

Chapter 2: Business and the Constitution

CHAPTER OVERVIEW

This chapter begins with a very brief history and description of the structure of the U.S. Constitution with a focus on the first three articles and the powers of Congress (especially the Commerce Clause). As a practical matter, it may be best to assume that students have only a very basic knowledge of the purpose, history or challenges associated with having a written constitution. Making the leap between understanding the nature of the constitution and how it impacts business entities can be a significant hurdle for students. Therefore, the chapter first lays out the nuts and bolts, then covers black letter law, and concludes with applications and impact of the constitutional principles in a business context.

Teaching tip: Capturing the Vast Universe of Con Law

Teaching such a vast and fascinating subject area in such a short period of time is a challenge primarily because of the temptation to delve into an interesting foray that intrigues the instructor. Although a dose of this intrigue in your lectures may be helpful, limiting your discussion and study to context of the *constitution's impact on business* helps keep both students and instructor focused and on track. For example, students tend to be enthusiastic about material related to the Bill of Rights—they may even wish to offer their own experiences if time permits. However, the instructor's role is to bring the focus back to a business context (e.g., regulation of commercial speech).

KEY LEARNING OUTCOMES

Outcome	Accreditation Categories
Explain the structure, nature, and importance of the U.S. Constitution and describe the enumerated powers of government to regulate individuals and businesses.	Knowledge
Recognize the role of judicial review in Constitutional law.	Application
List the major protection of the Constitution's Bill of Rights and how they apply in a business environment.	Application; Critical Thinking

TEACHING OUTLINE

A. Structure and Nature of the Constitution: Federal Powers [P.37]

Points to emphasize:

- The U.S. uses a **federal system** in which a national government, having limited regulatory powers granted by the Constitution, **coexists** with the government of each state.
- The Constitution functions to (1) establish a **structure** for the federal government and rules for amending the Constitution; (2) grant **specific powers** for the different branches of government; and (3) provide **procedural protections** for U.S. citizens from wrongful government actions.
- **Structure of the Constitution:** Composed of a preamble, seven articles and 27 amendments.
 - The preamble states the Constitution's broad objectives and the articles then set out structure, power, and procedures
(Reference to Table 2.1: Overview of Articles in the U.S. Constitution [P.39]).

TABLE 2.1 Overview of Articles in the U.S. Constitution

Article I	Establishes the legislative branch (a Congress composed of the House of Representatives and the Senate); sets qualifications for members; grants congressional powers (lawmaking).
Article II	Establishes the executive branch (president); sets qualifications for the presidency; grants executive powers (enforcement of laws).
Article III	Establishes the judicial branch with a federal system of courts, including a Supreme Court; grants certain judicial powers.
Article IV	Establishes the relationship between the states and the federal government; describes how to admit new states to the Union.
Article V	Describes the process for amending the Constitution.
Article VI	Establishes the Constitution and federal law as the supreme law of the United States over any conflicting state law; authorizes the national debt (Congress may borrow money); public officials must take an oath to support the Constitution.
Article VII	Lists the requirements for ratification of the Constitution.

- The Constitution also establishes boundaries of jurisdiction.
- **Amendments:** Additions or changes to the Constitution, the first 10 of which form the Bill of Rights.

B. Overview of Federal Powers [P.38]

Points to emphasize:

- Federal legislation or regulation must be authorized by a specific, **enumerated** power in the Constitution and these powers are limited in scope.
- **Separation of Powers:** The system of checks and balances whereby the three branches have unique powers that allow them to resolve conflicts among themselves, thus ensuring no one branch exceeds its constitutional authority.
- **Reference to Table 2.2: Example of Constitutional Checks and Balances [P.40]**

TABLE 2.2 Example of Constitutional Checks and Balances

Branch	Power	Power Checked
Executive	Veto	Congress's lawmaking authority
Legislative	Override veto with supermajority	President's veto authority
Legislative	Impeachment and removal	President and federal judiciary's general powers
Judicial	Invalidate a law as unconstitutional	Congress's authority to make laws; the president's authority to enforce laws

- **Judicial Review:** Federal courts have the right to **invalidate state or federal laws** that are inconsistent with the U.S. Constitution in some way.

