

## Chapter 2

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# Constitutional Law

## INTRODUCTION

Many people assume that a government acts from a vague position of strength and can enact any regulation it deems necessary or desirable. This chapter emphasizes a different perspective from which to view the law: action taken by the government must come from authority and this authority cannot be exceeded.

Neither Congress nor any state may pass a law in conflict with the Constitution. The Constitution is the supreme law in this country. The Constitution is the source of federal power and to sustain the legality of a federal law or action a specific federal power must be found in the Constitution. States have inherent sovereign power—that is, the power to enact legislation that has a reasonable relationship to the welfare of the citizens of that state. The power of the federal government was *delegated* to it by the states while the power of the states was *retained* by them when the Constitution was ratified.

The Constitution does not expressly give the states the power to regulate, but limits the states' exercise of powers not delegated to the federal government.

## CHAPTER OUTLINE

### I. The Constitutional Powers of Government

Before the U.S. Constitution, the Articles of Confederation defined the central government.

#### A. A FEDERAL FORM OF GOVERNMENT

The U.S. Constitution established a federal form of government, delegating certain powers to the national government. The states retain all other powers. The relationship between the national government and the state governments is a partnership—neither partner is superior to the other except within the particular area of exclusive authority granted to it under the Constitution.

#### B. THE SEPARATION OF POWERS

Deriving power from the Constitution, each of the three governmental branches (the executive, the legislative, and the judicial) performs a separate function. No branch may exercise the authority of another, but each has some power to limit the actions of the others. This is the system of *checks and balances*.

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- Congress, for example, can enact a law, but the president can veto it.
- The executive branch is responsible for foreign affairs, but treaties with foreign governments require the advice and consent of the members of the Senate.
- Congress determines the jurisdiction of the federal courts, but the courts have the power to hold acts of the other branches of the government unconstitutional.

C. THE COMMERCE CLAUSE

1. The Commerce Clause and the Expansion of National Powers

The Constitution expressly provides that Congress can regulate commerce with foreign nations, interstate commerce, and commerce that affects interstate commerce. This provision—the commerce clause—has had a greater impact on business than any other provision in the Constitution. This power was delegated to the federal government to ensure a uniformity of rules governing the movement of goods through the states.

CASE SYNOPSIS—

**Case 2.1: *Heart of Atlanta Motel v. United States***

A motel owner, who refused to rent rooms to African Americans despite the Civil Rights Act of 1964, brought an action to have the Civil Rights Act of 1964 declared unconstitutional. The owner alleged that, in passing the act, Congress had exceeded its power to regulate commerce because his motel was not engaged in interstate commerce. The motel was accessible to state and interstate highways. The owner advertised nationally, maintained billboards throughout the state, and accepted convention trade from outside the state (75 percent of the guests were residents of other states). The district court sustained the constitutionality of the act and enjoined the owner from discriminating on the basis of race. The owner appealed. The case went to the United States Supreme Court.

The United States Supreme Court upheld the constitutionality of the Civil Rights Act of 1964. The Court noted that it was passed to correct “the deprivation of personal dignity” accompanying the denial of equal access to “public establishments.” Congressional testimony leading to the passage of the act indicated that African Americans in particular experienced substantial discrimination in attempting to secure lodging. This discrimination impeded interstate travel, thus impeding interstate commerce. As for the owner’s argument that his motel was “of a purely local character,” the Court said, “[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.” Therefore, under the commerce clause, Congress has the power to regulate any local activity that has a harmful effect interstate commerce.

Notes and Questions

***Does the Civil Rights Act of 1964 actually regulate commerce or was it designed to end the practice of race (and other forms of) discrimination?*** In this case, the Supreme Court said, “[T]hat Congress was legislating against moral wrongs . . . rendered its enactments no less valid.”

***Are there any businesses in today’s economy that are “purely local in character”?*** An individual who contracts to perform manual labor such as lawn mowing or timber cutting within a small geographic area might qualify, as long as the activity has no effect on interstate commerce. But in most circumstances it would be difficult if not impossible to do business “purely local in character” in today’s U.S. economy. Federal

statutes that derive their authority from the commerce clause often include requirements or limits to exempt small or arguably local businesses.

