

SOLUTIONS MANUAL



Contemporary
Business and
Online
Commerce Law

Seventh Edition

Cheeseman

Chapter 2
Constitutional Law for
Business and E-Commerce

Why Can't We Yell Fire In A Crowded Theater?

Learning Objectives:

1. Describe the concept of federalism and the doctrine of separation of powers.
2. Define and apply the Supremacy Clause of the U.S. Constitution.
3. Explain the federal government's authority to regulate interstate commerce and foreign commerce.
4. Explain how the freedoms of speech, assembly, religion, and the press are protected by the First Amendment and how commercial speech may be limited.
5. Explain the doctrines of equal protection and due process.

I. Teacher-to-Teacher Dialogue

Constitutional law is, for many legal academics, not only their reason for loving to teach but it also provides the ultimate challenge in illustrating the constant balance of competing but legitimate rights of the individual vis-à-vis the larger society. The only major drawback to this material is the frustration of having the time constraints inherent in a survey course.

Because of these time limitations, teaching efforts might best be concentrated on two main objectives:

1. The concepts of federalism, dual sovereignty, and the balancing of rights among the often-competing sovereigns of federal and state government.
2. The enumeration of key individual civil liberties protections listed in the Bill of Rights with an extrapolation of those same theories to business.

The most impressive fact that surfaces in the study of the Constitution is that it never changes but it always changes. This underscores the importance of the courts. To watch students as they uncover the mysteries found in this document is well worth the effort.

*The key objective of this chapter is to introduce students to the role of the U.S. Constitution and its pivotal role in the ultimate distribution of powers between the federal government and the states vis-à-vis the control of business conduct in the United States. This aspect of the chapter will introduce students to key terms which they will be using throughout the rest of the course such as substantive and procedural due process and the like. In all likelihood, because of the

breadth of materials covered, the lecture/discussion format will work best for purposes of illustrating as much of the material as possible in the time allowed.

II. Text Materials

The U.S. Constitution Serves Two Major Functions:

1. It creates the three branches of government (executive, legislative, and judicial) and allocates powers to these branches.
2. It protects individual rights by limiting the government's ability to restrict those rights.

Federalism and Delegated Powers:

- *Federalism* is the U.S. form of government. The federal government and the 50 state governments share powers.
- *Reserved Powers*: Any powers that are not specifically delegated to the federal government by the Constitution are reserved to the states.
- *Enumerated Powers*—certain powers delegated to the federal government by the states.

Doctrine of Separation of Powers:

- Article I of the Constitution establishes the *legislative branch* of government.
 - The part of the government that consists of *Congress*:
 - The Senate
 - The House of Representatives
- Article II of the Constitution establishes the *executive branch* of government.
 - The part of the government that consists of:
 - The President
 - The Vice President
 - The president is selected by the *Electoral College*, not elected by popular vote.
- Article III of the Constitution establishes the *judicial branch* of government.
 - The part of the government that consists of:
 - The Supreme Court
 - Other federal courts that may be created by the Congress
- *Checks and Balances*: Certain *checks and balances* are built into the constitution to ensure that no one branch of the federal government becomes too powerful.

The Supremacy Clause:

- *Supremacy Clause*—establishes that the federal constitution, treaties, federal laws, and federal regulations are the supreme law of the land.
 - State and local laws that conflict with valid federal law are unconstitutional.

Case 2.1: U.S. Supreme Court Speaks: *Attorney General of Maine v. New Hampshire Motor Transport Authority*, 552 U.S. 364, 128 S.Ct., 989, Web 2008 U.S. Lexis 2008 (2010)

Facts: U.S. Congress enacted the Federal Motor Carrier Act, among others, deregulating the trucking industry. Maine adapted a statute regulating the industry forbidding non-Maine-licensed tobacco retailers from accepting a delivery and forbidding them from transporting a tobacco product to anyone in Maine. Truckers sued claiming preemption by the Federal statute. The U.S.

Court of Appeals upheld a district court decision holding the federal law did preempt the Maine statute. Maine appealed the decision.

Issue: Does federal law preempt the Maine statute here?

Decision: Yes, the decision was affirmed.

Reason: The state statute conflicts with the competitive market taxes designed by the federal statutes. If Maine could do it, all states could do it and this is not the purpose of the preemption concept.

Case 2.2: The Supreme Court Speaks: *Crosby, Secretary of Administration and Finance of MA v. National Foreign Trade Council*, 530 U.S. 3b3, 120 S.Ct. 2288, Wels 2000 U.S. Lexis 4153 (2000)

Facts: The National Foreign Trade Council filed a lawsuit against MA to have the state law banning MA from purchasing goods and services from companies doing business with Myanmar declared unconstitutional. Congress had passed a statute giving the President the power to regulate dealings with Myanmar. From rulings in favor of the Council MA appeals.