Case 2.1: U.S. v. Alvarez, 132 S.Ct. 2537 (2012) [P. 41]

Facts: The Stolen Valor Act of 2005 made it a federal crime to make false claims related to receiving military decoration or honors. The penalty for false claims about the Congressional Medal of Honor was enhanced to include up to one year in prison. Alvarez was an individual who served as a member of a municipal water district board and introduced himself and included facts about his past including that he served as a marine, was wounded, and received the Congressional Medal of Honor. None of these representations were true. Alvarez was charged with violating the Stolen Valor Act and pled guilty, but reserved the right to challenge the constitutionality of the law based on the First Amendment upon appeal.

Issue: Since Alvarez's statements were false, is he entitled to First Amendment protection?

Ruling: The U.S. Supreme Court ruled in favor of Alvarez and upheld the lower court's decisions that the statute violated the First Amendment. The Court ruled that their previous decisions made clear that content-based restrictions on speech were presumed to be invalid and that it was the government's responsibility to demonstrate a compelling interest. The Court rejected the government's argument that false speech is not protected and pointed out several instances in which they had previously ruled that falsity alone does not make a statement automatically outside the protection of the First Amendment.

Case Questions

1. The dissenting justices argued that the allowing First Amendment protection for statements that are lies was a dangerous and unwise path. They also concluded that the link between the statute and the government's interest was more than enough to satisfy any constitutional scrutiny. Are the dissenting arguments compelling? Why or why not?

A. This question is intended to spur discussion on the topic of protection of First Amendment rights.

2. Could Congress have crafted a different law that would have achieved its intended result but survive a constitutional challenge? How?

A. If Congress drafts a different law, it could not be content-based regulation.

- **Applying the Constitution: Standards of Review:** When reviewing a government action for constitutional soundness, the Court classifies the action into one of three categories of **scrutiny**: (1) the rational basis category, or (2) intermediate-level scrutiny, or (3) Strict scrutiny.
 - ***Rationale Basis:*** The government need only show that their action advanced a legitimate government objective and the action was minimally related to the government's objective.
 - ***Intermediate-Level Scrutiny:*** The government must prove that their action advanced an important government objective and that the action is substantially related to the government's objective.
 - ***Strict Scrutiny:*** (1) The government's objective must be compelling, (2) the means chosen by the government to advance that objective is necessary to achieve that compelling end, and (3) no less-restrictive alternatives existed.

Case 2.2: Brown v. Entertainment Merchants, 131 S. Ct. 2729 (2011) [P. 43].

Facts: In 2005, the state of California passed a law that banned the sale or rental of violent video games to anyone under age 18 and required warning labels beyond the existing Entertainment Software Ratings Board's voluntary rating system. The law covered games in which players had the options of killing, maiming, dismembering, or sexually assaulting characters that represent human beings. Entertainment Merchants Association sought to have the law declared unconstitutional.

Issue: Are video games are considered speech, similar to plays and movies, and are therefore protected by the First Amendment despite the fact that some people find the video games offensive?

Ruling: The U.S. Supreme Court ruled in favor of the video game industry and struck down the law as unconstitutional. Because the law tried to restrict speech, the Court applied a strict scrutiny analysis to the statute and found that California failed to meet their burden of proving a compelling government interest through the use of expert testimony, and the law was both too broad/ too narrow.

Case Questions:

1. Why did the state of California have to meet a strict scrutiny standard for this statute to be constitutional?

A. Content-based regulation of speech by the government triggers strict scrutiny.

2. If the expert testimony had been conclusive and scientifically proven, should the court's decision be different? Why or why not?

A. Perhaps. While we can't know for sure, the Court did point out that the government had failed to carry their burden and this suggests that scientific proof may help the government overcome a strict scrutiny analysis.

3. Should a state be legislating regarding this type of conduct, or should such conduct be solely a private issue to be decided on and enforced by parents or guardians?

A. This question is intended to spur discussion on the role of government in private lives of its citizens.

- **The Supremacy Clause and Preemption:** Under the Supremacy Clause, federal laws preempt (override) any conflicting state laws.

C. Commerce Powers [P.44]

Points to emphasize:

- Congress's **broadest power** is derived from the Commerce Clause whereby Congress is given the power to "regulate Commerce among the several states."
- **Application of Commerce Powers:** The direct and broad power to regulate all persons and products related to the flow of intrastate commerce is the fundamental source of its authority.