**Which constitutional clause empowers the federal government 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 “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

**2. The Commerce Clause Today**

The United States Supreme Court has recently limited the clause in its reach, in decisions that significantly enhanced the sovereign power of the states within the federal system. Some of these decisions are detailed in the text. Essentially, the holdings of these cases state that the clause does not support the national regulation of non-economic conduct.

**3. The Regulatory Powers of the States**

A state can regulate matters within its own borders under its police power.

**4. The “Dormant” Commerce Clause**

States do not have the authority to regulate interstate commerce. When state regulations impinge on interstate commerce, the state’s interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce. It is difficult to predict the outcome in a particular case.

ENHANCING YOUR LECTURE—



“ **DOES STATE REGULATION OF INTERNET PRESCRIPTION TRANSACTIONS VIOLATE THE COMMERCE CLAUSE?**



Every year, about 30 percent of American households purchase at least some prescription drugs online. There is nothing inherently unlawful in such a transaction. Consider that Article X of the Constitution gives the states the authority to regulate activities affecting the safety and welfare of their citizens. In the late 1800s, the states developed systems granting physicians the exclusive rights to prescribe drugs and pharmacists the exclusive right to dispense prescriptions. The courts routinely upheld these state laws.<sup>a</sup> All states use their police power authority to regulate the licensing of pharmacists and the physicians who prescribe drugs.

**AN EXTENSION OF STATE LICENSING LAWS**

About 40 percent of the states have attempted to regulate Internet prescription transactions by supplementing their licensure rules in such a way to define a “safe” consulting relationship between the physician prescribing and the pharmacists dispensing prescription drugs. For example, certain states allow an electronic diagnosis. This consists of a patient filling out an online questionnaire that is then “approved” by a physician before an Internet prescription is filled and shipped. In contrast, other states specifically prohibit a physician from creating a prescription if there is no physical contact between the patient and the physician

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providing the prescription.

### SOME STATES ARE ATTEMPTING TO REGULATE INTERSTATE COMMERCE

Recently, the New York State Narcotic Bureau of Enforcement started investigating all companies in New Jersey and Mississippi that had been involved in Internet prescription medicine transactions with residents of New York. None of the companies under investigation has New York offices. The legal question immediately raised is whether the New York State investigations are violating the commerce clause. Moreover, it is the Food and Drug Administration (FDA) that enforces the regulation of prescription drugs, including their distributors.

### ARE NEW YORK AND OTHER STATES VIOLATING THE DORMANT COMMERCE CLAUSE?

As you learned in this chapter, the federal government regulates all commerce not specifically granted to the states. This is called the dormant commerce clause. As such, this clause prohibits state regulations that discriminate against interstate commerce. Additionally, this clause prohibits state regulations that impose an undo burden on interstate commerce. The dormant commerce clause has been used in cases that deal with state regulation of pharmacy activities.<sup>b</sup>

In this decade, there is an opposing view based on a line of cases that suggest that state regulation of Internet activities do *not* violate the dormant commerce clause. In one case, a New York state law that banned the sale of cigarettes to its residents over the Internet was found not to violate the dormant commerce clause because of public health concerns.<sup>d</sup> In another case, a Texas statute that prohibited automobile manufacturers from selling vehicles on its Web site was upheld.<sup>e</sup> Whether the reasoning in these cases will be extended to cases involving Internet pharmacies remains to be seen. There exist state laws limiting Internet prescriptions. For example, in Nevada, no resident can obtain a prescription from an Internet pharmacy unless that pharmacy is licensed and certified under the laws of Nevada. Because this statute applies equally to in-state and out-of-state Internet pharmacies, it is undoubtedly nondiscriminatory. Additionally, the requirement that Internet pharmacies obtain a Nevada license prior to doing business in the state will probably be viewed as not imposing an undo burden on interstate commerce

### WHERE DO YOU STAND?

***Clearly, there are two sides to this debate. Many states contend that they must regulate the provision of prescription drugs via the Internet in order to ensure the safety and well-being of their citizens. In some instances, however, the states may be imposing such regulations at the behest of traditional pharmacies, which do not like online competition. What is your stand on whether state regulation of Internet prescription drug transactions violates the dormant commerce clause of the Constitution? Realize that if you agree that it does, then you probably favor less state regulation. If you believe that it does not, then you probably favor more state regulation.***

