

A bystander is not obligated to come to the aid of anyone in distress unless the bystander created the peril, and obviously the store did not do so. The policeman should sue those who attacked him. **Argument for the Police Officer:** We agree that in general a bystander has no obligation to come to the aid of one in distress. However, when a business that is open to the public receives an urgent request to call the police, the business should either make the call or permit someone else to do it

5. Federal antitrust statutes are complex, but the basic goal is straightforward: to prevent a major industry from being so dominated by a small group of corporations that they destroy competition and injure consumers. Does Major League Baseball violate the antitrust laws? Many observers say that it does. A small group of owners not only dominate the industry, but actually *own* it, controlling the entry of new owners into the game. This issue went to the United States Supreme Court in 1922. Justice Holmes ruled, perhaps surprisingly, that baseball is exempt from the antitrust laws, holding that baseball is not “trade or commerce.” Suppose that members of Congress dislike this ruling and the current condition of baseball. What can they do?

DISCUSSION QUESTIONS

1. Courts generally follow precedent, but in the *Tarasoff* and *Soldano* cases discussed earlier in this chapter, they did not. Consider the opening scenario at the Old Abandoned Mill. *Should* the hiker bear any *legal* responsibility for Gary’s untimely end; or should a court follow precedent and hold the lazy hiker blameless?
2. Revisit the *Fox Television Stations* case. Do you agree with the opinion? What would a sensible broadcast obscenity policy contain? When (if ever) should a network face fines for airing bad language?
3. In 2010, President Barack Obama signed a major health care reform bill into law. Seventeen state attorneys general filed a lawsuit challenging the constitutionality of the new statute. A key argument in the case will revolve around “interstate commerce.” The states will argue that a provision in the law that requires Americans to purchase health insurance or face fines should be struck down because the Constitution allows for the *regulation* of commerce but does not allow the federal government to require people to *participate in* commerce; that is, to buy something.

Does this argument seem sensible to you? Should the government be able to require those who can afford to purchase health insurance to purchase it?
4. FOIA applies to government agencies, but it exempts Congress. Should top lawmakers be obligated to comply with FOIA requests, or would that create more problems than it would solve?
5. Suppose you were on a state supreme court and faced with a restaurant-choking case. Should you require restaurant employees to know and employ the Heimlich maneuver to assist a choking victim? If they do a bad job, they could cause additional injury. Should you permit them to do nothing at all? Is there a compromise position? What social policies are most important?

CHAPTER 5

CONSTITUTIONAL LAW

The consultant started his presentation to the energy company's board of directors. "So I don't have to tell you that if the Smith-Jones bill ever passes Congress, it will be an utter disaster for your company. The House has already passed it. The president wants it. The only thing that kept it from becoming law this summer is that the Senate was too chicken to bring it up for a vote in an election year.

"Here's the bottom line: to be comfortable, you need three candidates who see things your way to beat current senators who support the bill."

The next slide showed a large map of the United States with three states highlighted in red. "These are your best bets. Attempting wins here would cost \$60 million total—not so much for a billion-dollar-a-year operation like yours.

"The money would go to saturation advertising from Labor Day to Election Day. I want to buy TV ads during local news programs all day, and during most prime time shows. I want the viewers to see your ads at least a dozen times before they go to the polls.

"In state #1, the challenger—your candidate—is a squeaky-clean state representative, but no one knows much about her outside her own district. She carries herself well, has a nice family. People will like her if they see her. Your money makes sure people will see her.

"In state #2, your guy hasn't really done much. But his grandfather was a hero at Normandy, and his dad was a coal miner. Great-grandparents were immigrants who came through New York with nothing in their pockets—I can see the ad with the Statue of Liberty already. A lot of voters will appreciate his family's story. This strategy will work if we have the funds to tell the story often enough.



**"In state #3, we go
negative. Really
negative."**

“In state #3, we go negative. Really negative. Our opponent has been in the Senate a long time, and he’s taken maybe 100,000 photos. We have three of them showing him with world leaders who have become unpopular of late. We’re going to use them to tell a story about the senator putting foreign interests above American jobs and national security. People are angry—they think America is losing its place in the world. Our polling shows that this kind of campaign will be highly effective.

“You need to get into this election. All of your stakeholders benefit if the Smith-Jones bill dies—your workers stay on the job, your shareholders make more money, and your customers pay lower prices. Corporations are nothing more or less than the people who work for them, and they have the right to express their political opinions. These ads would simply give your workers the chance to exercise their right to free speech.”

The CFO interrupted, “Look, we’re all against the Smith-Jones bill. But is this plan *legal*?”

GOVERNMENT POWER

One in a Million

The Constitution of the United States is the greatest legal document ever written. No other written constitution has lasted so long, governed so many, or withstood such challenge. This amazing work was drafted in 1787, when two weeks were needed to make the horseback ride from Boston to Philadelphia, a pair of young cities in a weak and disorganized nation. Yet today, when that trip requires less than two hours by jet, the same Constitution successfully governs the most powerful country on earth. This longevity is a tribute to the wisdom and idealism of the Founding Fathers. The Constitution is not perfect, but overall, it has worked astonishingly well and has become the model for many constitutions around the world.

The Constitution sits above everything else in our legal system. No law can conflict with it. The chapter opener raises a constitutional issue: does Congress have the right to prohibit corporations from spending money to affect elections, or are these actions protected as free speech under the First Amendment? We will explore this later in the chapter when we discuss the *Citizens United* case.

The Constitution is short and relatively easy to read. This brevity is potent. The Founding Fathers, or **Framers**, wanted it to last for centuries, and they understood that would happen only if the document permitted interpretation and “fleshing out” by later generations. The Constitution’s versatility is striking. In this chapter, the first part provides an overview of the Constitution, discussing how it came to be and how it is organized. The second part describes the power given to the three branches of government. The third part explains the individual rights the Constitution guarantees to citizens.

OVERVIEW

Thirteen American colonies declared independence from Great Britain in 1776, and gained it in 1783. The new status was exhilarating. Ours was the first nation in modern history founded on the idea that the people could govern themselves, democratically. The idea was

daring, brilliant, and fraught with difficulties. The states were governing themselves under the Articles of Confederation, but these articles gave the central government no real power. The government could not tax any state or its citizens and had no way to raise money. The national government also lacked the power to regulate commerce between the states or between foreign nations and any state. This was disastrous. States began to impose taxes on goods entering from other states. The young “nation” was a collection of poor relations, threatening to squabble themselves to death.

In 1787, the states sent a group of 55 delegates to Philadelphia. Rather than amend the old articles, the Framers set out to draft a new document and to create a government that had never existed before. It was hard going. What structure should the government have? How much power? Representatives like Alexander Hamilton, a *federalist*, urged a strong central government. The new government must be able to tax and spend, regulate commerce, control the borders, and do all things that national governments routinely do. But Patrick Henry and other *antifederalists* feared a powerful central government. They had fought a bitter war precisely to get rid of autocratic rulers; they had seen the evil that a distant government could inflict. The antifederalists insisted that the states retain maximum authority, keeping political control closer to home.

The debate continues to this day, and periodically it plays a key role in elections. The “tea party” movement, for example, is a modern group of antifederalists with a growing political influence.

Another critical question was how much power the *people* should have. Many of the delegates had little love for the common people and feared that extending this idea of democracy too far would lead to mob rule. Antifederalists again disagreed. The British had been thrown out, they insisted, to guarantee individual liberty and a chance to participate in the government. Power corrupted. It must be dispersed amongst the people to avoid its abuse.

How to settle these basic differences? By compromise, of course. **The Constitution is a series of compromises about power.** We will see many provisions granting power to one branch of the government while at the same time restraining the authority given.

Separation of Powers

The Framers did not want to place too much power in any single place. One method of limiting power was to create a national government divided into three branches, each independent and equal. Each branch would act as a check on the power of the other two. Article I of the Constitution created a Congress, which was to have legislative, or lawmaking, power. Article II created the office of president, defining the scope of executive, or enforcement, power. Article III established judicial, or interpretive, power by creating the Supreme Court and permitting additional federal courts.

Consider how the three separate powers balance one another: Congress was given the power to pass statutes, a major grant of power. But the president was permitted to veto, or block, proposed statutes, a nearly equal grant. Congress, in turn, had the right to override the veto, ensuring that the president would not become a dictator. The president was allowed to appoint federal judges and members of his cabinet, but only with a consenting vote from the Senate.

Individual Rights

The original Constitution was silent about the rights of citizens. This alarmed many who feared that the new federal government would have unlimited power over their lives. So in 1791 the first 10 amendments, known as the **Bill of Rights**, were added to the Constitution, guaranteeing many liberties directly to individual citizens.

In the next two sections, we look in more detail at the two sides of the great series of compromises: power granted and rights protected.

POWER GRANTED

Congressional Power

To recap two key ideas from Chapter 1:

1. Voters in all 50 states elect representatives who go to Washington, D.C., to serve in Congress.
2. The Congress is comprised of the House of Representatives and the Senate. The House has 435 voting members, and states with large populations send more representatives. The Senate has 100 members—two from each state.

Congress wields tremendous power. Its members create statutes that influence our jobs, money, health care, military, communications, and virtually everything else. But can Congress create *any* kind of law that it wishes? No.

Article I, section 8 is a critically important part of the Constitution. It lists the 18 types of statutes that Congress is allowed to pass, such as imposing taxes, declaring war, and coining money. Thus, only the national government may create currency. The state of Texas cannot print \$20 bills with George W. Bush's profile.

States like Texas *are* supposed to create all other kinds of laws for themselves because the Tenth Amendment says, "All powers not delegated to the United States by the Constitution ... are reserved to the States."

