|  |
| --- |
| Chapter 2 |
|  |



**Business and the Constitution**

**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 states *delegated* the power of the federal government to it while the states *re*­*tained* their power, 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 1789, the Articles of Confederation defined the central federal government, which was perceived as too weak when state laws interfered with commerce. A national convention was called to amend the Articles, but instead the delegates drafted the U.S. Constitution.

**A. A Federal Form of Government**

The U.S. Constitution established a federal form of government, through which the states and the na­tional government share sovereign powers.

**1. Federal Powers**

The na­tional government has specific powers and the implied power to act to carry out these enumerated powers. All other powers are reserved to the states under the Tenth Amendment.

**2. Regulatory Powers of the States**

The states regulate affairs within their borders through their police powers, which derive in part from the Tenth Amendment. These powers are exercised to protect or promote the public order, health, safety, morals, and general welfare.

**B. Relations among the States**

**1. The Privileges and Immunities Clause**

Under the Constitution’s Article IV privileges and immunities clause, when a citizen of one state engages in basic and essential activities in another state, the for­eign state must have a substantial reason for treating nonresidents differently than its own residents and the rea­son must be substantially related to its ultimate purpose in adopting legislation or an activity.

**2. The Full Faith and Credit Clause**

The Constitution’s full faith and credit clause ensures that rights es­tablished under deeds, wills, contracts, and so on in one state will be honored by other states. It also ensures that ju­dicial decisions with respect to such property rights are honored and en­forced in all states.

### C. The Separation of Powers

Deriving power from the Constitution, each of the 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*.

• 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.

**D. The Commerce Clause**

**1. The Expansion of National Powers under the Commerce Clause**

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. At one time the clause was interpreted to allow Congress to regulate even intra­state commerce that affected interstate commerce.

|  |
| --- |
|  |
| **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.” |
|  |
| ***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. |
|  |

|  |
| --- |
|  |
| Enhancing Your Lecture— |
|  |
|  *Gibbons v. Ogden* (1824)  |
|  |
| The commerce clause, which is found in Article I, Section 8, of the U.S. Constitution, gives Congress the power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” What exactly does “to regulate commerce” mean? What does “commerce” en­tail? These questions came before the United States Supreme Court in the case of *Gibbons v. Ogden.***a** |
|  |
| Background |
|  |
| In 1803, Robert Fulton, the inventor of the steamboat, and Robert Livingston, who was then American minister to France, secured a monopoly on steam navigation on the waters in the state of New York from the New York legislature. Fulton and Livingston licensed Aaron Ogden, a former gov­ernor of New Jersey and a U.S. senator, to operate steam-powered ferryboats between New York and New Jersey. Thomas Gibbons, who had obtained a license from the U.S. government to operate boats in inter­state waters, competed with Ogden without New York’s permission. Ogden sued Gibbons. The New York state courts granted Ogden’s request for an injunction—an order prohibiting Gibbons from operating in New York waters. Gibbons appealed the decision to the United States Supreme Court. |
|  |
| Marshall’s Decision |
|  |
| Sitting as chief justice on the Supreme Court was John Marshall, an advocate of a strong na­tional gov­ernment. In his decision, Marshall defined the word *commerce* as used in the commerce clause to mean all commercial intercourse—that is, all business dealings that affect more than one state. The Court ruled against Ogden’s monopoly, reversing the injunction against Gibbons. Marshall used this op­portunity not only to expand the definition of commerce but also to validate and increase the power of the national legislature to regulate commerce. Said Marshall, “What is this power? It is the power .  .  . to prescribe the rule by which commerce is to be governed.” Marshall held that the power to regu­late interstate commerce was an exclusive power of the national government and that this power in­cluded the power to regulate any intrastate commerce that substantially affects inter­state commerce. |
|  |
| Application to Today’s World |
|  |
| Marshall’s broad definition of the commerce power established the foundation for the expansion of na­tional powers in the years to come. Today, the national government continues to rely on the com­merce clause for its constitutional authority to regulate business activities. Marshall’s conclusion that the power to regulate interstate commerce was an exclusive power of the national government has also had significant consequences. By implication, this means that a state cannot regulate ac­tivities that extend beyond its borders, such as out-of-state online gambling operations that affect the welfare of in-state citi­zens. It also means that state regulations over in-state activities normally will be invalidated if the regulations substantially burden interstate commerce. |
|  |
|  |
|  |
| a. 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). |
|  |