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a. See, for example, *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889).

b. See, for example, *Pharmaceutical Manufacturers' Association v. New Mexico Board of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (N.M. App. 1974); *State v. Rasmussen*, 213 N.W.2d 661 (Iowa 1973).

c. See *American Libraries Association v. Pataki*, 969 F.Supp.160 (S.D.N.Y. 1997).

d. *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200 (2nd Cir. 2003).

e. *Ford Motor Company v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001).



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### D. THE SUPREMACY CLAUSE

The Constitution, laws, and treaties of the United States are the supreme law of the land. When there is a direct conflict between a federal law and a state law, the state law is held to be invalid.

#### 1. Preemption

When Congress chooses to act exclusively in an area of concurrent federal and state powers, it is said to preempt the area, and a valid federal law will take precedence over a conflicting state or local law.

#### 2. Congressional Intent

Generally, congressional intent to preempt will be found if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it. Also, when a federal statute creates an agency to enforce the law, matters that may come within the agency's jurisdiction will likely preempt state laws.

## II. Business and the Bill of Rights

The first ten amendments to the Constitution embody protections against various types of interference by the federal government. These are listed in the text.

### A. LIMITS ON FEDERAL AND STATE GOVERNMENTAL ACTIONS

Most of the rights and liberties in the Bill of Rights apply to the states under the due process clause of the Fourteenth Amendment. The United States Supreme Court determines the parameters.

### B. THE FIRST AMENDMENT—FREEDOM OF SPEECH

The freedoms guaranteed by the First Amendment cover *symbolic* speech (gestures, clothing, and so on) if a reasonable person would interpret the conduct as conveying a message.

#### 1. Reasonable Restrictions

A balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their rights.

##### a. Content-Neutral Laws

If a restriction imposed by the government is content neutral (aimed at combating a societal problem such as crime, not aimed at suppressing expressive conduct or its message), then a court may allow it.

##### b. Laws That Restrict the Content of Speech

To regulate the content of speech, a law must serve a compelling state interest and be narrowly written to achieve that interest.

#### 2. Corporate Political Speech

Speech that otherwise would be protected does not lose that protection simply because its source is a corporation. For example, corporations cannot be entirely prohibited from making political contributions that individuals are permitted to make.

#### 3. Commercial Speech

Commercial speech is not protected as extensively as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective.

## CASE SYNOPSIS—

**Case 2.2: *Bad Frog Brewery, Inc. v. New York State Liquor Authority***

Bad Frog Brewery, Inc., sells alcoholic beverages with labels that display a frog making a gesture known as “giving the finger.” Bad Frog’s distributor, Renaissance Beer Co., applied to the New York State Liquor Authority (NYSLA) for label approval, required before the beer could be sold in New York. The NYSLA denied the application, in part because children might see the labels in grocery and convenience stores. Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against this denial. The court granted a summary judgment in favor of the NYSLA. Bad Frog appealed.

The U.S. Court of Appeals for the Second Circuit reversed. The NYSLA’s ban on the use of the labels lacked a “reasonable fit” with the state’s interest in shielding minors from vulgarity, and the NYSLA did not adequately consider alternatives to the ban. “In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children’s exposure to such displays to any significant degree.” Also, there were “numerous less intrusive alternatives.”

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**Notes and Questions**

The free flow of commercial information is essential to a free enterprise system. Individually and as a society, we have an interest in receiving information on the availability, nature, and prices of products and services. Only since 1976, however, have the courts held that communication of this information (“commercial speech”) is protected by the First Amendment.

Because some methods of commercial speech can be misleading, this protection has been limited, particularly in cases involving in-person solicitation. For example, the United States Supreme Court has upheld state bans on personal solicitation of clients by attorneys. Currently, the Supreme Court allows each state to determine whether or not in-person solicitation as a method of commercial speech is misleading and to restrict it appropriately.