Issue: Did the MA anti-Myanmar statute violate the Supremacy Clause?

Decision: Yes. The lower decisions were affirmed.

Reason: The MA statute conflicted with the federal law. Congress could not have intended on giving the president power which could be preempted by state statutes such as the one from MA.

Commerce Clause:

- A clause of the U.S. Constitution that grants Congress the power “to regulate commerce with foreign nations, and among the several states, and with Indian tribes.”
- Because this clause authorizes the federal government to regulate commerce, it has a greater impact on business than any other provision in the Constitution.

Federal Regulation of Interstate Commerce:

- The commerce clause also gives the federal government the authority to regulate *interstate commerce*.
- The federal government may regulate:
 - *Interstate* commerce that crosses state borders
 - *Intrastate* commerce that affects interstate commerce

Landmark Case: *Heart of Atlanta Motel v. United States*. In this case, the Supreme Court said that the Civil Rights Act of 1964 properly regulates interstate commerce and thus discrimination in the hotel that was readily accessible to U.S. highways was prohibited.

Note:

Interstate Commerce Clause (The Dichotomy)

Baseball—Wichard v. Filburn—Today—Gun-Free School Zone Act

State and Local Government Regulation of Business:

- **Police Power**—the power of the states to regulate private and business activity within their borders.

- States may enact laws that protect or promote the public health, safety, morals, and general welfare as long as the law does not ***unduly burden interstate commerce***.

No:

1. Discrimination
2. Undue burden
 - a. Cannot limit length of passenger trains
 - b. No antifederal ban on truck length
 - c. Permissible local road weight controls.

Cyber Law: E-Commerce and the Commerce Clause

A Michigan law permitting Internet sale of wine (among other methods) that discriminated against the other state wineries violated the U.S. Constitution by imposing an undue burden on interstate e-commerce.

State and Local Government Regulation of Business:

- State and local governments may regulate:
 - ***Interstate*** commerce within their borders
 - ***Intrastate*** commerce not exclusively regulated by the federal government
- Zoning ordinances, state environmental laws, corporation and partnership laws, and property laws are enacted under this power.

Landmark Law: The Bill of Rights

The first 10 amendments to the U.S. Constitution are known as the Bill of Rights. In addition, there are 17 other amendments.

The Bill of Rights and Business:

- The *Bill of Rights* provides certain freedoms and protections to individuals and business:
 - Freedom of speech
 - Freedom of religion

Freedom of Speech:

- The right to engage in oral, written, and symbolic speech protected by the First Amendment.
- The U.S. Supreme Court places speech into three categories:
 - Fully protected
 - Limited protected
 - Unprotected

Note:

1. *Commercial speech is subject to time, place, and manner restrictions.*
2. *Symbolic speech is also protected.*
3. *State can define what constitutes obscene speech.*

Court Tests

1. Compelling Interest Test (Strict Scrutiny)—Government action sustained only if:
 - a. Overriding or compelling government interest involved
 - b. Government is using narrowest possible means.
2. Reasonable Basis Test—Government action constitutional if:
 - a. Government is pursuing legitimate government purpose
 - b. Some reasonable basis for the action
3. Intermediate Test—Government action sustained if:
 - a. Pursuit of important government objectives
 - b. Significantly related to the attainment of these objectives

Use Test 1 for fundamental rights and suspect classifications. Use Test 2 for all others except for classes based on sex or sometimes age—then use Test 3

Case 2.3: The Supreme Court Speaks: *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 175 L.Ed. 2d 753, Web 2010 U.S. Lexis 766 (2010)

Facts: The documentary “Hillary” depicted Senator and presidential primary Clinton in a very critical light. It was produced by Citizens United (CU) who wanted to promote the movie with ads. CU sued the Federal Election Commission (FEC) alleging violation of free speech. They were challenging Section 441b of the federal campaign law prohibiting corporations and labor unions from using general ways to promote election or defeat of a political candidate. This law is administered by FEC.

Issue: Do the challenged restrictions violate CU’s right to free speech?

Decision: Yes. In a 5–4 decision the court held that CU’s free speech rights had been violated.

Reason: The court had recognized that free speech rights extend to corporations and to do otherwise would be censorship. The speech in question contributes to the debate, which is indispensable to decision making.

Case 2.4: The Supreme Court Speaks: *Mainstream Marketing Services, Inc. FTC and FCC*, 358, F.3d1228, Web 2004 U.S. App. Lexis 2564 (2004) U.S. Court of Appeals 10th Circuit

Facts: FTC and FCC created donor-call registry (the list) prohibiting commercial telemarketers from calling any one on the list. Only charities and fundraisers can call. MMS sued claiming a violation of right to free speech. The FTC and FCC argued a proper regulation of commercial speech (the unsolicited calls).

