

# **Chapter 2**

## **Constitutional Law for Business and E-Commerce**

### **Learning Objectives**

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

### **Teacher-to-Teacher Dialogue**

For many legal academics, constitutional law is not only the reason why they love to teach but also an ultimate challenge in illustrating the constant balance of competing but legitimate rights of the individual vis-à-vis the larger society. The only major drawback to this material is the frustration of having the time constraints inherent in a survey course.

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

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

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

The key objective of this chapter is to introduce students to the role of the U.S. Constitution and its pivotal role in the ultimate distribution of powers between the federal government and the states vis-à-vis the control of business conduct in the United States. This aspect of the chapter will introduce students to key terms which they will be using throughout the rest of the course, such as substantive and procedural due process and the like. In all likelihood, because of the breadth of materials covered, the lecture/discussion format will work best for purposes of illustrating as much of the material as possible in the time allowed.

## Text Materials

### I. Introduction to Constitutional Law for Business and E-Commerce

Prior to the American Revolution, each of the 13 original colonies operated as a separate sovereignty under the rule of England. In September 1774, representatives of the colonies met as a Continental Congress. In 1776, the colonies declared independence from England, and the American Revolution ensued. The **Declaration of Independence** was the document that declared the American colonies' independence from England.

### II. Constitution of the United States of America

In 1778, the Continental Congress formed a **federal government** and adopted the **Articles of Confederation**. The Articles of Confederation created a federal Congress composed of representatives of the 13 new states. The Articles of Confederation was a particularly weak document that gave limited power to the newly created federal government.

The **Constitutional Convention** was convened in Philadelphia in May 1787. The primary purpose of the convention was to strengthen the federal government. After substantial debate, the delegates agreed to a new **U.S. Constitution**.

The U.S. Constitution, as amended, serves two major functions:

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

#### A. Federalism and Delegated Powers

The form of government in the U.S. is referred to as **federalism**. That means that the federal government and the 50 state governments share powers. When the states ratified the Constitution, they *delegated* certain powers—called **enumerated powers**—to the federal government.

Any powers that are not specifically delegated to the federal government by the Constitution are reserved to the state governments. These are called **reserved powers**. State governments are empowered to deal with local affairs.

#### B. Doctrine of Separation of Powers

The federal government is divided into three branches:

- **Article I: Legislative branch**—Article I of the Constitution establishes the **legislative branch** of the federal government.

- The legislative branch is responsible for making federal law. This branch is **bicameral**; that is, it consists of the U.S. Senate and the U.S. House of Representatives.
- Collectively, they are referred to as **U.S. Congress**, or simply **Congress**.
- Each state has two senators in the **U.S. Senate**.
- The number of representatives to the **U.S. House of Representatives** is determined according to the population of each state.
- **Article II: Executive branch**—Article II of the Constitution establishes the **executive branch** of the federal government by providing for the election of the president and vice-president.  
The president is not elected by popular vote, but instead is selected by the **Electoral College**, whose representatives are appointed by state delegations.
- **Article III: Judicial branch**—Article III of the Constitution establishes the **judicial branch** of the federal government by establishing the U.S. Supreme Court and providing for the creation of other federal courts by Congress.

### C. Checks and Balances

Certain **checks and balances** are built into the Constitution to ensure that no one branch of the federal government becomes too powerful.

### III. Supremacy Clause

The **Supremacy Clause** establishes that the U.S. Constitution and federal treaties, laws, and regulations are the supreme law of the Land. The concept of federal law taking precedence over state or local law is commonly called the **preemption doctrine**.

Congress may expressly provide that a particular federal statute *exclusively* regulate a specific area or activity. No state or local law regulating the area or activity is valid if there is such a statute. Often, though, federal statutes do not expressly provide for exclusive jurisdiction. In these instances, state and local governments have *concurrent jurisdiction* to regulate the area or activity.

### III. Commerce Clause

The **Commerce Clause** of the U.S. Constitution grants Congress the power “to regulate commerce with foreign nations, and among the several states, and with Indian tribes.” Among other things, this clause is intended to foster the development of a national market and free trade among the states.