- ***Interstate versus Intrastate Commercial Activity:*** Congress has the authority to regulate (1) channels of interstate commerce, (2) the instrumentalities of interstate commerce, (3) the articles moving in interstate commerce, and (4) intrastate commerce when it has a substantial economic effect on interstate commerce.
 - The Supreme Court has even deferred to congressional regulation of a product that is cultivated for noncommercial purposes solely in one state as **sufficiently related** to interstate commerce, citing *Gonzalez v. Raich*.
- ***Civil Rights Legislation:*** In the 1964 Civil Rights Act, Congress used its commerce power to **ban discrimination** in places of public accommodation such as restaurants (*Katzenbach v. McClung*) and hotels (*Heart of Atlanta Motel v. U.S.*)
- ***Noncommercial Activity:*** Some limits on Congress's commerce power still exist, such as in cases where the activity is purely noncommercial, the activity Congress seeks to regulate must have a sufficient nexus to some **legitimate economic interest** (*U.S. v. Lopez*; *U.S. v. Morrison*).
- ***Constitutional Restrictions on State Regulation of Commerce:*** States are free to regulate commerce that crosses into their state borders so long as (1) it does not impose a **discriminatory** law, and (2) the state law is a **legitimate effort to regulate** health, safety, and welfare.

Case 2.3 Gonzalez v. Raich, 545 U.S. 1 (2005) [P. 47]

Facts: In 1996, California voters approved a proposition legalizing the use of marijuana for medical purposes. The California legislature then adopted the Compassionate Use Act of 1996 to ensure that its residents had access to

marijuana for medical use as an alternative to conventional methods. Raich and Monson were patients diagnosed with a variety of medical conditions which were not alleviated through traditional methods and medications. As a result, physicians in each case prescribed marijuana. In 2002, U.S. drug agents arrived at Monson's home and confiscated and destroyed her marijuana plants pursuant to a federal law called the Controlled Substances Act (CSA).

Issue: Does enforcement of the CSA violate the Commerce Clause because the medical marijuana was cultivated and possessed within state borders and did not enter the stream of commerce?

Ruling: The U.S. Supreme Court ruled in favor of the government and held that the CSA was a valid exercise of Congressional powers derived from the Commerce Clause. In analyzing the question of purely intrastate production and use of marijuana, the Court pointed out that Congress need only supply a rational basis for believing that locally cultivated marijuana would end up in interstate commerce.

Case Questions:

1. The CSA expressly prohibits the cultivation, processing, distribution, and use of marijuana, declaring it unfit for any legal use. Since a market for marijuana legally cannot exist, why is this a Commerce Clause case? Do you agree or disagree with the Court that locally grown and locally consumed crops can have an impact on interstate commerce?

A. This is Congressional authority that derives from the Commerce Clause and this question is intended to spur discussion of the appropriate scope of the Commerce Clause to regulate intra-state activities.

2. The California law gave licensed physicians the duty and authority to prescribe medical marijuana. Should a court have the right or power to substitute its judgment for the judgment of a trained professional?

A. This question is intended to spur discussion on the role of the federal government in regulation of controlled substances.

3. California enacted this law to provide relief to certain California citizens deemed to need it. Citizens of other states were excluded from all provisions of this statute. Should the federal government have the right to determine that a

federal law preempts a state law designed and intended to affect only the state's residents?

A. This question is intended to spur discussion on the role of the federal government versus the right of state government to regulate matters within its own borders.

Legal/Ethical Reflection and Discussion: *Gonzalez v. Raich* [P. 48]

D. Tax and Spend Power [P.49]

Points to emphasize:

- Congress has the power to **tax** the citizenry and to **spend** the federal government's money in any way that promotes the **common defense and general welfare**.
- **Necessary and Proper Clause:** Under the Necessary and Proper Clause, Congress may also place **conditions** on the use of federal money in order to achieve some public policy objective. (Refer to *South Dakota v. Dole*).

Self-Check: What is the constitutional source of authority for each of the following laws? [P.50]

Concept Summary: Structure and Nature of the Constitution: Federal Powers [P.50]

E. Constitutional Protections [P.51]

Points to emphasize:

- The Bill of Rights contains protections for citizens from unlawful or repressive acts by the government and guarantee right of due process.