**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 “Dormant” Commerce Clause**

States do not have the authority to regulate interstate commerce. When state regulations affect 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, but state laws enacted pursuant to a state’s police powers carry a strong presumption of validity.

|  |
| --- |
|  |
| 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.**a** 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 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.**b** |
|  |
| 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.**d** In another case, a Texas statute that prohibited automobile manufacturers from selling vehicles on its Web site was upheld.**e** 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***. |
|  |
|  |
|  |
| 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). |
|  |

**E. The Supremacy Clause and Federal Preemption**

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.

**F. The Taxing and Spending Powers**

• Congress has the power to impose taxes, but all taxes must be uniform among the states. In re­view­ing tax laws, the United States Supreme Court focuses on whether the tax can be sustained as a valid exercise of federal regulation. If a tax measure is reasonable, it is generally upheld. Also, a broad interpretation of the commerce clause can provide a basis for sustain­ing a fed­eral tax.

• Through its spending power, Congress disposes of tax revenue.

**II. Business and the Bill of Rights**

The first ten amendments to the Constitution, known as the Bill of Rights, embody protections against various types of interference by the federal government.

**A. Limits on Federal and State Governmental Actions**

**1. The Fourteenth Amendment**

Through the Fourteenth Amendment, most of these guarantees have been held to apply at the state level as well.

**2. Judicial Interpretation**

The rights se­cured by the Constitution are not absolute. The government gives consti­tutional principles their form and substance. The United States Supreme Court de­fines, and deter­mines the boundaries of, these rights.

**B. Freedom of Speech**

The freedoms of religion, speech, press, assembly, and petition are guaranteed by the First Amendment. *Symbolic speech* (gestures, clothing, and so on) is protected.

**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.

|  |
| --- |
|  |
| **Enhancing Your Lecture—** |
|  |
|  Do Computers Have Free Speech Rights?  |
|  |
| When you do a Web search using Microsoft’s Bing, Google, or any other search engine, the program inherent in those engines give you a listing of results. When you use a document-creation program, such as Microsoft Word, it often guesses at your misspellings and corrects them automatically. Do computers that make such choices engage in “speech,” and therefore do they enjoy First Amendment protections? This question is not as absurd as it may seem at first glance. |
|  |
| **Are Google’s Search Results “Speech?”** |
|  |
| More than a decade ago, a company dissatisfied with its rankings in Google’s search results sued. Google argued that its search results were constitutionally protected speech. The plaintiff, Search King, Inc., sought a preliminary injunction against Google. A federal district court in Oklahoma decided in Google’s favor, though. The court ruled that the ranking of resulting Web sites when a search is undertaken “constitutes opinions protected by the First Amendment. . . . PageRanks are opinions—opinions are the significance of particular Web sites as they correspond to a search query.” The First Amendment applies.**a** |
|  |
| **Google versus the Federal Trade Commission (FTC)** |
|  |
| There has never been any question in the last few years that Google is the dominant search engine. Less than 15 years ago, the federal government was worried that Microsoft’s search engine was too dominant and was crushing Yahoo!, AltaVista, and Lycos search engines. Of course, the latter two no longer exist and Microsoft’s new search engine, Bing, is a relatively minor player in the field. |
|  |
| Fast forward ten years. The FTC contemplated bringing charges against Google for favoring its own results in Google searches, such as restaurant reviews. Now it was Microsoft that was encouraging the FTC to proceed. After a 19-month investigation, the FTC in early 2013 decided *not* to prosecute Google. The FTC decision was considered a blow to Microsoft, other Google search-engine competitors. |
|  |
| **The First Amendment Protection Argument** |
|  |
| Google commissioned Eugene Folokh and Donald Falk, two legal experts in this field, to research the First Amendment protection issue for search engine search results.**b** The researchers argue that search engine results are the same as editorial judgments made by newspapers in terms of which wire service stories to run, which op-ed columnist to feature, and which business columnists to feature. The authors further claim that free speech applies to editorial choices no matter what their format. Search engine are protected even when they are “unfair” in their rankings of search results. Whether there is use of a computerized algorithm or not is irrelevant. |
|  |
| Columbia Law professor Tim Wu does not agree. He has argued that protecting a computer’s “speech” is not related to the purposes of the First Amendment, which was intended to protect humans against the evils of state censorship. At best, you can call search engine results *commercial speech*. First amendment coverage of such speech has always been limited. After all, computers make trillions of invisible decisions each day. Is each of those decisions protected speech? |
|  |
| ............................................................................................................................................... |
|  |
| **Critical Thinking** |
|  |
| ***Facebook has numerous computers, all programmed by humans, of course. If Facebook’s computers make decisions that allow your private information to be shared without your knowledge, should the First Amendment protect Facebook? Why or why not?*** The issue of protecting privacy has both technological and ethical aspects. From the technological point of view, Facebook and other social media companies have the ability to protect users’ private information. From an ethical point of view, some argue that Facebook and other social media companies *must* protect all users’ private information. Then there are ethical issues that surround the private information that so many companies now have because of their presence on the Internet. Does a social media user’s right to privacy outweigh a social media company’s free speech rights with respect to what its computers editorially decide? This is not an easy question to answer |
|  |
|  |
| **a.***Search King, Inc.* v. *Google Technology, Inc.,* 2003 WL 21464568, (W.D. Okla., May 27, 2003). See also *Langdon* v. *Google, Inc.,* 474 F.sup.2d 622, (D. Del., 2007). |
|  |
| **b.**Folokh and Falk, “*First Amendment Protection for Search Engine Search Results*, April 20, 2012. |
|  |

