
CHAPTER 2

CONSTITUTIONAL LAW

ANSWERS TO LEARNING OBJECTIVES AT THE BEGINNING OF THE CHAPTER

1A. *What constitutional clause gives the federal government the power to regulate commercial activities among the states?* To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to the national government the power to regulate interstate commerce. The commerce clause—Article I, Section 8, of the U.S. Constitution—expressly permits Congress “to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

2A. *What is the Bill of Rights? What freedoms does the First Amendment guarantee?* The Bill of Rights consists of the first ten amendments to the U.S. Constitution. Adopted in 1791, the Bill of Rights embodies protections for individuals against interference by the federal government. Some of the protections also apply to business entities. The First Amendment guarantees the freedoms of religion, speech, and the press, and the rights to assemble peaceably and to petition the government.

3A. *Where in the Constitution can the due process clause be found?* Both the Fifth and the Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived “of life, liberty, or property, without due process of law.” The due process clause of each of these constitutional amendments has two aspects—procedural and substantive.

4A. *Which constitutional amendments have been interpreted as implying a right to privacy?* The U.S. Constitution does not explicitly mention a general right to privacy. In a landmark 1965 case, however, the United States Supreme Court held that a constitutional right to privacy was implied by the First, Third, Fourth, Fifth, and Ninth Amendments.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

MANAGERIAL STRATEGY—BUSINESS QUESTIONS

1A. *Can a business manager's religious beliefs factor into the business's hiring treatment of same-sex partners? Why or why not?* No, a business manager should avoid letting her or his religious beliefs factor into the business's treatment of same-sex partners with regard to family and medical leave and health insurance.

Although many religions disapprove of same-sex relationships, treating same-sex partners less favorably than heterosexual employees with respect to employment benefits may lead to legal challenges and to disgruntled employees. The general public increasingly believes that homosexual couples should be entitled to equal treatment under the law. It stands to reason that a firm's heterosexual employees might be upset if the firm treats same-sex couples differently than any other employees.

As noted in the feature, no federal law defines marriage, and federal courts are increasingly likely to invalidate state laws that prohibit same-sex marriage. The federal government has already indicated that it will treat same-sex couples the same in terms of bankruptcy and federal benefits, and it may be that states will start requiring equal treatment of same-sex couples in employment benefits. Therefore, it would be wise for a manager to steer clear of any appearance of discriminatory treatment of employees involved in same-sex relationships, even if they are based on the manager's religious beliefs.

2A. *Must business owners in all states have to provide the same benefits to employees in a same-sex union as they do to heterosexual couples?* It seems likely that eventually, most states will recognize the rights of same-sex couples, particularly with regard to employment benefits, such as family and medical leave and health insurance. The public perception of same-sex unions has changed, and many of the firm's employees may support equal treatment of homosexual couples in such matters. Therefore, the owner of a business located in one of the states that bans same-sex marriage may want to provide the same benefits to

employees in a same-sex union as they do to married employees. This would show their employees that they are committed to fair treatment of all employees in the workplace. It would also show that the business is ahead of the curve (existing law) on this issue.

BEYOND OUR BORDERS—CRITICAL THINKING

Should U.S. courts, and particularly the United States Supreme Court, look to the other nations' laws for guidance when deciding important issues—including those involving rights granted by the Constitution? If so, what impact might this have on their decisions? Explain. U.S. courts should consider foreign law when deciding issues of national importance because changes in views on those issues is not limited to domestic law. How other jurisdictions and other nations regulate those issues can be informative, enlightening, and instructive, and indicate possibilities that domestic law might not suggest. U.S. courts should not consider foreign law when deciding issues of national importance because it can be misleading and irrelevant in our domestic and cultural context.

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—CRITICAL THINKING

The Court said in its opinion that “specific criminal acts are not protected speech even if speech is the means for their commission.” What use of the social media and the Internet might therefore still be unlawful (and not protected free speech) for registered sex offenders? If a registered sex offender used the Internet specifically to contact a minor, that type of speech would be prohibited. Additionally, a registered sex offender’s use of a website specifically to obtain information about a minor would not be protected free speech.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE CASES

CASE 2.1—CRITICAL THINKING QUESTIONS

WHAT IF THE FACTS WERE DIFFERENT?

If this case had involved a small, private retail business that did not advertise nationally, would the result have been the same? Why or why not? It is not likely that the result in this case would have been different even if the facts had involved a small, private retail business that did not advertise nationally. The intended impact of the decision in *Heart of Atlanta* was to uphold the constitutionality of the Civil Rights Act of 1964 and the power of Congress to regulate interstate commerce to stop local discriminatory practices. In the Supreme Court’s opinion, “The power of Congress to promote interstate commerce also includes the power to regulate the local incidents

thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce.”