- **The Bill of Rights and Business:** Corporations and other business entities do not always receive the same level of constitutional protections as individuals.

Teaching Tip: The First Amendment as a Cultural Icon

As you begin your discussion of the First Amendment, it can be an ideal time to bring up the fact that the free speech and expression rights are somewhat unique to Americans. For example, many European nations ban the sale of Nazi memorabilia and do not permit marches or other signs of expression if it is related to recognition of the Nazi regime. A nation's history influences its laws. I have found that pointing this out is a good teaching moment for students to recognize that their frame of reference is almost inherently American-centric.

- **First Amendment:** Contains the important introductory phrase “**Congress shall make no law**” and then articulates several specific protections against government encroachment in the areas of religion, press, speech, assembly, and petition of grievances.
 - ***Limits on Free Speech:*** Although the Supreme Court has given broad protections to speech that involves political expression, the First Amendment is **not absolute** and the government may place reasonable restrictions related to time and place of political expression in certain cases.

Teaching Tip: Famous Holmes Quote

Students remember that free speech is not an absolute right by recalling Justice Oliver Wendell Holmes's point that the Constitution does not protect one who falsely yells “fire” in a crowded theatre.

- ***Commercial Speech:*** Traditionally, advertising had little or no First Amendment protection, but the Supreme Court has gradually increased the constitutional protections related to

advertising allowing purely commercial speech to have **partial First Amendment** protection so long as it is truthful (*Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*).

- *Central Hudson Gas v. Public Service Commission* created a framework for a **four-part test** that subjects government restrictions on commercial speech to a form of intermediate-level scrutiny.
- (1) Qualifies for First Amendment protection so long as it concerns lawful activities and is not misleading; --if it qualifies-- (2) A **substantial government interest** in regulating the speech must exist; (3) The government must demonstrate that the restriction directly **advances** the claimed government interest; and (4) The government's restriction must **not more extensive** to achieve the government's asserted interest.

Case 2.4 R.J. Reynolds

Fact: Among those proposed by the FDA were images of a man exhaling cigarette smoke through a tracheotomy hole in his throat and a pair of diseased lungs next to a pair of healthy lungs. R.J. Reynolds and four other tobacco companies (RJR) challenged the rule arguing that it would infringe on their commercial speech rights under the First Amendment. The trial court ruled in favor of RJR and the FDA appealed.

Issue: Did the government violate RJR's First Amendment rights?

Ruling: U.S. Court of Appeals for the District of Columbia upheld the trial court's decision in favor of RJR. The court applied the *Central Hudson* test and ruled that the FDA had failed to supply any evidence that the rule which restricted the commercial speech directly advances a substantial government interest. The court ruled that the labels were not purely factual because they did not convey any warning information or offer any information about the impact of smoking. Rather, the images were intended to generate emotional responses. Therefore, the

FDA could not meet their burden under the *Central Hudson* test with respect to how the graphic warnings directly advance the government's interest.

Case Questions:

1. This question is intended to focus attention on different levels of scrutiny and the impact on the final decision.
2. The FDA needed more persuasive evidence that the rule advanced the interest of the government.
3. This question is intended to spur discussion of the difference between compelled speech and prohibited speech.

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- ***Advertising and Obscenity Regulation:*** Obscenity regulation of commercial speech is subject to the same scrutiny as any other government regulation of commercial speech, referencing *Bad Frog Brewery, Inc. v. N.Y. State Liquor Authority*.

Note to Instructor: The “Bad Frog” label at issue is available through Connect or through an Internet search.

- ***Political Speech by Corporations:*** Typically, **political speech** by corporations is fully protected by the First Amendment.
- ***Political Spending and Corporations:*** In *Citizens United v. Federal Election Commission*, the Supreme Court ruled that the government may not ban all political spending by corporations in candidate elections.

F. Other Amendments [P.55]

Points to emphasize:

- The Fourth Amendment protects individual citizens' rights to **be secure** in their “persons, houses, papers and effects.”

- The Fifth Amendment provides that no person “shall be compelled in any criminal case to be a witness against himself.”