**Whose interests are advanced by banning certain ads?** 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.

## ADDITIONAL CASES ADDRESSING THIS ISSUE—

**Advertising and the Commerce Clause**

Cases involving the **constitutionality of government restrictions on advertising under the commerce clause** include the following.

- Cases in which restrictions on advertising were held unconstitutional include *Thompson v. Western States Medical Center*, \_\_\_ U.S. \_\_\_, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (restrictions on advertising of

compounded drugs); and *This That and Other Gift and Tobacco, Inc. v. Cobb County*, 285 F.3d 1319 (11th Cir. 2002) (restrictions on advertising of sexual devices).

- Cases in which restrictions on advertising were held not unconstitutional include *Long Island Board of Realtors, Inc. v. Inc. Village of Massapequa Park*, 277 F.3d 622 (2d Cir. 2002) (restrictions on signs in residential areas); *Borgner v. Brooks*, 284 F.3d 1204 (11th Cir. 2002) (restrictions on dentists' ads); *Genesis Outdoor, Inc. v. Village of Cuyahoga Heights*, \_\_\_ Ohio App.3d \_\_\_, \_\_\_ N.E.2d \_\_\_ (8 Dist. 2002) (restrictions on billboard construction); and *Johnson v. Collins Entertainment Co.*, 349 S.C. 613, 564 S.E.2d 653 (2002) (restrictions on offering special inducements in video gambling ads).

#### 4. Unprotected Speech

Constitutional protection has never been afforded to certain classes of speech—defamatory speech, threats, child pornography, “fighting” words, and statements of fact, for example.

##### a. Obscenity

Obscene material is unprotected. But other than child pornography, there is little agreement about what material qualifies as obscene. The United States Supreme Court has held that material is obscene if—

- The average person finds that it violates contemporary community standards.
- The work taken as a whole appeals to a prurient interest in sex.
- The work shows patently offensive sexual conduct.
- The work lacks serious redeeming literary, artistic, political, or scientific merit.

##### b. Virtual Child Pornography

Another exception is a law that makes it a crime to intentionally distribute *virtual child pornography*—which uses computer-generated images, not actual people—without indicating that it is computer-generated.

### C. THE FIRST AMENDMENT—FREEDOM OF RELIGION

#### 1. The Establishment Clause

Under the establishment clause, the government cannot establish a religion nor promote, endorse, or show a preference for any religion.

##### a. Applicable Standards

Federal or state law that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion.

##### b. Religious Displays

Public displays that include nonreligious symbols or symbols of different religions, or that have historical, as well as religious, significance do not necessarily violate the establishment clause.

#### 2. The Free Exercise Clause

Under the free exercise clause, the government cannot prohibit the free exercise of religious practices. In other words, a person cannot be compelled to do something contrary to his or her religious practices unless the practices contravene public policy or public welfare.



**a. Restrictions Must Be Necessary**

The government must have a compelling state interest for restricting the free exercise of religion, and the restriction must be the only way to further that interest.

**CASE SYNOPSIS—**

**Case 2.3: Holt v. Hobbs**

Gregory Holt, an inmate in an Arkansas state prison, is a devout Muslim who wished to grow a beard in accord with his religious beliefs. The Arkansas Department of Correction prohibited inmates from growing beards (except for medical reasons). Holt asked for an exemption on religious grounds. Prison officials denied his request. Holt filed a suit in a federal district court against Ray Hobbs, the director of the department, and others, claiming a violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which governs religious exercise by institutionalized persons. The court dismissed the suit. The U.S. Court of Appeals for the Eighth Circuit affirmed. Hobbs appealed.

The United States Supreme Court reversed and remanded. The prohibition against the beard did not likely further the department’s compelling interest in stopping the flow of contraband—the beard was too short. And the policy was not shown to be the least restrictive means of furthering this interest. The department could simply search an inmate’s beard when it searched his hair and clothing. And the department could photograph all inmates periodically to record changes in their appearances.

**Notes and Questions**

*Suppose that instead of a state prison regulation and an inmate, the facts of this case had involved a private employer and an employee who wished to grow a beard for religious reasons in contravention of the employer’s dress code. Would the result have been the same?* The result might have been the same, but the judgment and reasoning would have been based on federal statutory employment discrimination law instead of the U.S. Constitution. The Bill of Rights protects against interference with certain rights by the government, not private businesses. But under the Civil Rights Act of 1964, discrimination on the basis of religion is prohibited, and private businesses are required to reasonably accommodate the religious beliefs of their employees, unless that would cause the employer undue hardship.