The **Commerce Clause** is the specific item in Article I, Section 8, most important to your future as a businessperson. It calls upon Congress "to regulate commerce ... among the several States," and its impact is described in the next section.

Commerce Clause

The part of Article I, Section 8, that gives Congress the power to regulate commerce with foreign nations and among states.

Interstate Commerce

With the Commerce Clause, the Framers sought to accomplish several things in response to the commercial chaos that existed under the Articles of Confederation. They wanted the federal government to speak with one voice when regulating commercial relations with foreign governments.¹ The Framers also wanted to give Congress the power to bring coordination and fairness to trade among the states, and to stop the states from imposing the taxes and regulations that were wrecking the nation's domestic trade.

Virtually all of the numerous statutes that affect businesses are passed under the Commerce Clause. But what does it mean to regulate interstate commerce? Are all business transactions "interstate commerce," or are there exceptions? In the end, the courts must interpret what the Constitution means.

Substantial Effect Rule

An important test of the Commerce Clause came in the Depression years of the 1930s, in *Wickard v. Filburn*.² The price of wheat and other grains had fluctuated wildly, severely harming farmers and the national food market. Congress sought to stabilize prices by limiting the bushels per acre that a farmer could grow. Filburn grew more wheat than federal law allowed and was fined. In defense, he claimed that Congress had no right to regulate him because none of his wheat went into *interstate* commerce. He sold some locally and used the rest on his own farm as food for livestock and as seed. The Commerce Clause, Filburn claimed, gave Congress no authority to limit what he could do.

¹*Michelin Tire Corp. v. Wages, Tax Commissioner*, 423 U.S. 276, 96 S. Ct. 535, 1976 U.S. LEXIS 120 (1976).

²317 U.S. 111, 63 S. Ct. 82, 1942 U.S. LEXIS 1046 (1942).

The Supreme Court disagreed and held that **Congress may regulate any activity that has a substantial economic effect on interstate commerce**. Filburn's wheat *affected* interstate commerce because the more he grew for use on his own farm, the less he would need to buy in the open market of interstate commerce. In the end, "interstate commerce" does not require that things travel from one state to another.

In *United States v. Lopez*,³ however, the Supreme Court ruled that Congress *had* exceeded its power under the Commerce Clause. Congress had passed a criminal statute called the "Gun-Free School Zones Act," which forbade any individual from possessing a firearm in a school zone. The goal of the statute was obvious: to keep schools safe. Lopez was convicted of violating the act and appealed his conviction all the way to the high Court, claiming that Congress had no power to pass such a law. The government argued that the Commerce Clause gave it the power to pass the law, but the Supreme Court was unpersuaded.

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. [Lopez] was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. [The statute was unconstitutional and void.]

Congress's power is great—but still limited.

Current Application: The Affordable Healthcare Act. In 2010, Congress passed the Affordable Healthcare Act and President Barack Obama signed it into law. The wide-ranging legislation may result in as many as 30 million uninsured Americans gaining health care coverage. Almost immediately after it passed, many states sued and argued that the law violated the Constitution by exceeding Congress's power to regulate interstate commerce.

The challenge centers on a provision (which the press refers to as the "individual mandate") in the Act that requires many people to purchase health insurance or face fines. The states argue that requiring people to buy something is fundamentally different from regulating people who *voluntarily* decided to participate in commerce.

At this writing, the lower courts are divided on whether the healthcare statute is constitutional. The Supreme Court will surely have the final word. In the end, the fate of this law hinges upon how the justices define "commerce."

State Legislative Power

The "dormant" or "negative" aspect of the Commerce Clause governs state efforts to regulate interstate commerce. **The dormant aspect holds that a state statute which discriminates against interstate commerce is almost always unconstitutional.** Here is an example, but please do not read it if you plan to drive later today. Michigan and New York permitted in-state wineries to sell directly to consumers. They both denied this privilege to out-of-state producers, who were forced to sell to wholesalers, who offered the wine to retailers, who sold to consumers. This created an impossible barrier for many small vineyards, which did not produce enough wine to attract wholesalers. Even if they did, the multiple resales drove their prices prohibitively high.

Local residents and out-of-state wineries sued, claiming that the state regulations violated the dormant Commerce Clause. The Supreme Court ruled that these statutes obviously discriminated against out-of-state vineyards; the schemes were illegal unless Michigan and

³514 U.S. 549, 115 S. Ct. 1624, 1995 U.S. LEXIS 3039 (1995).

New York could demonstrate an important goal that could not be met any other way. The states' alleged motive was to prevent minors from purchasing wine over the Internet. However, Michigan and New York offered no evidence that such purchases were really a problem. The Court said that minors seldom drink wine, and when they do, they seek instant gratification, not a package in the mail. States that allowed direct shipment to consumers reported no increase in purchases by minors. This discrimination against interstate commerce, like most, was unconstitutional.⁴

Devil's Advocate

Underage drinking is a serious problem. The Court should allow states wide leeway in their efforts to limit the harm. Even if the regulations are imperfect, they may help reduce the damage.

Supremacy Clause

What happens when both the federal and state governments pass regulations that are permissible, but conflicting? For example, Congress passed the federal Occupational Safety and Health Act (OSHA) establishing many job safety standards, including those for training workers who handle hazardous waste. Congress had the power to do so under the Commerce Clause. Later, Illinois passed its own hazardous waste statutes, seeking to protect both the general public and workers. The state statute did not violate the Commerce Clause because it imposed no restriction on interstate commerce.

Each statute specified worker training and employer licensing. But the requirements differed. Which statute did Illinois corporations have to obey? Article VI of the Constitution contains the answer. **The Supremacy Clause** states that the Constitution, and federal statutes and treaties, shall be the supreme law of the land.

The Supremacy Clause
Makes the Constitution, and federal statutes and treaties, the supreme law of the land.

- If there is a conflict between federal and state statutes, the federal law **preempts** the field, meaning it controls the issue. The state law is void.
- Even in cases where there is no conflict, if Congress demonstrates that it intends to exercise exclusive control over an issue, federal law preempts.

Thus state law controls only when there is no conflicting federal law *and* Congress has not intended to dominate the issue. In the Illinois case, the Supreme Court concluded that Congress intended to regulate the issue exclusively. Federal law therefore preempted the field, and local employers were obligated to obey only the federal regulations.

EXAM Strategy

Question: Dairy farming was more expensive in Massachusetts than in other states. To help its farmers, Massachusetts taxed all milk sales, regardless of where the milk was produced. The revenues went into a fund that was then distributed to in-state dairy farmers. Discuss.

⁴*Granholm v. Heald*, 544 U.S. 460, 125 S.Ct. 1885 (2005).

Strategy: By giving a subsidy to local farmers, the state is treating them differently than out-of-state dairies. This raises Commerce Clause issues. The dormant aspect applies. What does it state? Apply that standard to these facts.

Result: The dormant aspect holds that a state statute which discriminates against interstate commerce is almost always invalid. Massachusetts was subsidizing its farmers at the expense of those from other states. The tax violates the Commerce Clause and is void.

Executive Power

Article II of the Constitution defines executive power. The president's most basic job function is to enforce the nation's laws. Three of his key powers concern appointment, legislation, and foreign policy.

Appointment

Administrative agencies play a powerful role in business regulation, and the president nominates the heads of most of them. These choices dramatically influence what issues the agencies choose to pursue and how aggressively they do it. For example, a president who seeks to expand the scope of regulations on air quality may appoint a forceful environmentalist to run the Environmental Protection Agency (EPA), whereas a president who dislikes federal regulations will choose a more passive agency head.⁵

Legislation

The president and his advisers propose bills to Congress. During the last 50 years, a vast number of newly proposed bills have come from the executive branch. Some argue that *too many* proposals come from the president and that Congress has become overly passive. When a president proposes controversial legislation on a major issue, such as Social Security reform, the bill can dominate the news—and Congress—for months or even years. The president, of course, also has the power to veto bills.⁶

Foreign Policy

The president conducts the nation's foreign affairs, coordinating international efforts, negotiating treaties, and so forth. The president is also the commander in chief of the armed forces, meaning that he heads the military. But Article II does not give him the right to declare war—only the Senate may do that. A continuing tension between the president and Congress has resulted from the president's use of troops overseas *without* a formal declaration of war.

Judicial Power

Article III of the Constitution creates the Supreme Court and permits Congress to establish lower courts within the federal court system.⁷ Federal courts have two key functions: adjudication and judicial review.

⁵For a discussion of administrative agency power, see Chapter 4, on administrative law.

⁶For a discussion of the president's veto power and Congress's power to override a veto, see Chapter 4, on statutory law.

⁷For a discussion of the federal court system, see Chapter 3, on dispute resolution.