The U.S. Constitution grants the federal government the power to regulate three types of commerce:

- Commerce with Native American tribes
- Foreign commerce

- Interstate commerce

### A. Commerce with Native Americans

Before Europeans arrived in the “New World,” the land had been occupied for thousands of years by people we now refer to as Native Americans. There were many different Native American tribes, each having its own independent and self-governing system of laws.

When the United States was first founded more than 200 years ago, it consisted of the original 13 colonies, all located in the east, primarily on the Atlantic Ocean. Under its Commerce Clause powers, the federal government entered into treaties with many Native American nations. Most tribes, in the face of white settlers’ encroachment on their land and federal government pressure, were forced to sell their lands to the federal government. The Native Americans received money and goods for land. The federal government obtained many treaties through unscrupulous means, cheating the Native Americans of their land. These tribes were then relocated to other, smaller, pieces of land called *reservations*, often outside their typical tribal lands.

Once Native Americans came under U.S. authority, they lost much of their political power. Most tribes were allowed to keep their own governments but were placed under the “protection” of the U.S. government. Today, many Native Americans live on reservations set aside for various tribes. Others live and work outside reservations.

#### *Indian Gaming Regulatory Act*

In the late 1980s, the federal government authorized Native American tribes to operate gaming facilities. Congress passed the **Indian Gaming Regulatory Act**, a federal statute that establishes the requirements for conducting casino gambling and other gaming activities on tribal land.

### B. Foreign Commerce

The Commerce Clause of the U.S. Constitution gives the federal government the *exclusive power* to regulate commerce with foreign nations. This is called the **Foreign Commerce Clause**. Direct and indirect regulation of foreign commerce by state or local governments that *unduly burdens* foreign commerce violates the Commerce Clause and is therefore unconstitutional.

### C. Interstate Commerce

The Commerce Clause gives the federal government the authority to regulate **interstate commerce**. Originally, the courts interpreted this clause to mean that the federal government could only regulate commerce that moved *in* interstate commerce, that is, commerce that is

conducted across state borders. Under the **effects on interstate commerce test**, the regulated activity does not itself have to be in interstate commerce.

In the famous case *Wickard, Secretary of Agriculture v. Filburn*, a federal statute limited the amount of wheat that a farmer could plant and harvest for home consumption. Filburn, a farmer, violated the law. The U.S. Supreme Court upheld the federal statute on the grounds that it involved interstate commerce because the statute was designed to prevent nationwide surpluses and shortages of wheat. The Court reasoned that wheat grown for home consumption would affect the supply of wheat available in interstate commerce.

#### **Landmark U.S. Supreme Court Case—Heart of Atlanta Motel v. United States**

Congress enacted the **Civil Rights Act of 1964**, which made it illegal for motels, hotels, and other public accommodations to discriminate against guests based on their race. After the act was passed, the Heart of Atlanta Motel continued to refuse to rent rooms to blacks. The owner-operator of the motel brought a declaratory relief action in U.S. district court, *Heart of Atlanta Motel v. United States*, to have the Civil Rights Act of 1964 declared unconstitutional. The plaintiff argued that Congress, in passing the act, had exceeded its powers to regulate interstate commerce under the Commerce Clause of the U.S. Constitution.

#### **D. State Police Power**

The states did not delegate all power to regulate business to the federal government. They retained the power to regulate **intrastate commerce** and much of the interstate commerce that occurs within their borders. This is commonly referred to as states' **police power**. Police power permits states (and, by delegation, local governments) to enact laws to protect or promote the *public health, safety, morals, and general welfare*.

#### **E. Dormant Commerce Clause**

If the federal government has chosen not to regulate an area of interstate commerce that it has the power to regulate under its Commerce Clause powers, this area of commerce is subject to what is referred to as the **Dormant Commerce Clause**. However, if a state enacts laws to regulate commerce that the federal government has the power to regulate but has chosen not to regulate, the Dormant Commerce Clause prohibits the state's regulation from **unduly burdening interstate commerce**.

### **IV. E-Commerce and the Constitution**

The Internet and other computer networks permit parties to obtain website domain names and conduct business electronically. This is usually referred to as **electronic commerce** or **e-commerce**. Because e-commerce is commerce, it is subject to the Commerce Clause of the U.S. Constitution.