**b. Public Welfare Exception**

When public safety is an issue, an individual’s religious beliefs often must give way to the government’s interests in protecting the public.

**III. Due Process and Equal Protection**

**A. DUE PROCESS**

Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived “of life, liberty, or property, without due process of law.”

**1. Procedural Due Process**

A government decision to take life, liberty, or property must be made fairly. Fair procedure has been interpreted as requiring that the person have at least an opportunity to object to a proposed action before a fair, neutral decision maker (who need not be a judge).

**2. Substantive Due Process**

If a law or other governmental action limits a fundamental right, it will be held to violate substantive due process unless it promotes a compelling or overriding state interest. Fundamental rights include interstate travel, privacy, voting, and all First Amendment rights. Compelling state interests could include, for example, public safety. In all other situations, a law or action does not violate substantive due process if it rationally relates to any legitimate governmental end.

**B. EQUAL PROTECTION**

Under the Fourteenth Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws.” The equal protection clause applies to the federal government through the due process clause of the Fifth Amendment. Equal protection means that the government must treat similarly situated individuals in a similar manner. When a law or action distinguishes between or among individuals, the basis for the distinction (the classification) is examined.

**1. Strict Scrutiny**

If the law or action inhibits some persons’ exercise of a fundamental right or if the classification is based on a race, national origin, or citizenship status, the classification is subject to strict scrutiny—it must be necessary to promote a compelling interest.

**2. Intermediate Scrutiny**

Intermediate scrutiny is applied in cases involving discrimination based on gender or legitimacy. Laws using these classifications must be substantially related to important government objectives.

**3. The “Rational Basis” Test**

In matters of economic or social welfare, a classification will be considered valid if there is any conceivable rational basis on which the classification might relate to any legitimate government interest.

**IV. Privacy Rights**

A personal right to privacy is held to be so fundamental as to apply at both the state and the federal level. Although there is no specific guarantee of a right to privacy in the Constitution, such a right has been derived from guarantees found in the First, Third, Fourth, Fifth, and Ninth Amendments.

**A. FEDERAL PRIVACY LEGISLATION**

Federal laws relating to privacy include, among others—

- The Freedom of Information Act of 1966
- The Privacy Act of 1974
- The Electronic Communications Privacy Act of 1986
- The Health Insurance Portability and Accountability Act (HIPAA) of 1996

**B. THE USA PATRIOT ACT**

The USA Patriot Act of 2001 gave officials the authority to monitor Internet activities and access personal information without proof of any wrongdoing.

**ADDITIONAL BACKGROUND—****USA PATRIOT Act Tech Provisions**

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (**USA PATRIOT Act**) of 2001, which is mentioned in the text, touches on many topics, including immigration, money laundering, terrorism victim relief, intelligence gathering, and surveillance of Internet communications. Technology related provisions of the USA PATRIOT Act include the following, as summarized. (Some of these provisions were due to “sunset” in 2005.)

**Wiretap Offenses**

Sections 201 and 202—Crimes that can serve as a basis for law enforcement agencies (LEAs) to obtain a wiretap include crimes relating to terrorism and crimes relating to computer fraud and abuse.

**Voice Mail**

Section 209—LEAs can seize voice mail messages, with a warrant.

**ESP Records**

Sections 210 and 211—LEAs can obtain, with a subpoena, such information about e-communications service providers’ (ESPs) subscribers as “name,” “address,” “local and long distance telephone connection records, or records of session times and durations,” “length of service (including start date) and types of service utilized,” “telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address,” and “means and source of payment for such service (including any credit card or bank account number).”

**Pen Registers, and Trap and Trace Devices**

Section 216—LEAs can expand their use of pen registers and trap and trace devices (PR&TTs). A PR records the numbers that are dialed on a phone. TTs “capture the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.” PR&TTs can be used to capture routing, addressing, and other information in e-communications, but not the contents of the communication. This is considered one of the key sections of the act.