Thus, if the case had involved a small, local retail business, the Court would have found participation in interstate commerce based on the use of a phone, or a Facebook page (or other Web presence), or sales to customers who traveled across state lines—or, as in *Wickard v. Filburn*, participation might have been based on any transaction that might otherwise have occurred in interstate commerce.

CASE 2.2—CRITICAL THINKING QUESTIONS

LEGAL ENVIRONMENT

How does the making of “audio and video recordings of an agricultural production facility” fall under the protection of the First Amendment? As the court in the *Animal* case recognized, “Audiovisual recordings are protected by the First Amendment as recognized organs of public opinion and as a significant medium for the communication of ideas.” Thus, there is a constitutional right to film matters in the public interest.

The public consumes food obtained from “agricultural production facilities,” such as the dairy farm in the *Animal* case. This consumption brings those facilities within the public interest. Matters related to food safety, and by inference animal cruelty, are of significant public importance. And journalists have a constitutional right to investigate and broadcast or publish exposés on the agricultural industry, particularly with regard to food safety.

WHAT IF THE FACTS WERE DIFFERENT?

Suppose that instead of banning recordings of an agricultural production facility’s operations, the state had criminalized misrepresentations by journalists to gain access to such a facility. Would the result have been different? Explain. No, the result would not have been different. Like the statute struck down by the court in the *Animal* case, the provision suggested in this question would target speech protected by the First Amendment.

As the court in the *Animal* case observed, “Journalists [have a] constitutional right to investigate and publish exposés on the agricultural industry. Matters related to food safety and animal cruelty are of significant public importance.”

Of course, false statements are not always protected under the First Amendment. For example, false statements made for material gain or advantage or to inflict harm can be criminalized. But a false statement made to gain access to an agricultural production facility merely allows the speaker to cross the threshold of another’s property, including property that is generally open to the public. Such lies are pure speech—they do not inflict any material or legal harm on the deceived party.

CASE 2.3—CRITICAL THINKING QUESTIONS**LEGAL ENVIRONMENT****Whose interests are advanced by the banning of certain types of advertising?**

The government's interests are advanced when certain ads are banned. For example, in the *Bad Frog* case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of "vulgar and profane" advertising from children's sight arguably advanced the state's interest in protecting children from those ads.

WHAT IF THE FACTS WERE DIFFERENT?***If Bad Frog had sought to use the offensive label to market toys instead of beer, would the court's ruling likely have been the same? Explain your answer.***

Probably not. The reasoning underlying the court's decision in the case was, in part, that "the State's prohibition of the labels . . . does not materially advance its asserted interests in insulating children from vulgarity . . . and is not narrowly tailored to the interest concerning children." The court's reasoning was supported in part by the fact that children cannot buy beer. If the labels advertised toys, however, the court's reasoning might have been different.

ANSWERS TO QUESTIONS IN THE PRACTICE AND REVIEW FEATURE AT THE END OF THE CHAPTER

1A. Equal protection

When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

2A. Levels of scrutiny

The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are strict scrutiny (if fundamental rights are at stake), intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and the "rational basis" test (in matters of economic or social welfare).

3A. Standard

The court would likely apply the rational basis test, because the statute regulates a matter of social welfare by requiring helmets. Similar to seat-belt laws and speed limits, a helmet statute involves the state's attempt to protect the welfare of its citizens. Thus, the court would consider it a matter a social welfare and require that it be rationally related to a legitimate government objective.

4A. Application

The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

ANSWER TO DEBATE THIS QUESTION IN THE PRACTICE AND REVIEW FEATURE AT THE END OF THE CHAPTER

Legislation aimed at protecting people from themselves concerns the individual as well as the public in general. Protective helmet laws are just one example of such legislation. Should individuals be allowed to engage in unsafe activities if they choose to do so? Certainly many will argue in favor of individual rights. If certain people wish to engage in risky activities such as riding motorcycles without a helmet, so be it. That should be their choice. No one is going to argue that motorcycle riders believe that there is zero danger when riding a motorcycle without a helmet. In other words, individuals should be free to make their own decisions and consequently, their own mistakes.

In contrast, there is a public policy issue involved. If a motorcyclist injures him- or herself in an accident because he or she was not wearing a protective helmet, society ends up paying in the form of increased medical care expenses, lost productivity, and even welfare for other family members. Thus, the state has an interest in protecting the public in general by limiting some individual rights.