**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. Corporations may, how­ever, be prohibited from using corpo­rate funds to make independent expressions of opinion about po­litical candidates.

|  |
| --- |
|  |
| **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.” |
|  |
| .................................................................................................................................................. |
|  |
| **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. |
|  |

|  |
| --- |
|  |
| **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). |
|  |

**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 seeks to implement a sub­stantial government interest.

• The restriction directly advances that in­ter­est.

• The restriction goes no further than necessary to accomplish its objective.

**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. Obscene Speech**

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. Online Obscenity**

Some recent legislation has included—

• The Communications Decency Act (CDA) of 1996, portions of which were struck as unconstitutional.

• The Child Online Protection Act (COPA) of 1998, which has been suspended.

• The Children’s Internet Protection Act (CIPA) of 2000, which requires libraries to use filters, was held to be not unconstitutional.

**c. Virtual Pornography**

The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, which criminalizes the distribution of virtual child pornography, has been upheld.

**C. 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 Standard**

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**

A public display of a religious symbol (such as the cross or a menorah) is not unconstitutional if the display includes a nonreligious symbol (reindeers, for example) or has historical significance (a war memorial).

**2. The Free Exercise Clause**

Under the free exercise clause, the govern­ment cannot prohibit religious practices.

**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.

**b. Restrictions Must Not Be a Substantial Burden**

A burden is substantial if it pressures an individual to modify his or her behavior and to violate his or her beliefs.