Issue: Are unsolicited telemarketing calls commercial speech which can be constitutionally regulated by the list?

Decision: Yes. The registry restriction does not violate MMS’s right to free speech.

Reason: The list restricts only commercial calls. It targets calls that include customers privacy; it is an opt-in program, and it allows the government’s ability to protect abusive invasions of privacy. It does act to stop other sales attempts. The list features are within the purpose of the regulation.

Cyber Law: Broad Free-Speech Rights Granted in Cyberspace

There is discussion of the Computer Decency Act sections which were declared unconstitutional in part because of its chilling effect on adult free speech.

Freedom of Religion:

- The U.S. Constitution requires federal, state, and local governments to be neutral toward religion.
 - The Establishment Clause—prohibits the government from either establishing a state religion or promoting one religion over another.
 - The Free Exercise Clause—prohibits the government from interfering with the free exercise of religion in the United States.

Contemporary Environment: Second Amendment’s Right to Bear Arms. the District of Columbia’s restriction on firearms ownership violated the Second Amendment in a 5–4 decision.

Fourteenth Amendment: Equal Protection Clause

- As already shown earlier, the Supreme Court has adopted three different standards for reviewing equal protection cases:
 - Strict Scrutiny Test (also known as compelling benefit test)—applied to classifications based on race.
 - Intermediate Scrutiny Test—applied to classifications based on protected classes other than race (e.g., sex or age)
 - Rational Basis Test—applied to classifications not involving suspect or protected class.
- State cannot deny equal protection of the laws to any person within its jurisdiction.

Due Process Clause:

- The Fifth and Fourteenth Amendments both contain a Due Process Clause.
- These clauses provide that no person shall be deprived of “*life, liberty, or property*” without due process of the law.
- Fifth Amendment Clause—applies to *federal government* action.
- Fourteenth Amendment Clause—applies to *state and local government* action.
- Substantive due process requires that the laws be clear and not overly broad.
- Procedural due process usually deals with notice and ability to behave.

The Privileges and Immunities Clause:

- Article IV of the Constitution and the Fourteenth Amendment contain a Privileges and Immunities Clause.
- This clause prohibits states from enacting laws that unduly discriminate in favor of their residents.
- This clause applies only to citizens.
 - Corporations are not protected.

Note: No discrimination with respect to essential activities without a substantial reason.

P & I Clause Reasons

1. Acceptable Discrimination
 - a. Recreational hunting license
 - b. Higher tuition costs to state universities for non–tax-paying out-of-staters
2. Unacceptable Discrimination
 - a. Commercial fishing license extreme difference

- b. Right to own property

International Law: Human Rights Violations in Myanmar. The human rights issue in Myanmar is discussed.

III. Answers to Critical Thinking Cases

Commerce and Supremacy Clauses

- 2.1. Yes, the fleet purchase standards are the result of a carefully devised regulatory scheme. They must comply with federal specs and any state id to pass their tests and undo this scheme. *Engine Managers Assoc. v. Santa Coast Air quad tics Mgt. District* . 541 U.S. 241, 124 S. Ct. 1756, Web 2004 U.S. Lexis 32 32

Treaty with Native Americans

- 2.2 Yes, the Ojbue Treaty of 1837 was still valid and had not been extinguished when Minnesota entered into the Union. There was no other Congressional intent to abrogate the rights given by the treaty. *Minnesota v. Mille Lass Bard at Chippewa Indians*, 526 U.S. 172, 119 S.Ct. 1887, Web 1999 U.S. Lexis 2190

Separation of Powers

- 2.3. The U.S. Supreme Court held that the President’s seizure of the steel mills was a violation of separation of powers and unconstitutional. The court held that the seizure order could not stand. *Youngstown Company v. Sawyer, Secretary of Commerce*, 343 U.S. 579, 72 S.Ct. 863, 96 L. Ed. 1153 (1952).

Privileges and Immunities Clause

- 2.4. No, the Alaska Hire statute is not constitutional. The Privileges and Immunities Clause of the U.S. Constitution provides that “the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.” With few exceptions, this clause prohibits a state from favoring its residents over residents of other states in granting privileges or rights. The U.S. Supreme Court held that the Alaska Hire statute that required that employers give preference to hiring Alaska residents over residents of other states violated the Privileges and Immunities Clause. In so holding, the court stated that the Constitution “was framed upon the theory that peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” The Supreme Court held that the Alaska Hire statute cannot withstand constitutional scrutiny. *Hicklin v. Orbeck, Commissioner of the Department of Labor of Alaska*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978).