**ANSWERS TO ISSUE SPOTTERS
AT THE END OF THE CHAPTER**

1A. South Dakota wants its citizens to conserve energy. To help reduce consumer consumption of electricity, the state passes a law that bans all advertising by power utilities within the state. What argument could the power utilities use as a defense to the enforcement of this state law? Even if commercial speech is neither related to illegal activities nor misleading, it may be restricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this situation, however, the interest in energy conservation is substantial, but it could be achieved by less restrictive means. That would be the utilities' defense against the enforcement of this state law.

2A. *Suppose that a state imposes a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies. Is this a violation of the equal protection clause if the only reason for the tax is to protect the local firms from out-of-state competition? Explain.* Yes. The tax would limit the liberty of some persons (out of state businesses), so it is subject to a review under the equal protection clause. Protecting local businesses from out-of-state competition is not a legitimate government objective. Thus, such a tax would violate the equal protection clause.

ANSWERS TO BUSINESS SCENARIOS AND CASE PROBLEMS AT THE END OF THE CHAPTER

2-1A. *The free exercise clause*

Thomas has a constitutionally protected right to the free exercise of his religion. In denying his claim for unemployment benefits, the state violated this right. Employers are obligated to make reasonable accommodations for their employees' beliefs that are openly and sincerely held, as were Thomas's beliefs. By moving him to a department that made military goods, his employer effectively forced him to choose between his job and his religious principles. This unilateral decision on the part of the employer was the reason Thomas left his job and why the company was required to compensate Thomas for his resulting unemployment.

2-2A. **SPOTLIGHT ON PLAGIARISM—*Due process***

To adequately claim a due process violation, a plaintiff must allege that he was deprived of "life, liberty, or property" without due process of law. A faculty member's academic reputation is a protected interest. The question is what process is due to deprive a faculty member of this interest and in this case whether Gunasekera was provided it. When an employer inflicts a public stigma on an employee, the only way that an employee can clear his or her name is through publicity. Gunasekera's alleged injury was his public association with the plagiarism scandal. Here, the court reasoned that "a name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved." Thus the court held that Gunasekera was entitled to a public name-clearing hearing.

2–3A. Business CASE PROBLEM WITH SAMPLE ANSWER— *Freedom of speech*

No, Wooden’s conviction was not unconstitutional. Certain speech is not protected under the First Amendment. Speech that violates criminal laws—threatening speech, for example—is not constitutionally protected. Other unprotected speech includes fighting words, or words that are likely to incite others to respond violently. And speech that harms the good reputation of another, or defamatory speech, is not protected under the First Amendment.

In his e-mail and audio notes to the alderwoman, Wooden discussed using a sawed-off shotgun, domestic terrorism, and the assassination and murder of politicians. He compared the alderwoman to the biblical character Jezebel, referring to her as a “bitch in the Sixth Ward.” These references caused the alderwoman to feel threatened. The First Amendment does not protect such threats, which in this case violated a state criminal statute. There was nothing unconstitutional about punishing Wooden for this unprotected speech.

In the actual case on which this problem is based, Wooden appealed his conviction, arguing that it violated his right to freedom of speech. Under the principles set out above, the Missouri Supreme Court affirmed the conviction.

2–4A. *Equal protection*

Yes, the equal protection clause can be applied to prohibit discrimination based on sexual orientation in jury selection. The appropriate level of scrutiny would be intermediate scrutiny. Under the equal protection clause of the Fourteenth Amendment, the government cannot enact a law or take another action that treats similarly situated individuals differently. If it does, a court examines the basis for the distinction. Intermediate scrutiny applies in cases involving discrimination based on gender. Under this test, a distinction must be substantially related to an important government objective.

Gays and lesbians were long excluded from participating in our government and the privileges of citizenship. A juror strike on the basis of sexual orientation tells the individual who has been struck, as well as the trial participants and the general public, that the judicial system still treats gays and lesbians differently. This deprives these individuals of the opportunity to participate in a democratic institution on the basis of a characteristic that has nothing to do with their fitness to serve.

In the actual case on which this problem is based, SmithKline challenged the strike. The judge denied the challenge. On SmithKline’s appeal, the U.S. Court of Appeals for the Ninth Circuit held that the equal protection clause prohibits discrimination based on sexual orientation in jury selection and requires that heightened scrutiny be applied to equal protection claims involving sexual orientation. The appellate court remanded the case for a new trial.

2–5A. Procedural due process

No, the school's actions did not deny Brown due process. Procedural due process requires that any government decision to take life, liberty, or property must be made fairly. The government must give a person proper notice and an opportunity to be heard. The government must use fair procedures—the person must have at least an opportunity to object to a proposed action before a fair, neutral decision maker.