**Computer Trespassers**

Section 217—LEAs can assist companies, universities, and other entities that are subject to distributed denial of service, or other, Internet attacks by intercepting “computer trespasser’s communications.”

**ESP Compensation**

Section 222—An ESP “who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance.”

## ENHANCING YOUR LECTURE—



## CREATING A WEB SITE PRIVACY POLICY



Firms with online business operations realize that to do business effectively with their customers, they need to have some information about those customers. Yet online consumers are often reluctant to part with personal information because they do not know how that information may be used. To allay consumer fears about the privacy of their personal data, as well as to avoid liability under existing laws, most online businesses today are taking steps to create and implement Web site privacy policies.

### PRIVACY POLICY GUIDELINES

In the last several years, a number of independent, nonprofit organizations have developed model Web site privacy policies and guidelines for online businesses to use. Web site privacy guidelines are now available from a number of online privacy groups and other organizations, including the Online Privacy Alliance, the Internet Alliance, and the Direct Marketing Association. Some organizations, including the Better Business Bureau, have even developed a “seal of approval” that Web-based businesses can display at their sites if they follow the organization’s privacy guidelines.

One of the best known of these organizations is TRUSTe. Web site owners that agree to TRUSTe’s privacy standards are allowed to post the TRUSTe “seal of approval” on their Web sites. The idea behind the seal, which many describe as the online equivalent of the “Good Housekeeping Seal of Approval,” is to allay users’ fears about privacy problems.

### DRAFTING A PRIVACY POLICY

Online privacy guidelines generally recommend that businesses post notices on their Web sites about the type of information being collected, how it will be used, and the parties to whom it will be disclosed. Other recommendations include allowing Web site visitors to access and correct or remove personal information and giving visitors an “opt-in” or “opt-out” choice. For example, if a user selects an “opt-out” policy, the personal data collected from that user would be kept private.

In the last several years, the Federal Trade Commission (FTC) has developed privacy standards that can serve as guidelines. An online business that includes these standards in its Web site privacy policies—and makes sure that they are enforced—will be in a better position to defend its policy should consumers complain about the site’s practices to the FTC. The FTC standards are incorporated in the following checklist.

### CHECKLIST FOR A WEB SITE PRIVACY POLICY

1. Include on your Web site a notice of your privacy policy.
2. Give consumers a choice (such as opt-in or opt-out) with respect to any information collected.
3. Outline the safeguards that you will employ to secure all consumer data.

4. Let consumers know that they can correct and update any personal information collected by your business.
5. State that parental consent is required if a child is involved.
6. Create a mechanism to enforce the policy.

### TEACHING SUGGESTIONS

1. The concept of federalism is basic to students' understanding of the authority of the federal and state governments to regulate business. The Constitution has a significantly different impact on the regulation of business by the federal government that it does on the regulation of business by state governments. Emphasize that the federal government was *granted* specific powers by the states in the Constitution while the states *retained* the police power.

2. The commerce clause has become a very broad source of power for the federal government. It also restricts the power of the states to regulate activities that result in an undue burden on interstate commerce. Determining what constitutes an undue burden can be difficult. A court balances the benefit that the state derives from its regulation against the burden it imposes on commerce. The requirements for a valid state regulation under the commerce clause are (1) that it serve a legitimate end and (2) that its purpose cannot be accomplished as well by less discriminatory means.

To illustrate the balance, use a hypothetical involving a statute designed to protect natural resources. (Explain that this is an area traditionally left open to state regulation; that is, it is not considered preempted by a federal scheme of regulation.) For example, imagine a statute banning the importation of baitfish. The ban is a burden on interstate commerce, but the statute's concern is to protect the state's fish from nonnative predators and parasites, and there is no satisfactory way to inspect imported baitfish for parasites. This statute would likely be upheld as legitimate.

3. It might be explained to your students that constitutional law is concerned primarily with the exercise of judicial review. The emphasis is on the way that the courts in general, and the United States Supreme Court in particular, interpret provisions of the Constitution. *Stare decisis* does not have as much impact in constitutional law as in other areas of the law. In this area, the courts are not reluctant to overrule statutes, regulations, precedential case law, or other law.