Commercial Speech

- 2.5. Yes, the City of San Diego’s zoning ordinance which prohibits commercial billboards within the city is lawful. What is involved in this case is commercial speech. The U.S. Supreme Court held that although commercial speech such as advertising is protected by the Freedom of Speech Clause of the First Amendment to the U.S. Constitution, it is

accorded a lesser protection than other constitutionally guaranteed expressions. The Supreme Court held that commercial speech is subject to proper time, place, and manner restrictions.

In this case, the Supreme Court held that the twin goals of the zoning ordinance—traffic safety and aesthetic values—advanced the city’s interests and justified the prohibition on commercial billboards within the city. The court reasoned that advertisers had other forms of speech to reach consumers, such as print media, handbills, television, and radio commercials. The Supreme Court held that the San Diego zoning ordinance was a proper time, place, and manner restriction on commercial speech and did not violate the First Amendment. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981).

Equal Protection Clause

- 2.6. Metropolitan Life Insurance Company (Metropolitan) wins. The Supreme Court held that the Alabama statute that taxed foreign out-of-state insurance companies at a higher rate than domestic insurance companies violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The Supreme Court found that Alabama’s aim was purely and completely discriminatory, designed only to favor domestic industry within the state, no matter what the cost to foreign corporations also seeking to do business in the state. The court stated “the Alabama domestic preference tax gives the ‘home team’ an advantage by burdening all foreign corporations seeking to do business within the state.” The court held that under the circumstances, promotion of domestic business by discrimination against nonresident competitors is not a legitimate state purpose. The court found no rational basis for the discriminatory tax, and held it to be an unconstitutional violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Metropolitan Life Insurance Company v. Ward, Commissioner of Insurance of Alabama*, 470 U.S. 689, 105 S.Ct. 1676, 84 L.Ed.2d 751 (1985).

IV. Answers to Ethics Cases

- 2.7. The Supreme Court held that Congress had the part to enact the Drivers Privacy Protection Act. The United States had argued that the tax personal information in question is a part of interstate commerce. The intervention is used in the stream of commerce.
- 2.8. Appellees’ prosecution for burning a flag in violation of the Act is inconsistent with the First Amendment. Although flag desecration, like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990).

V. Answers to Public Policy Cases

- 2.9 This display of the Ten Commandments violated the Supremacy Clause. The First Amendment requires government religion neutrality. The secular purpose of acting must be genuine. Here the impression of events dictates this. This focused on religion and

carrying anything else would have been a sham in this case. *McCreary County, KY v. ACLU of KY*, 565 U.S. 844, 125 S.Ct. 2722, Web 2005 U.S. Lexis 5211

VI. Answer to “Briefing the Case” Writing Assignment:

1. Case Name, Citation, and Court

Lee v. Weisman
112 S.Ct. 2649 (1992)
United States Supreme Court

2. Key Facts

- A. The policy of public schools in Providence, R.I. has been to invite members of the clergy to give invocations and benedictions at middle and high school graduations.
- B. These invitations were issued at the discretion of school principals. Not all of them elected to take part.
- C. Robert E. Lee, principal of Nathan Bishop Middle School in Providence invited Rabbi Leslie Gutterman to deliver prayers at the school’s graduation.
- D. Rabbi Gutterman followed the school’s guidelines for such prayers as set out in “Guidelines for Civic Occasions.”
- E. Deborah Weisman, a graduating student from Nathan Bishop Middle School, objected to prayer policy and sought a temporary restraining order in the U.S. District Court for the District of Rhode Island.
- F. The District Court denied the motion based on lack of time to consider it. The graduation went forward with the prayer policy.
- G. Deborah Weisman attended the graduation and then sought a permanent injunction against the prayer policy at future graduations.
- H. The District Court held in favor of Deborah Weisman and issued a permanent injunction.

3. Issue

Does the “Establishment Clause” of the U.S. Constitution prohibit the use of prayer policy at Providence schools’ graduation ceremonies?

4. Holding

Yes.

5. Court’s Reasoning

- A. The Supreme Court held that the Establishment Clause calls for a three-part test for a practice to be allowed:
 - 1. The practice must clearly reflect a secular purpose.
 - 2. The practice must have a primary effect that neither advances nor inhibits religion.
 - 3. The practice must avoid excessive government entanglement with religion.
- B. The net effect of the Providence prayer policy was to coerce participation in the prayer service as part of the graduation ceremony.
- C. The policy failed to conform to the three-part Establishment Clause test because of the compulsive nature of attendance at the graduation ceremony, which, in effect, forced unwilling students to participate in a religious exercise.