion in Brown v Board of Education.

Subsequently, in Railroad Trainmen v Virginia State Bar, 377 U.S. 1 (1964) the U.S. Supreme Court again invalidated UPL prohibitions adopted under the "guise" of professional regulation. In that case, the Virginia Bar dishonestly asserted that the UPL regulation being review was enacted for the purpose of protecting the public. The dishonest assertion that UPL prohibitions are enacted for the primary purpose of protecting the public is a common thread among all State Supreme Courts. Protecting the public is an ancillary purpose of these prohibitions, but the primary reason the State Bars adopt them is to enhance the earning power of lawyers by eliminating more competent competition.

Notwithstanding State Supreme Courts' false assertions that the practice of law is "conduct" rather than "speech" it is clear from the U.S. Supreme Court cases that the validity of UPL prohibitions ultimately hinges upon whether they sustain scrutiny under the First Amendment. Similarly, the State Bar admission cases heard by the U.S. Supreme Court of Schware, Konigsberg, Anastaplo,

Stolar, Baird, and Wadmond , were all addressed within the context of the First Amendment.

There has not yet been a U.S. Supreme Court case addressing the moral character review process from the perspective of the intersection of the Equal Protection Clause to the 14th Amendment, and the First Amendment. Both State Bar admission standards and UPL prohibitions at a minimum "affect" the exercise of First Amendment rights, and at a maximum fall squarely within its purview. This is because the existence of the so-called good moral character admission standard and UPL prohibitions both result in the complete and total exclusion of speakers from communicating information that contains legal "content." Since they foreclose speakers from engaging in communication regarding an entire subject matter, they are "content-based" restrictions.

When a case deals with the intersection of both the First Amendment and the Equal Protection Clause of the Fourteenth, the U.S. Supreme Court has held that it is subject to the standards of scrutiny required by both the First Amendment and the Equal Protection Clause.. The seminal case is Police Department v Mosley, 408 U.S. 92 (1972), where the Court wrote (emphasis added):

> ". . . Of course, the equal protection claim in this case is closely intertwined with First Amendment interests. . . . As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment. . . .
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> . . . But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content . . . .
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> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. . . .
> . . .
> . . . because of their potential use as instruments for selectively suppressing some points of view, this Court has condemned licensing schemes that lodge broad discretion in a public official to permit speech-related activity. . . .
> . . .
> . . . these justifications for selective exclusions from a public forum must be **carefully scrutinized**. Because picketing plainly involves expressive conduct within the protection of the First Amendment. . . .
> . . .

> . . . Therefore, under the Equal Protection Clause, Chicago may not maintain that other picketing disrupts the school unless that picketing is clearly more disruptive than the picketing Chicago already permits. . . .
> . . .
> **The Equal Protection Clause requires that statutes affecting First Amendment interests be narrowly tailored to their legitimate objectives**. . . ." [124]

Footnote 8 of the Court's Opinion in Mosley then reads as follows (emphasis added):

> "In a variety of contexts, we have said that,
>
> > "even though the governmental purpose be legitimate and **substantial**, that purposes cannot be pursued by means that broadly stifle **fundamental personal liberties** when the end can be more narrowly achieved.
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> . . . This standard, of course, has been **carefully applied when First Amendment interests are involved**. . . ." [125]

The Court makes it clear in Mosley that the mere "involvement" of First Amendment interests in an Equal Protection Clause (EPC) claim mandates a higher level of scrutiny, than required in the typical EPC case. Since the right to express one's self under the First Amendment is the quintessence of a fundamental constitutional right, and since the communication of legal information at a bare minimum "involves" the First Amendment (even if one accepts its' classification as "conduct," rather than "speech"), the practice of law applying the Mosley standard, must be considered a fundamental constitutional right. It is also irrefutable that under Mosley, restrictions on the ability to engage in the practice of law should be subject to much more than Intermediate scrutiny due to the intersection of the First Amendment and Equal Protection Clause. See also, R.A.V. v City of St. Paul, 505 U.S. 377 (1992); Justice Scalia - Lead Opinion, Footnote 4 stating:

> ". . . This Court itself has occasionally **fused the First Amendment into the Equal Protection Clause** in this fashion, but at least **with the acknowledgement . . . that the First Amendment underlies its analysis**. See Police Dept. of Chicago v Mosley, 408 U.S. 92, 95 (1972) . . . Carey v Brown, 447 U.S. 455 (1980)." [126]