Adjudicating Cases

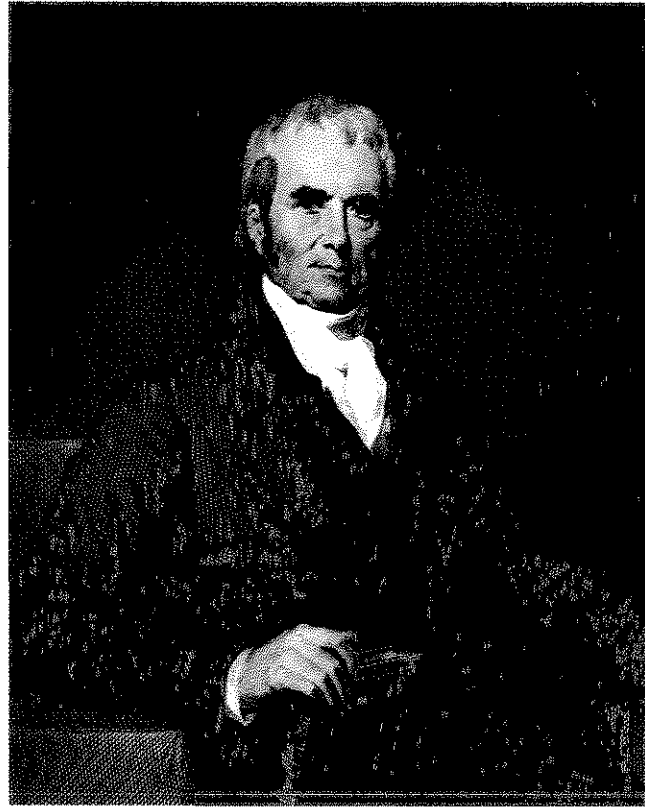
The federal court system hears criminal and civil cases. Generally, prosecutions of federal crimes begin in United States District Court. That same court has limited jurisdiction to hear civil lawsuits, a subject discussed in Chapter 3, on dispute resolution.

Judicial Review

One of the greatest “constitutional” powers appears nowhere in the Constitution. In 1803, the Supreme Court decided *Marbury v. Madison*.⁸ Congress had passed a relatively minor statute that gave certain powers to the Supreme Court, and Marbury wanted the Court to use those powers. The Court refused. In an opinion written by Chief Justice John Marshall, the Court held that the statute violated the Constitution because Article III of the Constitution did not grant the Court those powers. The details of the case were insignificant, but the ruling was profound: because the statute violated the Constitution, said the Court, it was void. **Judicial review refers to the power of federal courts to declare a statute or governmental action unconstitutional and void.**

This formidable grab of power has produced two centuries of controversy. The Court was declaring that it alone had the right to evaluate acts of the other two branches of government—the Congress and the executive—and to decide which were valid and which void. The Constitution nowhere grants this power. Undaunted, Marshall declared that “[I]t is emphatically the province and duty of the judicial department to say what the law is.” In later cases, the Supreme Court expanded on the idea, holding that it could also nullify state statutes, rulings by state courts, and actions by federal and state officials. In this chapter we have already encountered an example of judicial review in the *Lopez* case, where the justices declared that Congress lacked the power to pass local gun regulations.

Is judicial review good for the nation? Those who oppose it argue that federal court judges are all appointed, not elected, and that we should not permit judges to nullify a statute passed by elected officials because that diminishes the people’s role in their government. Those who favor judicial review insist that there must be one cohesive interpretation of the Constitution and the judicial branch is the logical one to provide it. The following example of judicial review shows how immediate and emotional the issue can be. This is a criminal prosecution for a brutal crime. Cases like this force us to examine two



Chief Justice John Marshall

© North Wind Picture Archives / Alamy

KENNEDY V. LOUISIANA

128 S.Ct. 2641
United States Supreme Court, 2008

Facts: Patrick Kennedy raped his eight-year-old stepdaughter. Her injuries were the most severe that the forensic expert had ever seen. Kennedy was convicted of aggravated rape because the victim was under 12 years of age.

The jury voted to sentence Kennedy to death, which was permitted by the Louisiana statute. The state supreme court affirmed the death sentence, and Kennedy appealed to the United States Supreme Court. He argued

⁸5 U.S. 137, 1 Cranch 137 (1803).

that the Louisiana statute was unconstitutional. The Eighth Amendment prohibits cruel and unusual punishment, which includes penalties that are out of proportion to the crime. Kennedy claimed that capital punishment was out of proportion to rape and violated the Eighth Amendment.

Issues: *Did the Louisiana statute violate the Constitution by permitting the death penalty in a case of child rape? Is it proper for the Supreme Court to decide this issue?*

Excerpts from Justice Kennedy's Decision: The constitutional prohibition against excessive or cruel and unusual punishments mandates that the State's power to punish be exercised within the limits of civilized standards. Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, a hesitation that has special force where no life was taken in the commission of the crime.

Consistent with evolving standards of decency and the teachings of our precedents we conclude that, in determining whether the death penalty is excessive, there is a distinction between intentional first-degree murder on the one hand and nonhomicide crimes against individual persons, even includ-

ing child rape, on the other. The latter crimes may be devastating in their harm, as here, but in terms of moral depravity and of the injury to the person and to the public, they cannot be compared to murder in their severity and irrevocability.

Louisiana reintroduced the death penalty for rape of a child in 1995. Five States have since followed Louisiana's lead: Georgia, Montana, Oklahoma, South Carolina, and Texas. By contrast, 44 States have not made child rape a capital offense. As for federal law, Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence, including certain nonhomicide offenses; but it did not do the same for child rape or abuse. [The court concludes that there is a national consensus against imposing the death penalty for rape, and strikes down the Louisiana statute.]

Justice Alito, dissenting: If anything can be inferred from state legislative developments, the message is very different from the one that the Court perceives. In just the past few years, five States have enacted targeted capital child-rape laws. Such a development would not be out of step with changes in our society's thinking. During that time, reported instances of child abuse have increased dramatically; and there are many indications of growing alarm about the sexual abuse of children.

questions about judicial review. What is the proper punishment for such a horrible crime? Just as important, *who should make that decision*—appointed judges, or elected legislators?

Judicial Activism/Judicial Restraint. The power of judicial review is potentially dictatorial. The Supreme Court nullifies statutes passed by Congress (*Marbury v. Madison*, *United States v. Lopez*) and executive actions. May it strike down any law it dislikes? In theory, no—the Court should nullify only laws that violate the Constitution. But in practice, yes—the Constitution means whatever the majority of the current justices says that it means, since it is the Court that tells us which laws are violative.

Judicial activism refers to a court's willingness, or even eagerness, to become involved in major issues and to decide cases on constitutional grounds. Activists are sometimes willing to "stretch" laws beyond their most obvious meaning. **Judicial restraint** is the opposite, an attitude that courts should leave lawmaking to legislators and nullify a law only when it unquestionably violates the Constitution. Some justices believe that the Founding Fathers never intended the judicial branch to take a prominent role in sculpting the nation's laws and its social vision.

From the 1950s through the 1970s, the Supreme Court took an activist role, deciding many major social issues on constitutional grounds. The landmark 1954 decision in *Brown v. Board of Education* ordered an end to racial segregation in public schools, not only changing the nation's educational systems but altering forever its expectations about race.⁹ The Court also struck down many state laws that denied minorities the right to vote. Beginning with *Miranda v. Arizona*, the Court began a sweeping reappraisal of the police power of the state and the rights of criminal suspects during searches, interrogations, trials, and appeals.¹⁰ And in *Roe v. Wade*, the

⁹347 U.S. 483, 74 S. Ct. 686, 1954 U.S. LEXIS 2094 (1954).

¹⁰384 U.S. 436, 86 S. Ct. 1602, 1966 U.S. LEXIS 2817 (1966).

Judicial activism

A court's willingness to decide issues on constitutional grounds.

Judicial restraint

A court's attitude that it should leave law making to legislators.

Supreme Court established certain rights to abortion, most of which remain after nearly 40 years of continuous litigation.¹¹

Beginning in the late 1970s, and lasting to the present, the Court has pulled back from its social activism. Exhibit 5.1 illustrates the balance among Congress, the president, and the Court.