**Digital Law: E-Commerce and the Commerce Clause**

In this Information Age, federal and state governments have had to grapple with how to regulate the Internet and e-commerce. The federal government seems to be taking the upper hand in passing laws that regulate business conducted in cyberspace, thus creating laws that apply uniformly across the country. However, states have also enacted laws that regulate the Internet and e-commerce. State laws that unduly burden interstate e-commerce are unconstitutional.

**V. Bill of Rights and other Amendments to the U.S. Constitution**

The U.S. Constitution provides that it may be amended. Currently, there are 27 **amendments to the U.S. Constitution**. In 1791, the 10 amendments that are commonly referred to as the **Bill of Rights** were approved by the states and became part of the U.S. Constitution. The Bill of Rights guarantees certain fundamental rights to natural persons and protects these rights from intrusive government action. Fundamental rights guaranteed in the **First Amendment** include *freedom of speech, freedom to assemble, freedom of the press, and freedom of religion*.

Originally, the Bill of Rights limited intrusive action by the *federal government* only. Intrusive actions by state and local governments were not limited until the *Due Process Clause of the Fourteenth Amendment* was added to the Constitution in 1868. The Supreme Court has applied the **incorporation doctrine** and held that most of the fundamental guarantees contained in the Bill of Rights are applicable to state and local government action.

**VI. Freedom of Speech**

One of the most honored freedoms guaranteed by the Bill of Rights is the **freedom of speech** of the First Amendment. The U.S. Supreme Court places speech into three categories:

- *Fully protected speech*
- *Limited protected speech*
- *Unprotected speech*

**A. Fully Protected Speech**

**Fully protected speech** is speech that the government cannot prohibit or regulate. The government cannot prohibit or regulate the content of fully protected speech. The First Amendment protects oral, written, and symbolic speech.

**B. Limited Protected Speech**

The Supreme Court has held that certain types of speech have only *limited protection* under the First Amendment. The government cannot forbid this type of speech, but it can subject this speech to *time, place, and manner of restrictions*. Two major forms of **limited protected speech** are *offensive speech* and *commercial speech*.

- **Offensive speech** is speech that offends many members of society.
- **Commercial speech**, such as advertising, was once considered unprotected by the First Amendment.

### C. Unprotected Speech

The U.S. Supreme Court has held that certain speech is **unprotected speech** that is not protected by the First Amendment and may be totally forbidden by the government. The Supreme Court has held that the following types of speech are unprotected speech:

- **Dangerous speech**
- **Fighting words that are likely to provoke a hostile or violent response from an average person**
- **Speech that incites the violent or revolutionary overthrow of the government**
  - However, the mere abstract teaching of the morality and consequences of such action is protected.
- **Defamatory language**
- **Child pornography**
- **Obscene speech**
  - If speech is considered **obscene speech**, it has no protection under the Freedom of Speech Clause of the First Amendment and can be banned by the government.

The definition of *obscenity* has plagued the courts. The definition of *obscene speech* is quite subjective. In *Miller v. California*, the U.S. Supreme Court determined that speech is obscene when:

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

States are free to define what constitutes obscene speech. Over the years, the content of material that has been found to be obscene has shifted to a more liberal view as the general norms of society have become more liberal. Today, fewer obscenity cases are brought than have been in the past.

## V. Freedom of Religion

**Freedom of religion** is a key concept addressed by the First Amendment. The First Amendment contains two separate religion clauses, the *Establishment Clause* and the *Free Exercise Clause*.

### A. Establishment Clause

The U.S. Constitution requires federal, state, and local governments to be neutral toward religion. The **Establishment Clause** prohibits the government from either establishing a government-sponsored religion or promoting one religion over another.

### B. Free Exercise Clause

The **Free Exercise Clause** prohibits the government from interfering with the free exercise of religion in the United States. Generally, this clause prevents the government from enacting laws that either prohibit or inhibit individuals from participating in or practicing their chosen religions.

## VI. Equal Protection

The **Fourteenth Amendment** was added to the U.S. Constitution in 1868. Its original purpose was to guarantee equal rights to all persons after the Civil War. The **Equal Protection Clause** of the Fourteenth Amendment provides that a state cannot “deny to any person within its jurisdiction the equal protection of the laws.”

