

## Chapter 6– The Constitution and Business

Laws that govern business have their origin in the lawmaking authority granted by the federal constitution.

### The Constitutional Powers of Government

The Constitution delegates certain powers to the national government and the states retain all other powers. Each branch of the federal government has some power to limit the actions of the other two branches. Congress can enact legislation relating to spending and commerce but the President can veto that legislation.

Checks and balances–

### The Commerce Clause

Article I, section 8 of the U.S. Constitution expressly permits Congress “to regulate commerce with foreign Nations and among the several states, and with the Indian tribes.” This is the commerce clause and has a greater impact on business than any other provision in the U.S. Constitution. This power was delegated to the federal government to ensure the uniformity of rules governing the movement of goods through the states.

For some time, the commerce power was interpreted as being limited to interstate commerce (commerce among the states) and not applicable to intrastate commerce (commerce within the states). In 1824, in *Gibbons v. Ogden*, the Supreme Court held that commerce within the states could also be regulated by the federal government as long as the commerce concerned more than one state.

In 1995, the Supreme Court held for the first time, in *U.S. v. Lopez*, that there was a limit to the reach of the commerce clause. The Court concluded that Congress had exceeded its constitutional authority when it passed the Gun-Free School Zones Act in 1990. The Court stated that the act, which banned the possession of guns within 1000 feet of any school, was unconstitutional because it attempted to regulate an area

that had “nothing to do with commerce, or any sort of economic enterprise.

Today, at least theoretically, the power over commerce authorizes the national government to regulate every commercial enterprise in the U.S.

### The Regulatory Powers of the States

A problem that frequently arises under the commerce clause concerns a state’s ability to regulate matters within its own borders. The U.S. Constitution does not expressly exclude state regulation of commerce, and there is no doubt that states have a strong interest in regulating activities within their borders.

#### Police powers–

Fire and building codes, antidiscrimination laws, parking regulations, zoning ordinances, licensing requirements, and many other state statutes have been enacted pursuant to a state’s police powers.

When state regulations impinge on interstate commerce, courts must balance the state’s interest in the merits and purposes of the regulation against the burden placed on interstate commerce. Generally, state laws enacted pursuant to a state’s police powers carry a strong presumption of validity.

Because the courts balance the interests involved, it is extremely difficult to predict the outcome in a particular case.

## The Supremacy Clause

Article VI of the Constitution provides that the Constitution, laws, and treaties of the U.S. are the supreme law of the land. This article is known as the supremacy clause. This means that when there is a direct conflict between a federal law and a state law, the state law is rendered invalid. Because some powers are concurrent (shared by the federal and state governments), it is necessary to determine which law governs in a particular circumstance.

No single factor is decisive as to whether a court will find preemption. Generally, Congressional intent to preempt will be found if the federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it.

## The Taxing and Spending Powers

Article I, section 8 provides that Congress has the “power to lay and collect taxes, duties, imposts, and excises.” Section 8 further provides that “all duties, imposts, and excises shall be uniform throughout the United States.”

## Business and the Bill of Rights

Some constitutional protections apply to business entities as well as individuals. For example, corporations exist as separate legal entities, or legal persons, and enjoy many of the same rights and privileges as natural persons do.

Summarized here are the protections guaranteed by the first ten amendments to

the Constitution also known as the Bill of Rights:

### Freedom of Speech

In interpreting the meaning of the First Amendment's guarantee of free speech, the courts have made it clear that types of speech will not be protected. Speech that harms the good reputation of another, or defamatory speech, or that is criminal in nature is not protected. Other unprotected speech includes "fighting words" or words that are likely to incite others to respond violently and obscene speech.

Courts often make a distinction between normal speech and commercial speech, which is speech and communications made by business firms, such as advertising. Although commercial speech is protected by the 1<sup>st</sup> Amendment, its protection is not as extensive as that afforded to noncommercial speech.

Generally, a restriction on commercial speech will be considered valid as long as

it meets the following three criteria: 1) it must seek to implement a substantial government interest; 2) it must directly advance that interest; and 3) it must go no further than necessary to accomplish its objective.

### Freedom of Religion

The 1<sup>st</sup> Amendment states that the government may neither establish any religion nor prohibit the free exercise of religious practices. The first part of this provision is referred to as the establishment clause and the second part is known as the free exercise clause. Federal or state regulation that does not promote religion or place a significant burden on religion is constitutional even if it has some impact on religion.