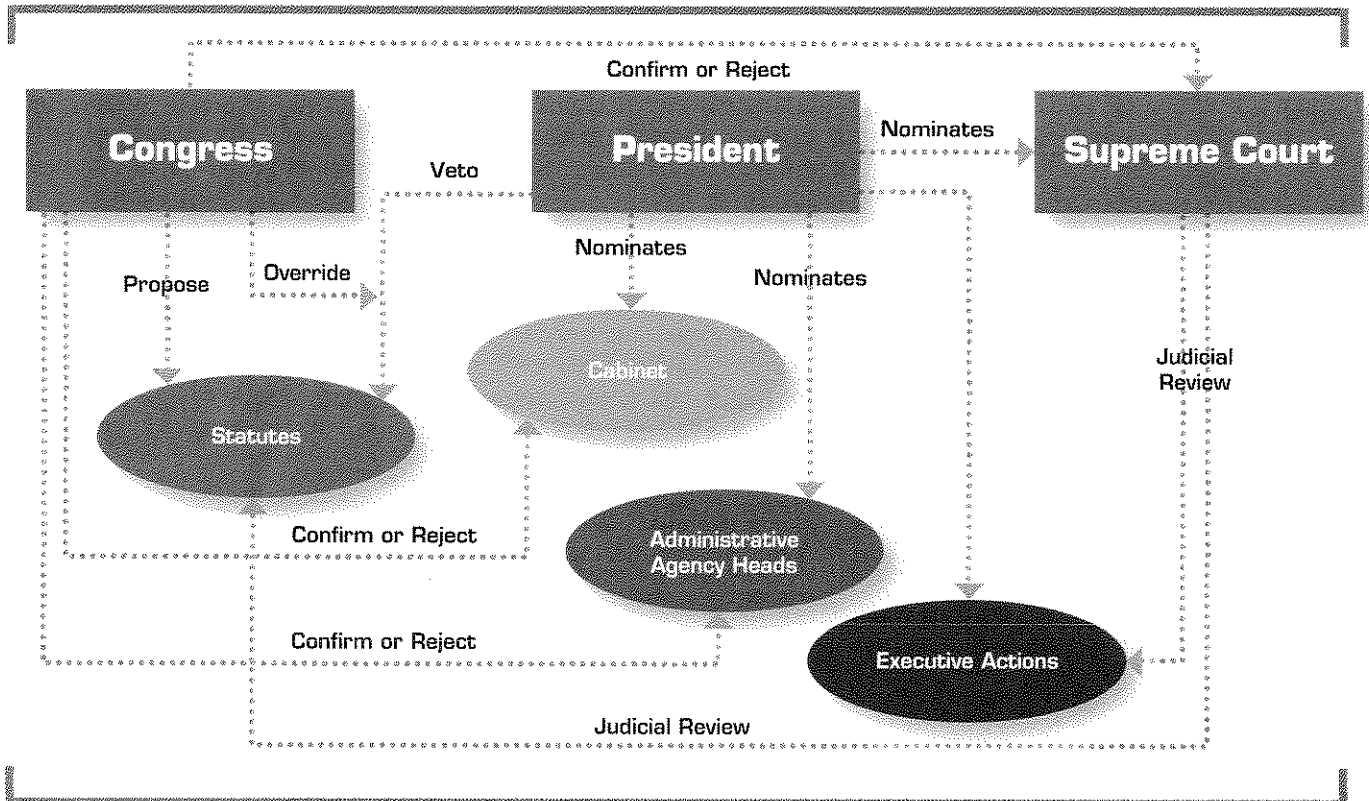


EXHIBIT 5.1

The Constitution established a federal government of checks and balances. Congress may propose statutes; the president may veto them; and Congress may override the veto. The president nominates cabinet officers, administrative heads, and Supreme Court justices, but the Senate must confirm his nominees. Finally, the Supreme Court (and lower federal courts) exercise judicial review over statutes and executive actions. Unlike the other checks and balances, judicial review is not provided for in the Constitution, but is a creation of the Court itself in *Marbury v. Madison*.

PROTECTED RIGHTS

The amendments to the Constitution protect the people of this nation from the power of state and federal government. The First Amendment guarantees rights of free speech, free press, and religion; the Fourth Amendment protects against illegal searches; the Fifth Amendment ensures due process; the Sixth Amendment demands fair treatment for defendants in criminal prosecutions; and the Fourteenth Amendment guarantees equal protection of the law. We consider the First, Fifth, and Fourteenth Amendments in this chapter and the Fourth, Fifth, and Sixth Amendments in Chapter 8, on crime.

¹¹410 U.S. 113, 93 S. Ct. 705, 1973 U.S. LEXIS 159 (1973).

The “people” who are protected include citizens and, for most purposes, corporations. Corporations are considered persons and receive most of the same protections. The great majority of these rights also extend to citizens of other countries who are in the United States.

Constitutional rights generally protect only against governmental acts. The Constitution generally does not protect us from the conduct of private parties, such as corporations or other citizens.

Incorporation

A series of Supreme Court cases has extended virtually all of the important constitutional protections to *all levels* of national, state, and local government. This process is called **incorporation** because rights explicitly guaranteed at one level are incorporated into rights that apply at other levels.

First Amendment: Free Speech

The First Amendment states that “Congress shall make no law ... abridging the freedom of speech....” In general, we expect our government to let people speak and hear whatever they choose. The Founding Fathers believed democracy would work only if the members of the electorate were free to talk, argue, listen, and exchange viewpoints in any way they wanted. The people could only cast informed ballots if they were informed. “Speech” also includes symbolic conduct, as the following case flamingly illustrates.

TEXAS V. JOHNSON

491 U.S. 397, 109 S. Ct. 2533, 1989 U.S. LEXIS 3115
United States Supreme Court, 1989

Facts: Outside the Republican National Convention in Dallas, Gregory Johnson participated in a protest against policies of the Reagan administration. Participants gave speeches and handed out leaflets. Johnson burned an American flag. He was arrested and convicted under a Texas statute that prohibited desecrating the flag, but the Texas Court of Criminal Appeals reversed on the grounds that the conviction violated the First Amendment. Texas appealed to the United States Supreme Court.

Issue: *Does the First Amendment protect flag burning?*

Excerpts from Justice Brennan’s Decision: The First Amendment literally forbids the abridgment only of “speech,” but we have long recognized that its protection does not end at the spoken or written word. While we have rejected the view that an apparently limitless variety of conduct can be labeled “speech,” we have acknowledged that conduct may be sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether an intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it. Hence, we have recognized the

expressive nature of students’ wearing of black armbands to protest American military involvement in Vietnam; of a sit-in by blacks in a “whites only” area to protest segregation; of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam; and of picketing about a wide variety of causes.

[The Court concluded that burning the flag was in fact symbolic speech.]

It remains to consider whether the State’s interest in reserving the flag as a symbol of nationhood and national unity justifies Johnson’s conviction. Johnson was prosecuted because he knew that his politically charged expression would cause “serious offense.”

If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. Nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it.

Could the Government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political

preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flagburner's message than by saluting the flag that burns, no surer

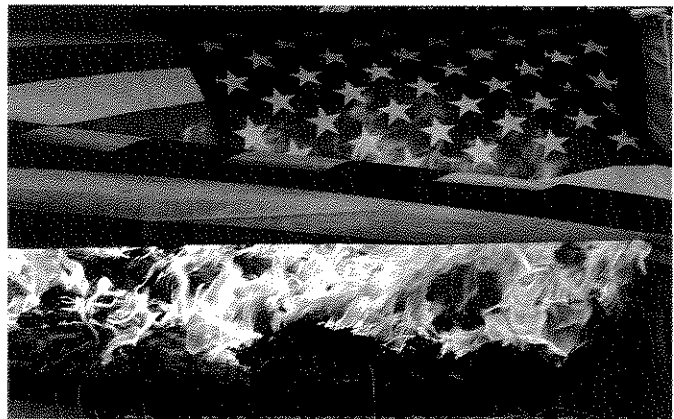
means of preserving the dignity even of the flag that burned than by—as one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

The judgment of the Texas Court of Criminal Appeals is therefore *affirmed*.

Political Speech

Because the Framers were primarily concerned with enabling democracy to function, political speech has been given an especially high degree of protection. Such speech may not be barred even when it is offensive or outrageous. A speaker, for example, could accuse a U.S. senator of being insane and could use crude, violent language to describe him. The speech is still protected. **Political speech is protected unless it is intended and likely to create imminent lawless action.**¹² For example, suppose the speaker said, "The senator is inside that restaurant. Let's get some matches and burn the place down." Speech of this sort is not protected. The speaker could be arrested for attempted arson or attempted murder.

One of the most important recent developments in constitutional law concerns the ability of *organizations* to engage in political speech. In the case that follows, a sharply divided Supreme Court weighed in on the issue raised in this chapter's opening scenario.



© Gordon Galbraith/Shutterstock

Protected speech?

CITIZENS UNITED V. FEDERAL ELECTION COMMISSION

130 S. Ct. 876

Supreme Court of the United States, 2010

Facts: Citizens United, a nonprofit organization, produced a documentary on presidential candidate Hillary Clinton. The group wanted to run television ads promoting *Hillary: The Movie*. The Bipartisan Campaign Reform Act of 2002 banned "electioneering communication" by corporations and unions for the 30 days before a presidential primary. Citizens United challenged the Act, arguing that it violated the First Amendment.

Issue: *Did the Bipartisan Campaign Reform Act violate the First Amendment?*

Excerpts from Justice Kennedy's Decision: The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech." The law before us makes it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election

¹²*Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 1969 U.S. LEXIS 1367 (1969).

or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. These prohibitions are classic examples of censorship.

As a restriction on the amount of money a person or group can spend on political communication during a campaign, that statute necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it. For these reasons, political speech must prevail against laws that would suppress it, whether by design or inadvertence.

The Government may not deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.

The Court has recognized that First Amendment protection extends to corporations. This protection has been extended by explicit holdings to the context of political speech. Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas that the First Amendment seeks to foster. The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not “natural persons.”

The Government falls back on the argument that corporate political speech can be banned in order to prevent corruption or its appearance. We must give weight to attempts by Congress to seek to dispel either the appearance or the reality of these influences. The remedies enacted by law, however, must comply with the First Amendment; and, it is our law and our tradition that more speech, not less, is the governing rule. An outright ban on corporate political speech during the critical preelection period is not a permissible remedy.

Modern-day movies, television comedies, or skits on YouTube might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation has made the purchase in order to engage in political speech. Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute’s purpose and design.

Some members of the public might consider Hillary to be insightful and instructive; some might find it to be neither high art nor a fair discussion on how to set the Nation’s course; still others simply might suspend judgment on these points but decide to think more about issues and candidates. Those choices and assessments, however, are not for the Government to make.

The judgment of the District Court is reversed.

It is so ordered.

Time, Place, and Manner

Even when speech is protected, the government may regulate the *time, place, and manner* of such speech. A town may require a group to apply for a permit before using a public park for a political demonstration. The town may insist that the demonstration take place during daylight hours and that there be adequate police supervision and sanitation provided. However, the town may not prohibit such demonstrations outright.

Many public universities have designated “free speech zones” located in high-traffic areas of campus which are not immediately adjacent to a large number of classrooms. The zones allow for debates to proceed and reach many students, but they minimize the chances that noisy demonstrations will interfere with lectures.

Morality and Obscenity

The regulation of morality and obscenity presents additional problems. Obscenity has never received constitutional protection. The Supreme Court has consistently held that it does not play a valued role in our society and has refused to give protection to obscene works. That is well and good, but it merely forces the question: what is obscene?