This clause prohibits state, local, and federal governments from enacting laws that classify and treat “similarly situated” persons differently. Artificial persons, such as corporations, are also protected.

### A. Standards of Review

The Supreme Court has adopted three different standards of review for deciding whether the government’s different treatment of people or businesses violates or does not violate the Equal Protection Clause:

- **Strict scrutiny test**—any government activity or regulation that classifies persons based on a **suspect class** (e.g., **race**, **national origin**, and **citizenship**) or involves **fundamental rights** (e.g., **voting**) is reviewed for lawfulness using a **strict scrutiny test**.
- **Intermediate scrutiny test**—the lawfulness of government classifications based on a **protected class** other than race (e.g., **gender**) is examined using an **intermediate scrutiny test**.
- **Rational basis test**—the lawfulness of all government classifications that do not involve suspect or protected classes is examined using a **rational basis test**.

### B. Due Process

The Fifth and Fourteenth Amendments to the U.S. Constitution both contain a **Due Process Clause**. The Due Process Clause of the Fifth Amendment applies to federal government action; that of the Fourteenth Amendment applies to state and local government action. However, the government must follow due process to do so. There are two categories of due process: *substantive* and *procedural*.



### C. Substantive Due Process

The **substantive due process** category of due process requires that government statutes, ordinances, regulations, and other laws be clear on their face and not overly broad in scope. Laws that do not meet this test are declared *void for vagueness*.

### D. Procedural Due Process

The **procedural due process** form of due process requires that the government give a person proper *notice* and *hearing* of legal action before that person is deprived of his or her life, liberty, or property.

## VII. Privileges and Immunities

The purpose of the U.S. Constitution is to promote nationalism. Article IV of the Constitution contains the **Privileges and Immunities Clause**, which provides that “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several states.” The Fourteenth Amendment contains the **Privileges or Immunities Clause**, which provides that “No State shall make or enforce any law that shall abridge the privileges or immunities of the citizens of the United States.” Collectively, the clauses prohibit states from enacting laws that unduly discriminate in favor of their residents.

### Global Law: Human Rights Violations in Myanmar

The country of Myanmar (also called Burma) is ruled by a junta composed of its military generals. The country has been accused of human rights violations, including using child labor and forced labor, eliminating political dissidents, and following strict censorship. The United Nations has consistently censured Myanmar for human rights violations. Recently, because of improved conditions in Myanmar, the United States lifted some sanctions against trading with Myanmar.

## Case 2.1—U.S. Supreme Court Case

### Supremacy Clause

*Mutual Pharmaceutical Company, Inc. v. Bartlett*

133 S.Ct. 2466 (2013)

Supreme Court of the United States

**Facts:** In 1978, the Food and Drug Administration (FDA), a federal government agency, approved a nonsteroidal anti-inflammatory pain reliever called “sulindac” under the brand name Clinoril. At the time, the FDA approved the labeling of the prescription drug, which contained warnings of specific side-effects of the drug. When the Clinoril patent expired, the law permitted other pharmaceutical companies to sell generic versions of sulindac under their own brand names. Federal law requires that generic sellers of drugs use the exact labeling as required on the original

drug, without alteration. Mutual Pharmaceutical Company, Inc. (Mutual) manufactured and sold a generic brand of sulindac. Karen L. Bartlett was prescribed sulindac for shoulder pain and the pharmacist dispensed Mutual's generic brand of sulindac to her. Bartlett soon developed an acute case toxic epidermal necrolysis. She is now severely disfigured, has a number of physical disabilities, and is nearly blind. The original patented drug's label, and therefore Mutual's generic brand label, did not refer to the possible side-effect toxic epidermal necrolysis. Bartlett sued Mutual for product liability under New Hampshire law. The jury of the U.S. district court found Mutual liable and awarded Bartlett more than \$21 million in damages, and the U.S. court of appeals affirmed the award. Mutual appealed to the U.S. Supreme Court, asserting that the federal labeling law preempted New Hampshire law under the Supremacy Clause.

**Issue:** Does the federal drug labeling law preempt a stricter state drug labeling law?

**Decision:** The Supreme Court reversed the U.S. court of appeal's decision that was in favor of Bartlett.

**Reason:** The U.S. Supreme Court held that federal drug labeling law preempted New Hampshire's stricter labeling law under the Supremacy Clause of the U.S. Constitution.