The 1<sup>st</sup> Amendment does not require a complete separation of church and state. On the contrary, it affirmatively mandates accommodation of all religions and forbids hostility toward any.

### Self-Incrimination

The 5<sup>th</sup> Amendment guarantees that no person “shall be compelled in any criminal case to be a witness against himself.” An accused person cannot be compelled to testify against himself or herself in any court. The 5<sup>th</sup> Amendment’s guarantee against self-incrimination extends only to natural persons.

The business records of a partnership do not receive 5<sup>th</sup> Amendment protection. When a partnership is required to produce these records, it must give the information even if it incriminates the persons who constitute the business entity. Sole proprietors cannot be compelled to produce their business records.

### Searches and Seizures

The 4<sup>th</sup> Amendment protects the “right of the people to be secure in their persons, homes, papers, and effects.” Before searching or seizing private property, law officials must obtain a search warrant—an order from a judge or other official authorizing the search. To obtain a search warrant, an officer must have probable cause.

Probable cause—

There are exceptions to the requirement of a search warrant, as when it is likely that the items sought will be removed before a warrant can be obtained.

As federal and state regulation of commercial activities increased, frequent and unannounced government inspections were conducted to ensure compliance with regulations. In *Marshall v. Barlow’s*, the Supreme Court held that the government inspectors do not have the right to enter business premises without a warrant, although the standard of probable cause is not the same as that required in nonbusiness contexts. The existence of a general and neutral enforcement plan will justify issuance of a warrant.

Other Constitutional Protections

Due Process Clause—

Procedural due process—

Substantive due process—

In all other situations, a law or action does not violate substantive due process if it rationally relates to any legitimate governmental end. It is almost impossible for a law or action to fail the “rationality” test.

### Equal Protection

Under the 14<sup>th</sup> Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws.” This clause means that the government must treat similarly situated individuals in a similar manner. Both substantive due process and equal protection require review of the substance of the law or other governmental action rather than review of the procedures used.

If the law inhibits some persons’ exercise of a fundamental right, the law will be subject to “strict scrutiny” test. Under this standard, the classification must be necessary to promote a compelling state interest.

Another standard, that of “intermediate scrutiny,” is applied in cases involving discrimination based on gender or legitimacy. Laws using these classifications must be *substantially related to important government objectives*.

In matters of economic or social welfare, the classification will be considered valid if there is any conceivable *rational basis* on which the classification might relate to any legitimate government interest. It is almost impossible for a law or action to fail this test.

## Constitutional Law in Cyberspace

### Regulating Online Obscenity

Obscene speech is not protected by the 1<sup>st</sup> Amendment. In 1996, in response to public concern, Congress enacted the Communications Decency Act (CDA). This act, which was part of the Telecommunications Act of 1996, made it a criminal offense to transmit “indecent” speech or images to minors or to make such speech or images available online to minors.

A major legal issue raised by the language of the act was that there is no national standard by which to measure “indecent” or “patently offensive” speech. The act’s definition of these terms followed the traditional practice of measuring obscenity by current community standards. With respect to the Internet, obscene materials can be accessed by virtually anyone in any community in the U.S. In effect, this means that any Internet transmission that is “patently offensive” by even the most restrictive community standards would be illegal under the CDA.

### Cryptography and Constitutional Protections

One of the foremost concerns of the business community today is the security of electronic proprietary and commercial information. To protect electronic data from being accessed by unauthorized persons, many companies use hardware or software with encryption capabilities. The constitutional issue currently before the courts is whether encryption software—more specifically, the source codes used to encrypt data—constitute speech. If so, then the government’s regulation of this speech may be challenged on constitutional grounds.

### Free Speech and Unwanted Electronic Mail

What about the transmission of “electronic leaflets” over the Internet? Is the transmission of such material—often referred to as “junk mail” or “spam”—over the Internet significantly different from the distribution of leaflets in a shopping mall?

The issue arose in a recent dispute between AOL and Cyber Promotions (CP).



CP transmits electronic ads to thousands of e-mail addresses, including AOL subscribers. In response to complaints, AOL blocked all e-mail from CP. AOL also gathered all of CP's e-mail messages together and returned them to CP in an "e-mail bomb" that brought down the computer system of CP's ISP. CP sued AOL, claiming that its e-mail messages were protected speech under the 1<sup>st</sup> Amendment. How did the court decide this case?