In this problem, Robert Brown applied for admission to the University of Kansas School of Law. He answered “no” to the questions on the application about criminal history and acknowledged that a false answer constituted cause for dismissal. He was accepted for admission to the school. But Brown had previous criminal convictions for domestic battery and driving under the influence. When school officials discovered this history, Brown was notified of their intent to dismiss him and given an opportunity to respond in writing. He demanded a hearing. The officials refused, and expelled him. As for due process, Brown knew he could be dismissed for false answers on his application. The school gave Brown notice of its intent to expel him and gave him an opportunity to be heard (in writing). Due process does not require that any specific set of detailed procedures be followed as long as the procedures are fair.

In the actual case on which this problem is based, Brown filed a suit in a federal district court against the school, alleging denial of due process. From a judgment in the school's favor, Brown appealed. The U.S. Court of Appeals for the Tenth Circuit affirmed, concluding that “the procedures afforded to Mr. Brown were fair.”

2–6A. The commerce clause

Yes, Massachusetts's use tax is valid under the commerce clause. When a state regulation that affects interstate commerce is challenged under the commerce clause, the court weighs the state's interest in regulating the matter against the burden that the regulation places on interstate commerce. Because a court balances the interests involved, it is difficult to predict the outcome in a particular case. State laws that alter conditions of competition to favor in-state interests over out-of-state competitors in a market are considered discriminatory and usually invalidated.

In this problem, Regency Transportation, Inc., operates a freight business throughout the eastern United States. Regency maintains a headquarters, warehouses, and other facilities in Massachusetts. All of the vehicles in Regency's fleet were bought in other states. When Massachusetts imposed a use tax on the purchase price of each tractor and trailer in Regency's fleet, the trucking firm challenged the assessment as discriminatory under the commerce clause. But Massachusetts imposes the tax on all taxpayers subject to its jurisdiction, not only those that, like Regency, do business in interstate commerce. Hence, the tax is not discriminatory. As for the balancing test, Massachusetts presumably imposes the tax based on the benefits derived from a company's using and storing vehicles in the

state. The burden that the regulation places on interstate commerce seems slight weighed against the state's interest in regulating this matter.

In the actual case on which this case problem is based, Regency sought review of imposition of the motor vehicle tax by the Commissioner of Revenue. The state's Appellate Tax Board affirmed, and Regency filed a petition for direct appellate review. The Supreme Judicial Court of Massachusetts affirmed the decision of the board.

2-7A. Freedom of speech

The First Amendment to the U.S. Constitution protects the freedom of speech. Government regulation of speech is presumed to be unconstitutional. To "pass muster" under the free-speech clause, a law or government action that regulates the content of speech must serve a compelling state interest and must be narrowly tailored to achieve that interest.

In this problem, the government, through OGS, disfavored WD's speech because of its branding. The agency may have labeled the branding offensive because of its perceived effect on the members of a certain ethnic group. The interest that the government sought to serve might have been a mandate of positive expression. But denying the business application of any vendor whose branding might demean or offend could silence dissent in the "marketplace of ideas."

In some contexts, an ethnic slur might be hostile and involve conduct. A regulation of that conduct would arguably serve the interest of preventing immediate harm. For example, the government can regulate threats of violence, harassment, and fighting words. But WD's speech did not fall into any of these categories.

WD's use of ethnic slurs reflected its owners' viewpoint about when and how such language should be used. There does not seem to be a sufficiently substantial compelling state interest to justify proscribing this viewpoint. By rejecting WD's application only on the ground of the business's branding, OGS impermissibly discriminated against WD's expression of the owners' viewpoint, and thereby violated the First Amendment.

In the actual case on which this problem is based, the court rejected WD's contention and entered a judgment in the defendants' favor. A state intermediate appellate court reversed, holding, based in part on the points stated above, that OGS violated WD's right to freedom of speech. The appellate court concluded that WD was entitled to an injunction denying WD's future lunch program applications because of the use of ethnic slurs in its branding.

2-8A. A QUESTION OF ETHICS—Free speech

1. No. The First Amendment guarantees the freedom of speech for individuals against interference by the government. To protect citizens from those who would abuse the right, speech is subject to reasonable restrictions. Speech that violates criminal laws is not constitutionally protected.