## **Case 2.2—U.S. Supreme Court Case**

### **Free Speech and Violent Video Games**

*Brown, Governor of California v. Entertainment Merchants Association*

131 S.Ct. 2729, 180 L.Ed.2d 708, Web 2011 U.S. Lexis 4802 (2011)

**Supreme Court of the United States**

**Facts:** Video games are played by millions of youth and adults. Some of the games contain violent content. The state of California enacted a state statute that prohibits the sale or rental of "violent video games" to minors. The act covers games "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted" in a manner that "a reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors," and that "causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors." Violation of the act is punishable by a civil fine of up to \$1,000. Members of the video game and software industries challenged the enforcement of the act. The U.S. district court concluded that the act violated the First Amendment and permanently enjoined its enforcement. The U.S. court of appeals affirmed the decision. California appealed to the U.S. Supreme Court.

**Issue:** Does the California act that restricts violent video games violate the First Amendment?

**Decision:** The U.S. Supreme Court held that the California Act violated the First Amendment to the U.S. Constitution.

**Reason:** The court found that even where the protection of children is the object, the

constitutional limits on governmental action apply.

## **Case 2.3—U.S. Supreme Court Case**

### **Free Speech**

*Snyder v. Phelps*

131 S.Ct. 1207, 179 L.Ed.2d 172, Web 2011 U.S. Lexis 1903 (2011)

Supreme Court of the United States

**Facts:** Fred Phelps founded the Westboro Baptist Church in Topeka, Kansas. The church's congregation believes that God hates and punishes the United States for its tolerance of homosexuality, particularly in America's military. The church frequently communicates its views by picketing at military funerals. In more than 20 years, the members of Westboro Baptist have picketed at nearly 600 funerals. Lance Corporal Matthew Snyder, a member of the U.S. Marines, was killed in Iraq in the line of duty. Lance Corporal Snyder's father, Albert Snyder, selected the Catholic Church in the Snyders' hometown of Westminster, Maryland, as the site for his son's funeral. The Westboro congregation members picketed while standing on public land adjacent to a public street approximately 1,000 feet from the church. Albert Snyder filed a lawsuit against Phelps, Phelps's daughters, and the Westboro Baptist Church (collective "Westboro") in U.S. district court. Snyder alleged intentional infliction of emotional distress and other state law tort claims. Westboro argued that their speech was protected by the First Amendment. The jury found for Snyder and held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages. The U.S. district court remitted the punitive damages to \$2.1 million. The U.S. court of appeals held that the First Amendment protected Westboro's speech and reversed the judgment. Snyder appealed to the U.S. Supreme Court.

**Issue:** Does the Free Speech Clause of the First Amendment shield church members from tort liability for their funeral picketing speech?

**Decision:** The U.S. Supreme Court held that Mr. Snyder could not recover tort damages for the emotional distress he suffered because of Westboro's speech.

**Reason:** The U.S. Supreme Court held that the First Amendment protected Westboro's speech in this case.

## **Case 2.4—U.S. Supreme Court Case**

### **Equality**

*United States v. Windsor*

133 S.Ct. 2675 (2013)

Supreme Court of the United States

**Facts:** Edith Windsor and Thea Spyer were same-sex partners who resided in the state of New York. They began their long-term relationship in 1963. In 2007, Windsor and Spyer made a trip to Canada where they were lawfully married. The state of New York recognized the marriage of Windsor and Spyer. Spyer died in 2009, and left her entire estate to Windsor. In 1996, Congress

enacted the Defense of Marriage Act (DOMA). Section 3 of this federal statute defined “marriage” as a legal union between a husband and wife, and defined “spouse” as a person of the opposite sex who is a husband or wife. Because of these definitions, DOMA denies same-sex married partners benefits allowed to heterosexual married couples in more than 1,000 federal statutes and thousands of federal regulations. When Spyer died, Windsor sought to claim the federal tax exemption for surviving spouses. This would have saved Windsor \$363,053 in federal estate taxes. DOMA barred her from obtaining this exemption. Windsor paid the taxes but filed a lawsuit in U.S. district court alleging that Section 3 of DOMA violated the guarantee of equal protection provided by the U.S. Constitution. The U.S. district court and the U.S. court of appeals ruled that the challenged provision of DOMA was unconstitutional and ordered the United States to pay Windsor a tax refund. The U.S. Supreme Court agreed to hear the appeal.