#### ***Cyberlaw Link***

Ask your students to consider the following issue. In most circumstances, it is not constitutional for the government to open private mail. ***Why is it then sometimes considered legal for the government to open e-mail between consenting adults?***

### DISCUSSION QUESTIONS

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- 1. *What is the basic structure of the American national government?*** The basic structure of the American government is federal—a form of government in which states form a union and power is shared with a central authority. The United States Constitution sets out the structure, powers, and limits of the government.
- 2. *What is the national government's relation to the states?*** The relationship between the national and state governments is a partnership. Neither is superior to the other except as the Constitution provides. When conflicts arise as to which government should be exercising power in a particular area, the United States Supreme Court decides which governmental system is empowered to act under the Constitution.
- 3. *What is the doctrine of separation of powers and what is its purpose?*** Each of the three governmental branches—executive, legislative, and judicial—performs a separate function. Each branch has some power to limit the actions of the others. This system of checks and balances prevents any branch from becoming too powerful.
- 4. *What is the conflict between the states' police power and the commerce clause?*** The term *police power* refers to the inherent right of the states to regulate private activities within their own borders to protect or promote the public order, health, safety, morals, and general welfare. When state regulation encroaches on interstate commerce—which Congress regulates under the commerce clause—the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce.
- 5. *What is preemption?*** Preemption occurs when Congress chooses to act exclusively in an area of concurrent federal and state powers, and a valid federal law will override a conflicting state or local law on the same general subject. Generally, if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it, the federal law will be held to have preempted the area. When a federal statute creates an agency to enforce the law, matters within the agency's jurisdiction will likely preempt state law.
- 6. *What is the distinction between the degrees of regulation that may be imposed on commercial and noncommercial speech?*** Commercial speech is not as protected as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective. As for noncommercial speech, the government cannot choose what are and what are not proper subjects.
- 7. *Should the First Amendment protect all speech?*** One argument in support of this suggestion is that all views could then be fully expressed, and subject to reasoned consideration, in the “marketplace of ideas” without the chilling effect of legal sanctions. One argument against this suggestion is exemplified by the yelling of “Fire!” in a crowded theater: there are statements that are too inflammatory to be allowed unfettered expression.
- 8. *What does it mean that under the establishment clause the government cannot establish any religion or prohibit the free exercise of religious practices?*** Federal or state regulation that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion. The clause mandates accommodation of all religions and forbids hostility toward any.
- 9. *Would a state law imposing a fifteen-year term of imprisonment without allowing a trial on all businesspersons who appear in their own television commercials be a violation of substantive due process? Would it violate procedural due process?*** Yes, the law would violate both types of due process. The law would be unconstitutional on substantive due process grounds, because it abridges freedom of speech. The law would be unconstitutional on procedural due process grounds, because it imposes a penalty without giving an accused a chance to defend his or her actions.

**10. What are the tests used to determine whether a law comports with the equal protection clause?** Equal protection means that the government must treat similarly situated individuals in a similar manner. Equal protection requires review of the substance of a law or other government action instead of the procedures used. If the law distinguishes between or among individuals, the basis for the distinction is examined. If the law inhibits some persons' exercise of a *fundamental right* or if the classification is based on race, national origin, or citizenship status, the classification must be necessary to promote a *compelling* interest. In matters of economic or social welfare, a classification will be upheld if there is any *rational* basis on which it might relate to any *legitimate* government interest. Laws using classifications that discriminate on the basis of gender or legitimacy must be *substantially related* to *important* government objectives. When a law or action limits the liberty of all persons, it may violate substantive due process; when a law or action limits the liberty of some persons, it may violate the equal protection clause.