In this problem, Michael Mayfield received a “notice of a legal claim” from Edward Starski. The “claim” alleged that a stack of lumber fell on a customer at Mayfield’s company as a result of “incompetence” of one of Mayfield’s employees. The “notice” included a settlement offer on the customer’s behalf in exchange for a release of liability. In a conversation with Mayfield, Starski stated that he was an attorney—when, in fact, he was not. He was arrested and charged with violating a state statute that prohibited the unlawful practice of law. He argued that “creating an illusion” he was an attorney fell within the protection of the First Amendment. He is wrong. It is within the government’s power to restrict speech to frustrate a false claim made to accomplish a fraud. And the interest of the government in regulating the practice of law is part of its interest in protecting the public.

In the actual case on which this problem is based, the court convicted Starski of the charge. On appeal, a state intermediate appellate court affirmed the conviction. Responding to his free speech defense, the court concluded, that Starski was wrong.

2. The question concerns the extent to which the government can regulate the practice of law without infringing on certain rights. The rights at issue include the right of a person to exercise free speech, and the rights of the public to be protected from misleading or deceptive speech, and to have access to competent legal representation.

In recognition of a person’s right to exercise free speech, the government might choose *not* to prohibit the unauthorized practice of law. This would deny the public’s right to be protected from misleading or deceptive speech. The government might choose to prohibit the practice of law entirely, but this would deprive the public of legal representation of all kinds in all circumstances. So, the government must strike a balance that protects the public and individual rights.

The government generally prohibits the *unauthorized* practice of law—the practice of law by those who have not met the state’s competency standards to be licensed as attorneys. The government also sanctions persons who have not met the standards from misrepresenting their status to practice law.

The government’s objective is to ensure that those performing legal services do so competently, without infringing on the rights to free speech, to be protected from misleading or deceptive speech, and to have access to competent legal representation. The regulation protects the public and goes no further than necessary, in recognition of the rights at issue.

CRITICAL THINKING AND WRITING ASSIGNMENTS

2–9A. BUSINESS LAW WRITING

The court ruled that like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. The law requiring companies that sell

cement in Puerto Rico to place certain labels on their products is clearly an attempt to regulate the cement market. The law imposed labeling regulations that affect transactions between the citizens of Puerto Rico and private companies. State laws that on their face discriminate against foreign commerce are almost always invalid, and this Puerto Rican law is such a law. The discriminatory labeling requirement placed sellers of cement manufactured outside Puerto Rico at a competitive disadvantage. This law therefore contravenes the dormant commerce clause.

2–10A. TIME-LIMITED GROUP ASSIGNMENT—*Free speech and equal protection*

1. The rules in this problem regulate the content of expression. Such rules must serve a compelling governmental interest and must be narrowly written to achieve that interest. In other words, for the rules to be valid, a compelling governmental interest must be furthered only by those rules. To make this determination, the government's interest is balanced against the individual's constitutional right to be free of the rules. For example, a city has a legitimate interest in banning the littering of its public areas with paper, but that does not justify a prohibition against the public distribution of handbills, even if the recipients often just toss them into the street. In this problem, the prohibition against young adults' possession of spray paint and markers in public places imposes a substantial burden on innocent expression because it applies even when the individuals have a legitimate purpose for the supplies. The contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti also undercuts any claim that the interest in eliminating illegal graffiti could not be achieved as effectively by other means.

2. The rules in this problem do not regulate the content of expression—they are not aimed at suppressing the expressive conduct of young adults but only of that conduct being fostered on unsuspecting and unwilling audiences. The restrictions are instead aimed at combating the societal problem of criminal graffiti. In other words, the rules are content neutral. Even if they were not entirely content neutral, expression is always subject to reasonable restrictions. Of course, a balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their right. But the rules at the center of this problem meet that standard. Young adults have other creative outlets and other means of artistic expression available.

3. Under the equal protection clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." This clause requires a review of the substance of the rules. If they limit the liberty of some person but not others, they may violate the equal protection clause. Here, the rules apply only to persons under the age of twenty-one. To succeed on an equal protection claim, opponents should argue that the rules should be subject to strict scrutiny—that the age restriction is similar to restrictions based on race, national

origin, or citizenship. Under this standard, the rules must be necessary to promote a compelling governmental interest. The argument would be that they are not necessary—there are other means that could accomplish this objective more effectively. Alternatively, opponents could argue that the rules should be subject to intermediate scrutiny—that the age restriction is similar to restrictions based on gender or legitimacy. Under this level of scrutiny, the restrictions must be substantially related to an important government objective. In this problem, the contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti undermines any claim that the restrictions are substantially related to the interest in eliminating illegal graffiti. If neither of these arguments is successful, opponents could cite these same numbers to argue that the rules are not valid because there is no rational basis on which their restrictions on certain persons relate to a legitimate government interest.