
CHAPTER 2

CONSTITUTIONAL LAW

ANSWERS TO LEARNING OBJECTIVES/ LEARNING OBJECTIVES CHECK QUESTIONS AT THE BEGINNING AND THE END OF THE CHAPTER

Note that your students can find the answers to the even-numbered *Learning Objectives Check Questions* in Appendix E at the end of the text. We repeat these answers here as a convenience to you.

1A. *What is the basic structure of the U.S. government?* The Constitution divides the national government's powers among three branches. The legislative branch makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. Each branch performs a separate function, and no branch may exercise the authority of another branch. A system of checks and balances allows each branch to limit the actions of the other two branches, thus preventing any one branch from exercising too much power.

2A. *What constitutional clause gives the federal government the power to regulate commercial activities among the various 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 “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

3A. What constitutional clause allows laws enacted by the federal government to take priority over conflicting state laws? The supremacy clause—Article VI of the Constitution—provides that the Constitution, laws, and treaties of the United States are “the supreme Law of the Land.” This article is important in the ordering of state and federal relationships. When there is a direct conflict between a federal law and a state law, the state law is rendered invalid.

4A. 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.

5A. 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.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

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

When should a statement made on social media be considered a true threat? The United States Supreme Court found that negligence was not enough to be

convicted under a federal criminal law for making true threats. Rather, the person posting the statements must have either intended to threaten or know that his or her statements would be viewed as a threat. The Court did not, however, clearly establish what constitutes a threat under federal law, but merely sent the case back to a lower court to determine whether Elonis met a higher standard. Therefore, the law is somewhat ambiguous.

If a person posts threats on social media with the *intent* to threaten someone, he or she can and should be convicted under the federal statute. But intent is often difficult to prove. If a person posts threats on social media but claims she or he did not intend to threaten, or says the words were just song lyrics (as Elonis claimed), the result is unclear. The prosecution will have to prove that the person “knew his or her statements would be viewed as threats.” Although posting statements about killing someone on a social media seems like it would be a true threat, it might not always be considered to be one. Perhaps the person was joking or just blowing off steam, and the other party knew that the threat was not serious.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE CASES

CASE 2.2—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.

CASE 2.3—CRITICAL THINKING—LEGAL CONSIDERATION

Most states and the federal government permit inmates to grow 1/2-inch beards. Would the policies followed at these institutions be relevant in determining the need for a beard restriction in this case? Discuss.

Yes, the policies followed at other institutions are relevant to a determination of the need for a beard restriction in this case. That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the department in this case could satisfy its security concerns through a means less restrictive than denying Holtan exemption.

ANSWERS TO QUESTIONS IN THE REVIEWING 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 of 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 REVIEWING 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. *Can a state, in the interest of energy conservation, ban all advertising by power utilities if conservation could be accomplished by less restrictive means? Why or why not?* No. Even if commercial speech is not 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 case, 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 equal protection 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 QUESTIONS AND CASE PROBLEMS AT THE END OF THE CHAPTER

BUSINESS SCENARIOS AND CASE PROBLEMS

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—*Establishment clause*

The establishment clause prohibits the government from passing laws or taking actions that promote religion or show a preference for one religion over another. In assessing a government action, the courts look at the predominant purpose for the action and ask whether the action has the effect of endorsing religion.

Although here DeWeese claimed to have a nonreligious purpose for displaying the poster of the Ten Commandments in a courtroom, his own statements showed a religious purpose. These statements reflected his views about “warring” legal philosophies and his belief that “our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments.” This plainly constitutes a religious purpose that violates the establishment clause because it has the effect of endorsing Judaism or Christianity over other religions. In the case on which this problem is based, the court ruled in favor of the American Civil Liberties Union.

2–4A. *The dormant commerce clause*

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.

2–5A. *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.

2–6A. *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.

2–7A. 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.”