## ACTIVITY AND RESEARCH ASSIGNMENTS

1. Have students look through the local newspaper for current stories about proposed laws. Ask them where the government would find the authority within the Constitution to adopt a specific law under consideration.
2. **Would the ten amendments in the Bill of Rights be part of the Constitution if it were introduced today?** Have students phrase the Bill of Rights in more contemporary language and poll their friends, neighbors, and relatives as to whether they would support such amendments to the Constitution. **If not, what rights might they be willing to guarantee?**

## EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

**Footnote 3:** The regulation in *Wickard v. Filburn* involved a marketing quota. The United States Supreme Court upheld the regulation even though it would be difficult for the farmer alone to affect interstate commerce. Total supply of wheat clearly affects market price, as does current demand for the product. The marketing quotas were designed to control the price of wheat. If many farmers raised wheat for home consumption, they would affect both the supply for interstate commerce and the demand for the product. The Court deferred to congressional judgment concerning economic effects and the relationship between local activities and interstate commerce. This was a return to the broad view of the commerce power that John Marshall had defined in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

**Footnote 14:** At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a banner conveying a message that she regarded as promoting illegal drug use. Consistent with school policy, which prohibited such messages at school events, the principal told the students to take down the banner. One student refused. The principal confiscated the banner and suspended the student. The student filed a suit in a federal district court against the principal and others, alleging a violation of his rights under the U.S. Constitution. The court issued a judgment in the defendants' favor. On the student's appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The defendants appealed. In *Morse v. Frederick*, the United States Supreme Court reversed the lower court's judgment and remanded the case. The Supreme Court viewed this set of facts as a "school speech case." The Court acknowledged that the message on Frederick's banner was "cryptic," but interpreted it as advocating the use of illegal drugs. Congress requires schools to teach students that this use is "wrong and harmful." Thus it was reasonable for the principal in this case to order the banner struck.

**Did—or should—the Court rule that Frederick's speech can be proscribed because it is "plainly offensive"?** The petitioners (Morse and the school board) argued for this rule. The Court, however, stated, "We think

this stretches [previous case law] too far; that case [law] should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

**Footnote 25:** Mount Soledad is in San Diego, California. There has been a forty-foot cross atop the peak since 1913. Since the 1990s, a war memorial has surrounded the cross. The site was privately owned until 2006 when the federal government acquired it to preserve the war memorial. Steve Trunk and others filed a suit in a federal district court against San Diego, claiming a violation of the establishment clause. The court determined that the government acted with a secular purpose and the memorial did not advance religion, and issued a summary judgment in its favor. The plaintiffs appealed. In *Trunk v. City of San Diego*, the U.S. Court of Appeals for the Ninth Circuit reversed and remanded. The government's purpose may have been nonreligious, but the memorial can be perceived as endorsing Christianity. Not all crosses at war memorials violate the Constitution. The context and setting must be examined. This cross physically dominates its site, was originally dedicated to religious purposes, and had a long history of religious use. From a distance, the cross was the only visible element. The court reasoned that "the use of a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion."

***If the forty-foot cross were replaced with a smaller, less visible symbol of the Christian religion and the symbols of other religions were added to the display, does it seem likely that any parties would object?*** Yes. Those who are offended by the association of any religion with their state would likely object to the inclusion of any religious symbols. And there are those who might object to the inclusion of symbols for religions other than their own—Christians who take offense at Wiccan symbols, Muslims who protest Stars of David, and so on. These objections are among the reasons that some would argue the Constitution's proscriptions on a mix of government and religion should be honored to the fullest.

***If the cross in this case had been only six feet tall and had not had a long history of religious use, would the outcome of this case have been different? Why or why not?*** A main reason that the court in this case found an establishment clause violation was because the cross was so large that it physically dominated the entire memorial site. The government could not avoid the appearance of promoting Christianity because the religious elements of the memorial overshadowed the nonreligious elements. In addition, the cross had a long history of religious use by the community. The court's decision might well have been different if the cross had not dominated the landscape and the memorial, and had not had a history of religious use.

***Can a religious display that is located on private property violate the establishment clause?*** Explain. Probably not. Individuals can erect religious displays on their own private property without constitutional implications. It makes sense that the only way the government can be accused of sponsoring or endorsing religion is for the display in question to appear on public property.

***Should religious displays on public property be held to violate the establishment clause?*** It might be argued that if a religious symbol is only one part of a larger display that features secular symbols, such as reindeer and candy canes in a winter holiday display, the display of the religious symbol does not violate the establishment clause. The symbols' acceptability may depend on such factors as size, number, and how close the symbols are to each other.