**Issue:** Is Section 3 of DOMA unconstitutional?

**Decision:** The U.S. Supreme Court held that Section 3 of DOMA was unconstitutional because it violated the Equal Protection Clause and that federal benefits are available to same-sex married couples equally with heterosexual married couples.

**Reason:** The court stated that the equal protection guarantee of the Fourteenth Amendment makes that Fifth Amendment right all the more specific and all the better understood and preserved.

## Answers to Critical Legal Thinking Cases

### 2.1. Supremacy Clause

Yes. The U.S. Supreme Court held that the Massachusetts’ anti-Myanmar law conflicted with federal law and was therefore preempted by the Supremacy Clause of the U.S. Constitution. The Supreme Court stated, “Within the sphere defined by Congress, then, the federal statute has placed the president in a position with as much discretion to exercise economic leverage against Burma, with an eye toward national security, as our law will admit. It is simply implausible that Congress would have gone to such lengths to empower the president if it had been willing to compromise his effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary presidential action.” The court stated that it was unlikely that Congress intended both to enable the president to protect national security by giving him the flexibility to suspend or terminate federal sanctions and simultaneously to allow Massachusetts to act at odds with the president’s judgment of what national security requires. And that is just what the Massachusetts Burma law would do in imposing a different, state system of economic pressure against the Burmese political regime. The U.S. Supreme Court held that the Massachusetts anti-Myanmar law conflicted with federal law and was therefore preempted by the Supremacy Clause of the Constitution. The Supreme Court ruled in favor of the National Foreign Trade Council. *Crosby, Secretary of Administration and Finance of Massachusetts v. National Foreign Trade Council*, 530 U.S. 363, 120 S.Ct. 2288, 147 L.Ed.2d 352, Web 2000 U.S. Lexis 4153 (Supreme Court of the United States)

## 2.2. Establishment Clause

Yes, the display of the Ten Commandments in the courthouses violates the Establishment Clause. The First Amendment's Establishment Clause mandates governmental neutrality regarding religion, that is, a government cannot promote religion. However, the U.S. Supreme Court has held that in some instances the display of a religious item may have obtained a secular purpose and therefore does not violate the Establishment Clause. Here, the Ten Commandments were not part of an historical display that may have taken on a secular meaning. Instead, the Ten Commandments were recently hung in the courtrooms, and were hung alone. Although the counties later added historical documents to the display—such as the Declaration of Independence and the Bill of Rights—this did not create a secular purpose. Here, the hanging of the additional material was a sham to hide the real purpose, which was to promote religion. The U.S. Supreme Court held that the Counties' display of the Ten Commandments violated the Establishment Clause. *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 545 U.S. 844, 125 S.Ct. 2722, 162 L.Ed.2d 729, Web 2005 U.S. Lexis 5211 (Supreme Court of the United States)

## 2.3. Supremacy Clause

Yes, South Coast's fleet emission standards are preempted by federal environmental protection law. The Supremacy Clause of the U.S. Constitution stipulates that federal law is the supreme law of the United States, and that any conflicting state or local law is preempted by the relevant federal law. Congress enacted the Clean Air Act, a federal law that sets air pollution standards for vehicles and other sources of pollution. The South Coast Air Quality Management District (South Coast), which is a political entity of the state of California, adopted air pollution standards for fleets of vehicles, such as those operated by trucking companies, that were more stringent than federal air pollution standards. The U.S. Supreme Court held that South Coast's more stringent pollution law conflicted with the federal pollution law and was therefore preempted by the Clean Air Act. The Supreme Court stated, "Clearly, Congress contemplated the enforcement of emission standards. But if one state or political subdivision may enact such rules, then so may any other, and the end result would undo Congress's carefully calibrated regulatory scheme. What is the use of imposing such a limitation if the states are entirely free to impose their own fleet purchase standards with entirely different specifications?" The U.S. Supreme Court held that the federal Clean Air Act preempted South Coast's more stringent fleet emission standards. *Engine Manufacturers Association v. South Coast Air Quality Management District*, 541 U.S. 246, 124 S.Ct. 1756, 158 L.Ed.2d 529, Web 2004 U.S. Lexis 3232 (Supreme Court of the United States)

## 2.4. Privileges and Immunities Clause

No, the Alaska Hire statute is not constitutional. The Privileges and Immunities Clause of the U.S. Constitution provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." With few exceptions, this clause prohibits a state from favoring its residents over residents of other states in granting privileges or rights. The U.S.