In *Miller v. California*,¹³ the Court created a three-part test to determine if a creative work is obscene. The basic guidelines for the factfinder are:

- Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest;
- Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

If the trial court finds that the answer to all three of those questions is “yes,” it may judge the material obscene; the state may then prohibit the work. If the state fails to prove any one of the three criteria, though, the work is not obscene.¹⁴ A United States District Court ruled that “As Nasty As They Wanna Be,” recorded by 2 Live Crew, was obscene. The appeals court, however, reversed, finding that the state had failed to prove lack of artistic merit.¹⁵

Commercial Speech

This refers to speech that has a dominant theme to propose a commercial transaction. For example, most advertisements on television and in the newspapers are commercial speech. This sort of speech is protected by the First Amendment, but the government is permitted to regulate it more closely than other forms of speech. Commercial speech that is false or misleading may be outlawed altogether. **The government may regulate other commercial speech, provided that the rules are reasonable, and directed to a legitimate goal.** The following case demonstrates the very different treatment given to this type of speech.

Commercial speech

Communication, such as advertisements, that has the dominant theme of proposing a business transaction.

SALIB V. CITY OF MESA

**133 P.3d 756, 212 Ariz. 446
Arizona Court of Appeals, 2006.**

Facts: Edward Salib owned a Winchell’s Donut House in Mesa, Arizona. To attract customers, he displayed large signs in his store window. The city ordered him to remove the signs, because they violated its Sign Code, which prohibited covering more than 30% of a store’s windows with signs. Salib sued, claiming that the Sign Code violated his First Amendment free speech rights. The trial court gave summary judgment for Mesa, and the store owner appealed.

Issue: *Did Mesa’s Sign Code violate the First Amendment?*

Excerpts from Judge Irvine’s Decision: Under [a Supreme Court case called] *Central Hudson*, commercial

speech that concerns unlawful activity or is misleading is not protected by the First Amendment. Commercial speech that falls into neither of these categories may be regulated if the government satisfies a three-prong test. First, the government must assert a substantial interest in support of the regulation. Mesa argues, and Salib concedes, that the governmental regulation of aesthetics constitutes a substantial interest, so the first prong of *Central Hudson* is not at issue.

Under the second prong of *Central Hudson*, the government must demonstrate that the challenged regulation advances its interest in a direct and material way. Salib argues that this prong has not been met because no

¹³413 U.S. 15, 93 S. Ct. 2607, 1973 U.S. LEXIS 149 (1973).

¹⁴*Penthouse Intern Ltd. v. McAuliffe*, 610 F.2d 1353 (5th Cir. 1980).

¹⁵*Luke Records, Inc. v. Navarro*, 960 F.2d 134, 1992 U.S. App. LEXIS 9592 (11th Cir. 1992).

studies were conducted to determine what aesthetic or safety problems existed and how the Sign Code could solve such problems.

Mesa responds that the Sign Code was enacted because of legitimate concerns among business owners that many businesses in the area had 100% coverage of their storefront windows and that this total coverage was unattractive and detracted from the aesthetics of the city. The First Amendment does not require a formal study before a regulation may be enacted. The record shows that the city council received considerable input on the subject of window coverage and aesthetics before enacting the Sign Code. Although its final adoption of the Sign Code may have rested on anecdote, history, consensus or simple common sense, rather than a formal study or survey addressed specifically to the window coverage provision, the constitution requires no greater proof.

Salib argues the restriction is not narrow enough and therefore violates the third prong of *Central Hudson*. It is clear from the First Amendment cases that narrowly tailored or narrowly drawn does not mean that the least restrictive means must be used. Rather, a “reasonable fit” between the intent and purpose of the regulation and the means chosen to accomplish those goals is required. The regulation does not have to be perfect, but its scope must be in proportion to the interest served.

Mesa argues that 30% is a reasonable compromise between 100% coverage and a total ban of signage. Further, Mesa argues, the Sign Code is narrow because it only addresses signs that are inside the pane, and the Code allows alternative methods of communication, including signs hanging outside of the window sill area. Additionally, Mesa conducted comparisons with other communities and found that the 30% restriction on window coverage was comparable to other cities’ restrictions.

We are not in a position to determine what percentage of window coverage is optimal. Rather, we only decide if the 30% figure that was adopted by the Sign Code is a reasonable fit to further the goal of improving aesthetics. We conclude that it is. Reasonable minds can differ as to whether Mesa’s interest would best be served by a 15%, 25%, 30% or 40% limitation on window coverage, but under the facts of this case we cannot conclude that these differences of degree are of a constitutional dimension. The exact balance between the size of the signs and the aesthetic benefits attained is ultimately a subjective decision best left to the city council.

We conclude the Sign Code directly advances a substantial governmental interest and is narrowly tailored to directly advance the goal of improved aesthetics. We therefore affirm the trial court’s granting of Mesa’s Motion for Summary Judgment.

EXAM Strategy

Question: Maria owns a lot next to a freeway that passes through Tidyville. She has rented a billboard to Huge Mart, a nearby retailer, and a second billboard to Green, a political party. However, Tidyville prohibits off-premises signs (those not on the advertiser’s property) that are visible from the freeway. Tidyville’s rule is designed to make the city more attractive, to increase property values, and to eliminate distractions that may cause freeway accidents. Huge Mart and Green sue, claiming that Tidyville’s law violates their First Amendment rights.

- A. Huge Mart is likely to win; Green is likely to lose.
- B. Green is likely to win; Huge Mart is likely to lose.
- C. Huge Mart and Green are both likely to win.
- D. Huge Mart and Green are both likely to lose.

Strategy: What is the difference between the two cases? Huge Mart wants the billboard for commercial speech, Green wants it for a political message. What are the legal standards for commercial and political free speech? Apply those standards.

Result: The government may regulate commercial speech, provided that the rules are reasonable and directed to a legitimate goal. Political speech is given much stronger protection, and can be prohibited only if it is intended and likely to create imminent lawless action. The regulation outlawing *advertising* will be upheld, but Tidyville will not be allowed to block political messages.

Fifth Amendment: Due Process and the Takings Clause

You are a senior at a major state university. You feel great about a difficult exam you took in Professor Watson's class. The Dean's Office sends for you, and you enter curiously, wondering if your exam was so good that the dean is awarding you a prize. Not quite. The exam proctor has accused you of cheating. Based on the accusation, Watson has flunked you. You protest that you are innocent and demand to know what the accusation is. The dean says that you will learn the details at a hearing, if you wish to have one. She reminds you that if you lose the hearing, you will be expelled from the university. Four years of work and your entire career are suddenly on the line.

Four years of work and
your entire career are
suddenly on the line.

The hearing is run by Professor Holmes, who will make the final decision. Holmes is a junior faculty member in Watson's department. (Next year, Watson will decide Holmes's tenure application.) At the hearing, the proctor accuses you of copying from a student sitting in front of you. Both Watson and Holmes have already compared the two papers and concluded that they are strongly similar. Holmes tells you that you must convince him the charge is wrong. You examine the papers, acknowledge that there are similarities, but plead as best you can that you never copied. Holmes doesn't buy it. The university expels you, placing on your transcript a notation of cheating.

Have you received fair treatment? To answer that, we must look to the Fifth Amendment, which provides several vital protections. We will consider two related provisions, the Due Process Clause and the Takings Clause. Together, they state: "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." These clauses prevent the government from arbitrarily taking the most valuable possessions of a citizen or corporation. The government has the right to take a person's liberty or property. But there are three important limitations:

- **Procedural Due Process.** Before depriving anyone of liberty or property, the government must go through certain steps, or procedures, to ensure that the result is fair.
- **The Takings Clause.** When the government takes property for public use, such as to build a new highway, it has to pay a fair price.
- **Substantive Due Process.** Some rights are so fundamental that the government may not take them from us at all. The substance of any law or government action may be challenged on fundamental fairness grounds.

Takings Clause

A clause in the Fifth Amendment which ensures that when any governmental unit takes private property for public use, it must compensate the owner.

Procedural Due Process

The government deprives citizens or corporations of their property in a variety of ways. The Internal Revenue Service may fine a corporation for late payment of taxes. The Customs Service may seize goods at the border. As to liberty, the government may take it by confining someone in a mental institution or by taking a child out of the home because of

Procedural due process

The doctrine which ensures that before the government takes liberty or property, the affected person has a fair chance to oppose the action.

parental neglect. The purpose of **procedural due process** is to ensure that before the government takes liberty or property, the affected person has a fair chance to oppose the action.

There are two steps in analyzing a procedural due process case:

- Is the government attempting to take liberty or property?
- If so, how much process is due? (If the government is *not* attempting to take liberty or property, there is no due process issue.)

Is the Government Attempting to Take Liberty or Property? Liberty interests are generally easy to spot: confining someone in a mental institution and taking a child from her home are both deprivations of liberty. A property interest may be obvious. Suppose that, during a civil lawsuit, the court **attaches** a defendant's house, meaning it bars the defendant from selling the property at least until the case is decided. This way, if the plaintiff wins, the defendant will have assets to pay the judgment. The court has clearly deprived the defendant of an important interest in his house, and the defendant is entitled to due process. However, a property interest may be subtler than that. A woman holding a job with a government agency has a "property interest" in that job, because her employer has agreed not to fire her without cause, and she can rely on it for income. If the government does fire her, it is taking away that property interest, and she is entitled to due process. A student attending any public school has a property interest in her education. If a public university suspends a student as described above, it is taking her property, and she, too, should receive due process.

How Much Process Is Due? Assuming that a liberty or property interest is affected, a court must decide how much process is due. Does the person get a formal trial, or an informal hearing, or merely a chance to reply in writing to the charges against her? If she gets a hearing, must it be held before the government deprives her of her property, or is it enough that she can be heard shortly thereafter? **What sort of hearing the government must offer depends upon how important the property or liberty interest is and on whether the government has a competing need for efficiency.** The more important the interest, the more formal the procedures must be.