G. Due Process Protections [P.56]

Points to emphasize:

- The Due Process Clause of the Fifth and Fourteenth Amendments protect individuals from being deprived of “life, liberty, or property” without due process of law.
- **Fourteenth Amendment:** Makes the Bill of Rights applicable to the states.
- The Due Process Clauses serves two purposes: (1) to impose **procedural requirements** on federal and state governments, and (2) to limit the **substantive power of the states** to regulate certain areas affecting individual liberties.
 - ***Equal Protection:*** The Clause that guarantees that the government will treat people who are similarly situated equally.

Concept Summary: Constitutional Protections [P.57]

H. Privacy [P.58]

Points to emphasize:

- The right of privacy, although not explicitly mentioned in the Constitution, is implied by language in the First, Third, Fourth, Fifth, and Ninth Amendments, which created a constitutionally protected zone of privacy (*Griswold v. Connecticut; Roe v. Wade*).
- **Federal Statutes:** In addition to privacy rights afforded by the Constitution, Congress has legislated specific privacy rights such as the Health Insurance Portability and Accountability Act and Freedom of Information Act.

- The USA Patriot Act provides increased authority for government officials to surreptitiously access and/or monitor individual and corporate financial records, e-mail, telephone conversations, and Internet activity when investigating possible terrorism-related activity.
- **Workplace Privacy:** Most privacy rights afforded by the Constitution do not extend to the workplace; nonetheless, privacy rights have become increasingly important to business owners and managers as Congress and state legislatures seek to clarify workplace privacy rights.

END OF CHAPTER PROBLEMS, QUESTIONS AND CASES

Theory to Practice

1. Congress is using the Commerce Clause as their authority for passing the law. Quick will likely challenge the law as an unconstitutional exercise of congressional power because the activity being regulated is purely local and no enumerated power exists. [Ties to “Overview of Federal Powers” and “Commerce Powers”]
2. In this case, Congress is using its Spending Power to implement policy. This changes the analysis because Congress has greater latitude to set policy via conditions on spending. [Ties to “Tax and Spend Power”]
3. Holmestown’s actions amount to a discriminatory tax because it impermissibly impacts interstate commerce. Therefore, the law is likely to be ruled unconstitutional. [Ties to “Constitutional Restrictions on State Regulation of Commerce”]
4. The Due Process Clause requires the government to provide a hearing and/or procedure whenever the government has taken some action to deprive. [Ties to “Due Process Protections”]

5. The Fourth Amendment is at issue. If the search is related to a criminal investigation, the government must have probable cause. If the search is related to an administrative investigation, the standard for the government to obtain a warrant is lower. [Ties to “Other Amendments”]

Manager’s Challenge [P.60]

A sample answer to all Manager’s Challenge questions is provided in the student and instructor versions of this textbook’s Web site www.mhhe.com/melvin.

Case Summary 2.1: Preemption: Cipollone v. Liggett Group, Inc., [P.61]

1. Given the Supreme Court’s language and the result of this case, is Congress’s preemption power broad or narrow? Explain your answer.
 - a. Congress’s preemption power is limited in scope to invalidate only state law that is in direct conflict with federal law. In the absence of express congressional intent, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’ In this sense, Congress’s preemption power isn’t broadly applied over state law in general, rather it arises only when there is a direct conflict between state and federal law.
2. Does the Supreme Court’s ruling bar all residents of New Jersey, or any other state, from bringing suit against a tobacco company for false advertising or promotion? Why or why not?
 - a. Yes. The Supreme Court’s ruling indicates that Congress chose specifically to regulate tobacco related advertising and promotion and therefore federal law is supreme to New Jersey and any other state that attempts to regulate that same category of advertising.

3. Why would Congress want to preempt state law regarding the advertising and promotion of tobacco products? Do you agree with their decision to do so? Why or why not?
 - a. Congressional preemption of state law regarding the advertising and promotion of tobacco products serves the purpose of maintaining consistency in a public policy matter. One could support the theory that this decision is appropriate because the federal government is in the best position to balance the general welfare of the public with the business interest of the tobacco industry as a whole.