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

1. The answers to these questions begin with the protection of the freedom of speech under the First Amendment. The freedom to express an opinion is a fundamental aspect of liberty. But this right and its protection are not absolute. Some statements are not protected because, as explained in the *Balboa* decision, “they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Defamatory statements are among those that are not protected.

Arguments in favor of protecting such statements include the perception of the right to freedom of speech as necessary to liberty and a free society. Arguments opposed to such protection include “the social interest in order and morality.” In

between these positions might fall a balancing of both their concerns. Under any interpretation the degree to which statements can be barred before they are made is a significant question.

In the *Balboa* case, the court issued an injunction against Lemen, ordering her to, among other things, stop making defamatory statements about the Inn. On appeal, a state intermediate appellate court invalidated this part of the injunction, ruling that it violated Lemen's right to freedom of speech under the Constitution because it was a "prior restraint"—an attempt to restrain Lemen's speech before she spoke. On further appeal, the California Supreme Court phrased "the precise question before us [to be] whether an injunction prohibiting the repetition of statements found at trial to be defamatory violates the First Amendment." The court held it could enjoin the repetition of such statements without infringing Lemen's right to free speech. Quoting from a different case, the court reasoned, "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment. An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint." The court added that the injunction could not prevent Lemen from complaining to the authorities, however.

2. To answer this question requires a standard to apply to the facts. A different chapter in the text sets out two fundamental approaches to ethical reasoning: one involves duty-based standards, which are often derived from religious precepts, and the other focuses on the consequences of an action and whether these are the "greatest good for the greatest number."

Under the former approach, a pre-established set of moral values founded on religious beliefs can be taken as absolute with regard to behavior. Thus, if these values proscribed Lemen's name-calling as wrong, it would be construed as wrong, regardless of the truth of what she said or any effect that it had. Similarly, if the values prescribed Lemen's conduct as correct, it might be unethical not to engage in it. A different duty-based approach grounded on philosophical, rather than religious, principles would weigh the consequences of the conduct in light of what might follow if everyone engaged in the same behavior. If we all engaged in name-calling, hostility and other undesirable consequences would likely flourish. A third duty-based approach, referred to as the principle of rights theory, posits that every ethical precept has a rights-based corollary (for example, "thou shalt not kill" recognizes everyone's right to live). These rights collectively reflect a dignity to which we are each entitled. Under this approach, Lemen's name-calling would likely be seen as unethical for failing to respect her victims' dignity.

Finally, an outcome-based approach focuses on the consequences of an act, requiring a determination as to whom it affects and assessments of its costs and

benefits, as well as those of alternatives. The goal is to seek the maximum societal utility. Here, Lemen's behavior appears to have had little positive effect on herself or the objects of her criticism (the Inn, its employees, its patrons, and its business). The Inn's business seems to have been affected in a substantial way, which in Lemen's eyes may be a "benefit," but in the lives of its owners, employees, and customers, would more likely be seen as a "cost."

CRITICAL THINKING AND WRITING ASSIGNMENTS

2–9A. BUSINESS LAW WRITING

For commercial businesses that operate only within the borders of one state, the power of the federal government to regulate every commercial enterprise in the United States means that even exclusively intrastate businesses are subject to federal regulations. This can discourage intrastate commerce, or at least the commercial activities of small businesses, by adding a layer of regulation that may require expensive or time-consuming methods of compliance. This may encourage intrastate commerce, however, by disallowing restrictions, such as arbitrary discriminatory practices, that might otherwise impair the operation of a free market. This federal power also affects a state's ability to regulate activities that extend beyond its borders, as well as the state's power to regulate strictly in-state activities if those regulations substantially burden interstate commerce. This effect can be to encourage intrastate commerce by removing some regulations that might otherwise impede business activity in the same way that added federal regulations can have an adverse impact. A state's inability to regulate may discourage small intrastate businesses, however, by inhibiting the state's power to protect its "home" or "native" enterprises.

2–10A. BUSINESS LAW CRITICAL THINKING GROUP ASSIGNMENT

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.