Neutral Factfinder. Regardless of how formal the hearing, one requirement is constant: the factfinder must be neutral. Whether it is a superior court judge deciding a multimillion dollar contract suit or an employment supervisor deciding the fate of a government employee, the factfinder must have no personal interest in the outcome. In *Ward v. Monroeville*,¹⁶ the plaintiff was a motorist who had been stopped for traffic offenses in a small town. He protested his innocence and received a judicial hearing. But the "judge" at the hearing was the town mayor. Traffic fines were a significant part of the town's budget. The motorist argued that the town was depriving him of procedural due process because the mayor had a financial interest in the outcome of the case. The United States Supreme Court agreed and reversed his conviction.

Attachment of Property. As described earlier, a plaintiff in a civil lawsuit often seeks to *attach* the defendant's property. This protects the plaintiff, but it may also harm the defendant if, for example, he is about to close a profitable real estate deal. Attachments used to be routine. In *Connecticut v. Doe*,¹⁷ the Supreme Court required more caution. Based on *Doe*, when a plaintiff seeks to attach at the beginning of the trial, a court must look at the plaintiff's likelihood of winning. Generally, the court must grant the defendant a hearing

¹⁶409 U.S. 57, 93 S. Ct. 80, 1972 U.S. LEXIS 11 (1972).

¹⁷501 U.S. 1, 111 S. Ct. 2105, 1991 U.S. LEXIS 3317 (1991).

before attaching the property. The defendant, represented by a lawyer, may offer evidence as to how attachment would harm him and why it should be denied.

Government Employment. A government employee must receive due process before being fired. Generally, this means some kind of hearing, but not necessarily a formal court hearing. The employee is entitled to know the charges against him, to hear the employer's evidence, and to have an opportunity to tell his side of the story. He is not entitled to have a lawyer present. The hearing "officer" need only be a neutral employee. Further, in an emergency, where the employee is a danger to the public or the organization, the government may suspend with pay, before holding a hearing. It then must provide a hearing before the decision becomes final.

Academic Suspension. There is still a property interest here, but it is the least important of those discussed. When a public school concludes that a student has failed to meet its normal academic standards, such as by failing too many courses, it may dismiss him without a hearing. Due process is served if the student receives notice of the reason and has some opportunity to respond, such as by writing a letter contradicting the school's claims.

In cases of disciplinary suspension or expulsion, courts generally require schools to provide a higher level of due process. In the hypothetical at the beginning of this section, the university has failed to provide adequate due process.¹⁸ The school has accused the student of a serious infraction. The school must promptly provide details of the charge and cannot wait until the hearing to do so. The student should see the two papers and have a chance to rebut the charge. Moreover, Professor Holmes has demonstrated bias. He appears to have made up his mind in advance. He has placed the burden on the student to disprove the charges. And he probably feels obligated to support Watson's original conclusion, since Watson will be deciding his tenure case next year.

The Takings Clause

Florence Dolan ran a plumbing store in Tigard, Oregon. She and her husband wanted to enlarge it on land they already owned. But the city government said that they could expand only if they dedicated some of their own land for use as a public bicycle path and for other public use. Does the city have the right to make them do that? For an answer we must look to a different part of the Fifth Amendment.

The Takings Clause prohibits a state from taking private property for public use without just compensation. A town wishing to build a new football field may boot you out of your house. But the town must compensate you. The government takes your land through the power of **eminent domain**. Officials must notify you of their intentions and give you an opportunity to oppose the project and to challenge the amount the town offers to pay. But when the hearings are done, the town may write you a check and level your house, whether you like it or not.

More controversial issues arise when a local government does not physically take the property but passes regulations that restrict its use. Tigard is a city of 30,000 in Oregon. The city developed a comprehensive land use plan for its downtown area in order to preserve green space, to encourage transportation other than autos, and to reduce its flooding problems. Under the plan, when a property owner sought permission to build in the downtown section, the city could require some of her land to be used for public purposes. This has become a standard method of land use planning throughout the nation. States have used it to preserve coastline, urban green belts, and many environmental features.

When Florence Dolan applied for permission to expand, the city required that she dedicate a 15-foot strip of her property to the city as a bicycle pathway and that she

Eminent domain

The power of the government to take private property for public use.

¹⁸See, e.g., *University of Texas Medical School at Houston v. Than*, 901 S.W.2d 926, 1995 Tex. LEXIS 105 (Tex. 1995).

preserve, as greenway, a portion of her land within a floodplain. She sued, and though she lost in the Oregon courts, she won in the United States Supreme Court. The Court held that Tigard City's method of routinely forcing all owners to dedicate land to public use violated the Takings Clause. The city was taking the land, even though title never changed hands.¹⁹

The Court did not outlaw all such requirements. What it required was that, **before a government may require an owner to dedicate land to a public use, it must show that this owner's proposed building requires this dedication of land.** In other words, it is not enough for Tigard to have a general plan, such as a bicycle pathway, and to make all owners participate in it. Tigard must show that it needs *Dolan's* land *specifically for a bike path and greenway*. This will be much harder for local governments to demonstrate than merely showing a city-wide plan. A related issue arose in the following controversial case. A city used eminent domain to take property on behalf of *private developers*. Was this a valid public use?

The Kelo decision was controversial, and in response some states passed statutes prohibiting eminent domain for private development.

KELO V. CITY OF NEW LONDON, CONNECTICUT

545 U.S. 469, 125 S.Ct. 2655
United States Supreme Court, 2005

Facts: New London, Connecticut, was declining economically. The city's unemployment rate was double that of the state generally, and the population at its lowest point in 75 years. In response, state and local officials targeted a section of the city, called Fort Trumbull, for revitalization. Located on the Thames River, Fort Trumbull comprised 115 privately owned properties and 32 additional acres of an abandoned naval facility. The development plan included one section for a waterfront conference hotel and stores; a second one for 80 private residences; and one for research facilities.

The state bought most of the properties from willing sellers. However, nine owners of 15 properties refused to sell, and filed suit. The owners claimed that the city was trying to take land for *private* use, not public, in violation of the Takings Clause. The case reached the United States Supreme Court.

Issue: *Did the city's plan violate the Takings Clause?*

Excerpts from Justice Stevens' Decision: It has long been accepted that the sovereign may not take the property of *A* for the sole purpose of transferring it to another private party *B*, even though *A* is paid just compensation. On the other hand, it is equally clear that a State may transfer property from one private party to another if future "use by the public" is the purpose of the

taking; the condemnation of land for a railroad with common-carrier duties is a familiar example.

This is not a case in which the City is planning to open the condemned land—at least not in its entirety—to use by the general public. Nor will the private lessees of the land in any sense be required to operate like common carriers, making their services available to all comers. But this Court long ago rejected any literal requirement that condemned property be put into use for the general public, [embracing] the broader and more natural interpretation of public use as "public purpose." Thus, in a case upholding a mining company's use of an aerial bucket line to transport ore over property it did not own, Justice Holmes' opinion for the Court stressed "the inadequacy of use by the general public as a universal test."

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts. Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.

¹⁹*Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 1994 U.S. LEXIS 4826 (1994).

To avoid this result, petitioners urge us to adopt a new bright-line rule that economic development does not qualify as a public use. [However, promoting] economic development is a traditional and long accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized. In our cases upholding takings that facilitated agriculture and mining, for example, we emphasized the importance of those industries to the welfare of the States in question. Clearly, there is no basis for exempting economic development from our traditionally broad understanding of public purpose.

The judgment of the Supreme Court of Connecticut is affirmed.

Justice O'Connor, dissenting: The Court today significantly expands the meaning of public use. It holds that the sovereign may take private property currently put to ordinary private use, and give it over for new, ordinary

private use, so long as the new use is predicted to generate some secondary benefit for the public—such as increased tax revenue, more jobs, maybe even esthetic pleasure. But nearly any lawful use of real private property can be said to generate some incidental benefit to the public. Thus, if predicted (or even guaranteed) positive side-effects are enough to render transfer from one private party to another constitutional, then the words “for public use” do not realistically exclude *any* takings, and thus do not exert any constraint on the eminent domain power.

Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more.

Substantive Due Process

This doctrine is part of the Due Process Clause, but it is entirely different from procedural due process and from government taking. During the first third of the twentieth century, the Supreme Court frequently nullified state and federal laws, asserting that they interfered with basic rights. For example, in a famous 1905 case, *Lochner v. New York*,²⁰ the Supreme Court invalidated a New York statute that had limited the number of hours that bakers could work in a week. New York had passed the law to protect employee health. But the Court declared that private parties had a basic constitutional right to contract. In this case, the statute interfered with the rights of the employer and the baker to make any bargain they wished. Over the next three decades, the Court struck down dozens of state and federal laws that were aimed at working conditions, union rights, and social welfare generally. This was called **substantive due process**²¹ because the Court was looking at the underlying rights being affected, such as the right to contract, not at any procedures.

Critics complained that the Court was interfering with the desires of the voting public by nullifying laws that the justices personally disliked (judicial activism). During the Great Depression, however, things changed. Beginning in 1934, the Court completely reversed itself and began to uphold the types of laws it earlier had struck down.

The Supreme Court made an important substantive due process ruling in the case of *BMW v. Gore*.²² A BMW dealership sold Gore a car that had sustained water damage. Instead of telling him of the damage, they simply repainted the car and sold it as new.

In Chapter 6, we will examine two different types of cash awards that juries may make in tort cases. For now, let's call them “ordinary” and “punitive” damages. When plaintiffs win tort cases, juries may always award ordinary damages to offset real, measureable losses. In addition, juries are sometimes allowed to add to an award to further punish a defendant for bad behavior.

Substantive due process

A form of due process that holds that certain rights are so fundamental that the government may not eliminate them.