Case Summary 2.2: Commercial Speech: State v. DeAngelo [P.61]

1. Is the ordinance constitutionally sound?

A: The ordinance would not be constitutionally sound unless the government can prove that (1) a substantial government interest in regulating the sign exist, (2) the restriction directly advances the claimed government interest, and (3) the restriction must be not more extensive than necessary to achieve the government's asserted interest.

2. What level of scrutiny will a court apply to the ordinance?

A: In cases of Commercial speech the government applies intermediate-level scrutiny.

Case Summary 2.3: Commerce Clause: U.S. v. Alderman [P.62]

1. Is the law constitutionally sound?

A: Yes, the activity criminalized by the statutes has a sufficient nexus to interstate commerce to fall within the broad congressional power under the Constitution.

2. If Alderman purchased the body armor in the same state as it was manufactured, how does that affect "interstate" commerce?

A: It affects “interstate” commerce in the sense that it has a substantial economic effect on “interstate” commerce.

Case Summary 2.4: Necessary and Proper Clause: United States v. American Library Association [P.62]

1. Is the plan constitutional?

A: Yes, Congress can cite the Necessary and Proper clause as authorization to set conditions on the use of federal money in order to achieve some public policy objective.

2. Is the First Amendment at issue? Explain your answer.

A: Yes. In order to comply with CIPA, the public libraries would have to block a substantial amount of constitutionally protected speech, in violation of the First Amendment.

Case Summary 2.6 Pagan v. Fruchey and Village of Glendale [P.63]

1. Could the ordinance itself be modified to meet the third part of the *Central Hudson test*?

A. It could be argued that a more specific ordinance could better facilitate satisfying the third requirement of the *Central Hudson Test*. Perhaps modifying the ordinance to prohibit parking a vehicle on a public roadway for the purposes of displaying it for sale, when the “For Sale” sign is visible to vehicles traveling in the roadway, would be easier to demonstrate that the restriction directly advances their claimed government interest. However, even in light of such modification, Glendale still would have to offer data to support their contention to meet their burden in showing that the ordinance actually advances its claimed interest in traffic safety.

2. What type of data do you suppose the court wanted from Glendale to support their claim that the ordinance advanced their traffic safety

interest? Why didn't the court give more weight to the police chief's opinion?

A. The court wanted actual data and evidence to support their contention that the ordinance advanced their traffic safety interest. This would include statistics such as a showing that accidents increased by "X" amount when a vehicle is posted for sale on a public road. The police chief's opinion is mere speculation about something that might occur rather than concrete evidence that it has occurred. An opinion of the like does not demonstrate that the restriction directly advances the claimed interest as is needed to satisfy the requirement

Case Summary 2.7: Williamson v. Mazda [P. 63]

1. Who prevails and why?

A. The court ruled that the federal statute did not preempt state tort law because there was no indication in the statute that Congress meant to preempt such claims.

2. If the federal law had mandated specific standards rather than give manufactures a choice, how would that impact your analysis?

A. This may bolster Mazda's argument because it may indicate that the federal statute was providing a safe-harbor to manufacturers so long as they complied with the specific requirements.

Quick Assessment Questions (QAQ)

1. **Which standard of review is typically used by the Supreme Court when considering the constitutionality of laws that are related to economic and tax regulation?**
 - a. Rational Basis
 - b. Intermediate-Level Scrutiny
 - c. Strict Scrutiny
 - d. Indulgent Scrutiny
 - e. Preemptive Scrutiny
2. **Under the Commerce Clause, Congress has the authority to regulate which of the following:**
 - a. Channels of interstate commerce
 - b. All intrastate commerce
 - c. Articles moving in interstate commerce
 - d. a and c

- e. All of the above
- 3. **Which of the following are functions of the Constitution?**
 - a. Establishing a structure for federal government and rules for amendments
 - b. Providing procedural protections for U.S. citizens against wrongful government actions
 - c. granting specific powers for legislative, executive and judicial branches
 - d. a and c
 - e. All of the above
- 4. **Federal legislation or regulation must always be authorized by a specific, enumerated power in the Constitution.**
 - A) True
 - B) False
- 5. **Businesses have full First Amendment protection for commercial speech.**
 - A) True
 - B) False
- 6. **Under the Supremacy Clause, valid state laws preempt federal laws.**
 - A) True
 - B) False

Answers: 1)a; 2)d; 3)e; 4)T; 5)F; 6)F