Supreme Court held that the Alaska Hire statute that required that employers give preference to hiring Alaska residents over residents of other states violated the Privileges and Immunities Clause. In so holding the court stated that the Constitution “was framed upon the theory that peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.” The Supreme Court held that the Alaska Hire statute cannot withstand constitutional scrutiny. *Hicklin v. Orbeck, Commissioner of the Department of Labor of Alaska*, 437 U.S. 518, 98 S.Ct. 2482, 57 L.Ed.2d 397 (1978), Web 1978 U.S. Lexis 36 (Supreme Court of the United States)

## 2.5. Commercial Speech

Yes, the City of San Diego’s zoning ordinance which prohibits commercial billboards within the city is lawful. What is involved in this case is commercial speech. The U.S. Supreme Court held that although commercial speech such as advertising is protected by the Freedom of Speech Clause of the First Amendment to the U.S. Constitution, it is accorded a lesser protection than other constitutionally guaranteed expressions. The Supreme Court held that commercial speech is subject to proper time, place, and manner restrictions.

In this case, the Supreme Court held that the twin goals of the zoning ordinance—traffic safety and aesthetic values—advanced the city’s interests and justified the prohibition on commercial billboards within the city. The court reasoned that advertisers had other forms of speech to reach consumers, such as print media, handbills, television, and radio commercials. The Supreme Court held that the San Diego zoning ordinance was a proper time, place and manner restriction on commercial speech and did not violate the First Amendment. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981), Web 1981 U.S. Lexis 50 (Supreme Court of the United States)

## Answers to Ethics Cases

### 2.6. Ethics Case

Yes, the federal Driver’s Privacy Protection Act (DPPA) was properly enacted by the U.S. Congress pursuant to the Commerce Clause power granted to the federal government by the U.S. Constitution. The DPPA is a proper exercise of Congress’s authority to regulate interstate commerce under the Commerce Clause. The personal, identifying information that the DPPA regulates is a thing in interstate commerce, and that the sale or release of that information in interstate commerce is therefore a proper subject of congressional regulation. The motor vehicle information that the states have historically sold is used by insurers, manufacturers, direct marketers, and others engaged in interstate commerce to contact automobile owners and drivers via customized solicitations. The information is also used in the stream of interstate commerce by various public and private entities for matters related to interstate motoring. Because automobile owners’ and drivers’ information is an article of commerce, its sale or release into the interstate stream of business is sufficient to support federal regulation. The U.S. Supreme Court held that Congress had the authority under the Commerce Clause of the U.S. Constitution to enact the

federal Driver's Privacy Protection Act. Therefore, a state cannot sell or otherwise distribute the personal information of registered drivers unless the state obtains that person's affirmative consent to do so.

Was it ethical for state governments to sell the personal information of parties who obtained driver's licenses or registered vehicles with the state to advertisers, businesses, and others of parties? Most persons who provide personal information to a state would expect that the information would be kept confidential. The government has an implied duty not to breach this confidentiality. *Reno, Attorney General of the United States v. Condon, Attorney General of South Carolina*, 528 U.S. 141, 120 S.Ct. 666, 145 L.Ed.2d 587, Web 2000 U.S. Lexis 503 (Supreme Court of the United States)

## **2.7. Ethics Case**

Appellees' prosecution for burning a flag in violation of the Act is inconsistent with the First Amendment. While flag desecration, like virulent ethnic and religious epithets, vulgar repudiations of the draft, and scurrilous caricatures is deeply offensive to many, the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. *United States v. Eichman*, 496 U.S. 310, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990), Web 1990 U.S. Lexis 3087 (Supreme Court of the United States)