²⁰198 U.S. 45, 25 S. Ct. 539, 1905 U.S. LEXIS 1153 (1905).

²¹Be the first on your block to pronounce this word correctly. The accent goes on the first syllable: *substantive*.

²²517 U.S. 559 (1996).

In the BMW case, the jury awarded Gore \$4,000 in ordinary damages as the difference in value between a flawless new car and a water-damaged car. The jury then awarded a delighted Gore \$4 *million* in punitive damages. In the end, the Supreme Court decided that the punitive award was so disproportionate to the harm actually caused that it violated substantive due process rights.

Fourteenth Amendment: Equal Protection Clause

Shannon Faulkner wanted to attend The Citadel, a state-supported military college in South Carolina. She was a fine student who met every admission requirement that The Citadel set except one: she was not a man. The Citadel argued that its long and distinguished history demanded that it remain all male. Faulkner responded that she was a citizen of the state and ought to receive the benefits that others got, including the right to a military education. Could the school exclude her on the basis of gender?

Equal Protection Clause

A clause in the Fourteenth Amendment that generally requires the government to treat people equally.

The Fourteenth Amendment provides that “No State shall ... deny to any person within its jurisdiction the equal protection of the laws.” This is the **Equal Protection Clause**, and it means that, generally speaking, **governments must treat people equally**. Unfair classifications among people or corporations will not be permitted. A notorious example of unfair classification would be race discrimination: permitting only white children to attend a public school violates the Equal Protection Clause.

Yet clearly, governments do make classifications every day. People with high incomes pay a higher tax rate than those with low incomes; some corporations are permitted to deal in securities, while others are not. To determine which classifications are constitutionally permissible, we need to know what is being classified. There are three major groups of classifications. The outcome of a case can generally be predicted by knowing which group it is in.

- **Minimal Scrutiny: Economic and Social Relations.** Government actions that classify people or corporations on these bases are almost always upheld.
- **Intermediate Scrutiny: Gender.** Government classifications are sometimes upheld.
- **Strict Scrutiny: Race, Ethnicity, and Fundamental Rights.** Classifications based on any of these are almost never upheld.

Minimal Scrutiny: Economic and Social Regulation

Just as with the Due Process Clause, laws that regulate economic or social issues are presumed valid. They will be upheld if they are *rationally related to a legitimate goal*. This means a statute may classify corporations and/or people and the classifications will be upheld if they make any sense at all. The New York City Transit Authority excluded all methadone users from any employment. The United States District Court concluded that this violated the Equal Protection Clause by unfairly excluding all those who were on methadone. The court noted that even those who tested free of any illegal drugs and were seeking non-safety-sensitive jobs, such as clerks, were turned away. That, said the district court, was irrational.

Not so, said the United States Supreme Court. The Court admitted that the policy might not be the wisest. It would probably make more sense to test individually for illegal drugs rather than automatically exclude methadone users. But, said the Court, it was not up to the justices to choose the best policy. They were only to decide if the policy was rational. Excluding methadone users related rationally to the safety of public transport and therefore did not violate the Equal Protection Clause.²³

Intermediate Scrutiny: Gender

Classifications based on sex must meet a tougher test than those resulting from economic or social regulation. Such laws must *substantially relate to important government objectives*. Courts have increasingly nullified government sex classifications as societal concern with gender equality has grown.

²³*New York City Transit Authority v. Beazer*, 440 U.S. 568, 99 S. Ct. 1355, 1979 U.S. LEXIS 77 (1979).

At about the same time Shannon Faulkner began her campaign to enter The Citadel, another woman sought admission to the Virginia Military Institute, an all-male state school. The Supreme Court held that Virginia had violated the Equal Protection Clause by excluding women from VMI. The Court ruled that gender-based government discrimination requires an “exceedingly persuasive justification,” and that Virginia had failed that standard of proof. The Citadel promptly opened its doors to women as well.²⁴

Strict Scrutiny: Race, Ethnicity, and Fundamental Rights

Any government action that intentionally discriminates against racial or ethnic minorities, or interferes with a fundamental right, is presumed invalid. In such cases, courts will look at the statute or policy with *strict scrutiny*; that is, courts will examine it very closely to determine whether there is compelling justification for it. The law will be upheld only if it is *necessary to promote a compelling state interest*. Very few meet that test.

- **Racial and Ethnic Minorities.** Any government action that intentionally discriminates on the basis of race, or ethnicity is presumed invalid. For example, in *Palmore v. Sidoti*,²⁵ the state had refused to give child custody to a mother because her new spouse was racially different from the child. The practice was declared unconstitutional. The state had made a racial classification, it was presumed invalid, and the government had no *compelling need* to make such a ruling.
- **Fundamental Rights.** A government action interfering with a fundamental right also receives strict scrutiny and will likely be declared void. For example, New York State gave an employment preference to any veteran who had been a state resident when he entered the military. Newcomers who were veterans were less likely to get jobs, and therefore this statute interfered with the right to travel, a fundamental right. The Supreme Court declared the law invalid.²⁶

Fundamental rights

Rights so basic that any governmental interference with them is suspect and likely to be unconstitutional.

EXAM Strategy

Question: Megan is a freshman at her local public high school; her older sister Jenna attends a nearby private high school. Both girls are angry because their schools prohibit them from joining their respective wrestling teams, where only boys are allowed. The two girls sue based on the U.S. Constitution. Discuss the relevant law and predict the outcomes.

Strategy: One girl goes to private and one to public school. Why does that matter? Now ask what provision of the Constitution is involved, and what legal standard it establishes.

Result: The Constitution offers protection from the *government*. A private high school is not part of the government, and Jenna has no constitutional case. Megan’s suit is based on the Equal Protection Clause. This is gender discrimination, meaning that Megan’s school must convince the court that keeping girls off the team *substantially relates to an important government objective*. The school will probably argue that wrestling with stronger boys will be dangerous for girls. However, courts are increasingly suspicious of any gender discrimination and are unlikely to find the school’s argument persuasive.

²⁴*United States v. Virginia*, 518 U.S. 515, 116 S. Ct. 2264, 1996 U.S. LEXIS 4259 (1996).

²⁵466 U.S. 429, 104 S. Ct. 1879, 1984 U.S. LEXIS 69 (1984).

²⁶*Attorney General of New York v. Soto-Lopez*, 476 U.S. 898, 106 S. Ct. 2317, 1986 U.S. LEXIS 59 (1986).

Chapter Conclusion

The legal battle over power never stops. The obligation of a state to provide equal educational opportunity for both genders relates to whether Tigard, Oregon, may demand some of Ms. Dolan's store lot for public use. Both issues are governed by one amazing document. That same Constitution determines what tax preferences are permissible, and even whether a state may require you to wear clothing. As social mores change in step with broad cultural developments, as the membership of the Supreme Court changes, the balance of power between federal government, state government, and citizens will continue to evolve. There are no easy answers to these constitutional questions because there has never been a democracy so large, so diverse, or so powerful.

EXAM REVIEW

1. **CONSTITUTION** The Constitution is a series of compromises about power. (pp. 103–105)
2. **ARTICLES I, II AND III** Article I of the Constitution creates the Congress and grants all legislative power to it. Article II establishes the office of president and defines executive powers. Article III creates the Supreme Court and permits lower federal courts; the article also outlines the powers of the federal judiciary. (pp. 105–111)
3. **COMMERCE CLAUSE** Under the Commerce Clause, Congress may regulate any activity that has a substantial effect on interstate commerce. (pp. 105–107)
4. **INTERSTATE COMMERCE** A state may not regulate commerce in any way that will interfere with interstate commerce. (p. 105)

EXAM Strategy

Question: Maine exempted many charitable institutions from real estate taxes but denied this benefit to a charity that primarily benefited out-of-state residents. Camp Newfound was a Christian Science organization, and 95 percent of its summer campers came from other states. Camp Newfound sued Maine. Discuss.

Strategy: The state was treating organizations differently depending on what states their campers come from. This raised *Commerce Clause* issues. Did the positive aspect or dormant aspect of that clause apply? The dormant aspect applied. What does it state? Apply that standard to these facts. (See the “Result” at the end of this section.)

5. **SUPREMACY CLAUSE** Under the Supremacy Clause, if there is a conflict between federal and state statutes, the federal law preempts the field. Even without a conflict, federal law preempts if Congress intended to exercise exclusive control. (p. 107)

6. **PRESIDENTIAL POWERS** The president's key powers include making agency appointments, proposing legislation, conducting foreign policy, and acting as commander in chief of the armed forces. (p. 108)
7. **FEDERAL COURTS** The federal courts adjudicate cases and also exercise judicial review, which is the right to declare a statute or governmental action unconstitutional and void. (pp. 108–111)
8. **FREEDOM OF SPEECH** Freedom of speech includes symbolic acts. Political speech by both people and organizations is protected unless it is intended and likely to create imminent lawless action. (pp. 112–117)
9. **REGULATION OF SPEECH** The government may regulate the time, place, and manner of speech. (p. 114)
10. **COMMERCIAL SPEECH** Commercial speech that is false or misleading may be outlawed; otherwise, regulations on this speech must be reasonable and directed to a legitimate goal. (pp. 115–117)

Question: A federal statute prohibits the broadcasting of lottery advertisements, except by stations that broadcast in states permitting lotteries. The purpose of the statute is to support efforts of states that outlaw lotteries. Truth Broadcasting operates a radio station in State A (a nonlottery state) but broadcasts primarily in State B (a lottery state). Truth wants to advertise State A's lottery but is barred by the statute. Does the federal statute violate Truth's constitutional rights?

Strategy: This case involves a particular kind of speech. What kind? What is the rule about that kind of speech? (See the "Result" at the end of this section.)

11. **PROCEDURAL DUE PROCESS** Procedural due process is required whenever the government attempts to take liberty or property. The amount of process that is due depends upon the importance of the liberty or property threatened. (pp. 117–119)

Question: Fox's Fine Furs claims that Ermine owes \$68,000 for a mink coat on which she has stopped making payments. Fox files a complaint and also asks the court clerk to *garnish* Ermine's wages. A garnishment is a court order to an employer to withhold an employee's wages, or a portion of them, and pay the money into court so that there will be money for the plaintiff, if it wins. What constitutional issue does Fox's request for garnishment raise?

Strategy: Ermine is in danger of losing part of her income, which is property. The Due Process Clause prohibits the government (the court) from taking life, liberty or property without due process. What process is Ermine entitled to? (See the "Result" at the end of this section.)

- 12. TAKINGS CLAUSE** The Takings Clause prohibits a state from taking private property for public use without just compensation. (pp. 119–121)
- 13. SUBSTANTIVE DUE PROCESS** A substantive due process analysis presumes that any economic or social regulation is valid, and presumes invalid any law that infringes upon a fundamental right. (pp. 121–122)
- 14. EQUAL PROTECTION CLAUSE** The Equal Protection Clause generally requires the government to treat people equally. Courts apply strict scrutiny in any equal protection case involving race, ethnicity, or fundamental rights; intermediate scrutiny to any case involving gender; and minimal scrutiny to an economic or social regulation. (pp. 122–123)

4. Result: The dormant aspect holds that a state statute which discriminates against interstate commerce is almost always invalid. Maine was subsidizing charities that served in-state residents, and penalizing those that attracted campers from elsewhere. The tax rules violated the Commerce Clause and was void.²⁷

10. Result: An advertisement is *commercial* speech. The government may regulate this speech as long as the rules are reasonable and directed to a legitimate goal. The goal of supporting nonlottery states is reasonable, and there is no violation of Truth's free speech rights.²⁸

11. Result: Ermine is entitled to notice of Fox's claim and to a hearing *before* the court garnishes her wages.²⁹

MULTIPLE-CHOICE QUESTIONS

- Greenville College, a public community college, has a policy of admitting only male students. If the policy is challenged under the Fourteenth Amendment, _____ scrutiny will be applied.
 - strict
 - intermediate
 - rational
 - none of the above
- You begin work at Everhappy Corp. at the beginning of November. On your second day at work, you wear a political button on your overcoat, supporting your choice for governor in the upcoming election. Your boss glances at it and says, "Get that stupid thing out of this office or you're history, chump." Your boss _____ violated your First Amendment rights. After work, you put the button back on and start walking home. You pass a police officer who blocks your path and says, "Take off that stupid button or you're going to jail, chump." The officer _____ violated your First Amendment rights.

²⁷*Camps Newfoundland/Owatonna, Inc. v. Town of Harrison, Maine*, 520 U.S. 564, 117 S.Ct. 1590 (1997).

²⁸*United States v. Edge Broadcasting*, 509 U.S. 418, 113 S.Ct. 2696 (1993).

²⁹*Snidach v. Family Finance Corp.*, 395 U.S. 337 (1969).

- (a) has; has
 - (b) has; has not
 - (c) has not; has
 - (d) has not; has not
3. Which of the following statements accurately describes statutes that Congress and the president may create?
- (a) Statutes must be related to a power listed in Article I, section 8 of the Constitution.
 - (b) Statutes must not infringe on the liberties in the Bill of Rights.
 - (c) Both A and B
 - (d) None of the above
4. Which of the following is true of the origin of judicial review?
- (a) It was created by Article II of the Constitution.
 - (b) It was created by Article III of the Constitution.
 - (c) It was created in the *Marbury v. Madison* case.
 - (d) It was created by the Fifth Amendment.
 - (e) It was created by the Fourteenth Amendment.
5. Consider *Kelo v. City of New London*, in which a city with a revitalization plan squared off against property owners who did not wish to sell their property. The key constitutional provision was the Takings Clause in the _____ Amendment. The Supreme Court decided the city _____ use eminent domain and take the property from the landowners.
- (a) Fifth; could
 - (b) Fifth; could not
 - (c) Fourteenth; could
 - (d) Fourteenth; could not

ESSAY QUESTIONS

1. **YOU BE THE JUDGE WRITING PROBLEM** Scott Fane was a CPA licensed to practice in New Jersey and Florida. He built his New Jersey practice by making unsolicited phone calls to executives. When he moved to Florida, the Board of Accountancy there prohibited him (and all CPAs) from personally soliciting new business. Fane sued. Does the First Amendment force Florida to forgo foreclosing Fane's phoning? **Argument for Fane:** The Florida regulation violates the First Amendment, which protects commercial speech. Fane was not saying anything false or misleading, but was just trying to secure business. This is an unreasonable regulation, designed to keep newcomers out of the marketplace and maintain steady business and high prices for established CPAs. **Argument for the Florida Board of Accountancy:** Commercial speech deserves—and gets—a lower level of protection than other speech. This regulation is a reasonable method of ensuring that the level of CPA work in our state remains high. CPAs who personally solicit

clients are obviously in need of business. They are more likely to bend legal and ethical rules to obtain clients and keep them happy, and will lower the standards throughout the state.

2. President George H.W. Bush insisted that he had the power to send American troops into combat in the Middle East, without congressional assent. Yet before authorizing force in Operation Desert Storm, he secured congressional authorization. President Bill Clinton stated that he was prepared to invade Haiti without a congressional vote. Yet he bargained hard to avoid an invasion, and ultimately American troops entered without the use of force. Why the seeming doubletalk by both presidents?
3. In the landmark 1965 case of *Griswold v. Connecticut*, the Supreme Court examined a Connecticut statute that made it a crime for any person to use contraception. The majority declared the law an unconstitutional violation of the right of privacy. Justice Black dissented, saying, "I do not to any extent whatever base my view that this Connecticut law is constitutional on a belief that the law is wise or that its policy is a good one. [It] is every bit as offensive to me as it is to the majority. [There is no criticism by the majority of this law] to which I cannot subscribe—except their conclusion that the evil qualities they see in the law make it unconstitutional." What legal doctrines are involved here? Why did Justice Black distinguish between his personal views on the statute and the power of the Court to overturn it?
4. Gilleo opposed American participation in the war in the Persian Gulf. She displayed a large sign on her front lawn that read, "Say No to War in the Persian Gulf, Call Congress Now." The city of Ladue prohibited signs on front lawns and Gilleo sued. The city claimed that it was regulating "time, place, and manner." Explain that statement, and decide who should win.
5. David Lucas paid \$975,000 for two residential lots on the Isle of Palms near Charleston, South Carolina. He intended to build houses on them. Two years later, the South Carolina legislature passed a statute that prohibited building seaward of a certain line, and Lucas's property fell in the prohibited zone. Lucas claimed that his land was now useless and that South Carolina owed him its value. Explain his claim. Should he win?

DISCUSSION QUESTIONS

1. Return to the opening scenario and the *Citizens United* case. Is political advertising purchased by corporations appropriate? Do you agree with the five members of the Supreme Court who voted to allow it, or with the four who dissented and would have drawn distinctions between free speech by individuals and organizations? Why?
2. **Ethics** Is political advertising by a nonprofit political organization like Citizens United any more or less appropriate than advertising by for-profit corporations like the one described in the opening scenario? If you were a board member in the opening scenario, which (if any) of the three ads would you vote to authorize?

3. Consider the “tea party” movement. Do you believe that the federal government should be able to create whatever laws it deems to be in the country’s best interests, or do you believe that individual states, like Florida and California, should have more control over the laws within their own borders?

4. This chapter is filled with examples of statutes that have been struck down by the courts. A Texas law banning flag burning was rejected by the Supreme Court, as was a Louisiana death penalty statute. The Affordable Healthcare Act has been voided by two lower court judges, and the Supreme Court may or may not agree with the action.

Do you like the fact that courts can void laws that they determine to be in violation of the Constitution? Or is it wrong for appointed judges to overrule “the will of the majority,” as expressed by elected members of Congress and state legislatures?

5. Gender discrimination currently receives “intermediate” Fourteenth Amendment scrutiny. Is this right? Should gender receive “strict” scrutiny as does race? Why or why not?

INTENTIONAL TORTS AND BUSINESS TORTS

In a small Louisiana town, Don Mashburn ran a restaurant called Maison de Mashburn. The *New Orleans States-Item* newspaper reviewed his eatery, and here is what the article said:

“Tain’t Creole, ’tain’t Cajun, ’tain’t French, ’tain’t country American, ’tain’t good. I don’t know how much real talent in cooking is hidden under the mélange of hideous sauces which make this food and the menu a travesty of pretentious amateurism, but I find it all quite depressing. Put a yellow flour sauce on top of the duck, flame it for drama, and serve it with some horrible multiflavored rice in hollowed-out fruit and what have you got? A well-cooked duck with an ugly sauce that tastes too sweet and thick and makes you want to scrape off the glop to eat the plain duck. [The stuffed eggplant was prepared by emptying] a shaker full (more or less) of paprika on top of it. [One sauce created] trout à la green plague [while another should have been called] yellow death on duck.”

Mashburn sued, claiming that the newspaper had committed libel, damaging his reputation and hurting his business.¹ Trout à la green plague will be the first course on our menu of tort law. Mashburn learned, as you will, why filing such a lawsuit is easier than winning it.



“Tain’t Creole, ’tain’t
Cajun, ’tain’t French,
’tain’t country American,
’tain’t good.

¹*Mashburn v. Collin*, 355 So.2d 879 (La. 1977).