|  |
| --- |
|  |
| **Case Synopsis—** |
|  |
| **Case 2.3: *Thompson v. Holm*** |
|  |
| Michael Thompson, a Muslim, was a prison inmate at Waupun Correctional Institution in Wisconsin. A central practice of the Islamic faith is a sunrise-to-sunset fast during the month of Ramadan. The prison accommodates this practice by providing “meal bags” at sunset to each Muslim prisoner listed as eligible. Ten days into Ramadan, Randall Lashock, a prison guard, withheld Thompson’s meal bags for two days. Thompson felt pressure to break his fast by going to the prison cafeteria, but under prison policy he would thereby forfeit meal bags for the rest of the fast. Meanwhile, hunger caused him to miss prayers and undercut his experience of Ramadan. Thompson filed a suit in a federal district court against several prison guards, including William Holm, claiming a violation of his right to exercise his religion freely. The court issued a summary judgment in the defendants’ favor. Thompson appealed. |
|  |
| The U.S. Court of Appeals for the Seventh Circuit vacated and remanded. The guards’ withholding of a Muslim inmate’s meal bags during Ramadan constituted a substantial burden on the inmate’s free exercise right. And Thompson provided sufficient evidence for a reasonable jury to find that all of the defendants were personally involved. |
|  |
| .................................................................................................................................................. |
|  |
| **Notes and Questions** |
|  |
| ***What unethical conduct on the part of the guards helped most to establish Thompson’s case? Explain.***. The unethical conduct on the part of the guards that helped most to establish Thompson’s case was their dishonesty. A party’s dishonesty can be considered evidence of wrongdoing or guilt. Under that principle, the guards’ conduct helped to establish the case against them. |
|  |
| When viewed in a light favorable to the plaintiff—the standard required of the appellate court’s review of this case—the acts that Thompson, the Muslim prison inmate, alleged to have been committed by the defendants, all of whom were prison guards, were generally illegal, in violation of the First Amendment’s free exercise clause, and unethical. |
|  |
| Lashock, the guard responsible for distributing the meal bags to eligible inmates, fabricated a charge that Thompson stole food from a meal bag that he was not entitled to. Lashock also falsely claimed to have filed a report about this theft. He and the other defendant guards lied to the plaintiff about the removal of his name from the eligibility list, and on this basis refused to bring him meal bags, directing him to the prison cafeteria to eat. Without a finding of fault on Thompson’s part for a purported theft of food, a guard’s belief that it occurred is not sufficient to justify the acts that followed here. |
|  |
| ***Suppose that instead of meal bags to break a Ramadan fast, Thompson had sought access to social media to communicate with terrorists who claimed a religious basis for their activities. Would the result have been the same? Discuss.*** No, the result in this case would not have been the same if, instead of meal bags to break a Ramadan fast, the plaintiff prison inmate had sought access to social media to communicate with terrorists who claimed a religious basis for their activities. |
|  |
| To comply with the free exercise clause, a government action must not be a substantial burden on religious practices. A burden is substantial if it pressures an individual to modify his or her behavior and to violate his or her beliefs. But not all asserted religious practices are entitled to be upheld. Terrorism that is claimed to arise from certain religious beliefs is not likely to be protected under the Constitution. Even if terrorist acts were not clearly illegal, there are security interests that would take precedence. The guards’ conduct might be considered in the balance, but it is not likely that their transgressions would be held to outweigh the need for security. |
|  |
| The appellate court “construed the facts in the light most favorable to Thompson” in determining whether the prison guards’ actions substantially burdened Thompson’s free-exercise rights. The court determined that contrary to the lower court’s finding, the evidence supported an inference that the defendants intentionally and unjustifiably forced a burdensome choice on Thompson. The appellate court reversed the lower court’s grant of the defendants’ motion for summary judgment and remanded the case. The case will likely go to trial on remand. ***Does the trial court now have to follow the appellate court’s construction of the facts?*** No, at a trial of this case on remand, a jury could find the facts to be otherwise. Thus, for example, on the admission of proper evidence, a jury could find that Thompson’s name was actually removed from the eligibility list. Such a finding would impact other findings and could result in a different conclusion and outcome. |
|  |
| ***On a decision in Thompson’s favor in a trial on remand, what might be the appropriate remedy?*** If a jury or the judge credits Thompson’s evidence that the defendant guards intentionally violated his rights under the free exercise clause of the First Amendment, he might be awarded damages. |
|  |
| ***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. |
|  |

|  |
| --- |
|  |
| **Additional Cases Addressing this Issue—** |
|  |
| **Religious Practices** |
|  |
| Cases involving whether **forcing an inmate to choose between daily nutrition and religious practice** is a substantial burden on the inmate’s free exercise right include the following. |
|  |
| • *Nelson v. Miller,* 570 F.3d 868 (7th Cir. 2009) (ruling that inmate’s free exercise rights were substantially burdened when prison forced him to choose between his religious practice and adequate nutrition by denying his request for meatless meals on Fridays). |
|  |
| • *Hunafa v. Murphy*, 907 F.2d 46 (7th Cir. 1990) (reasoning that failure to ensure that preparation of meals kept pork separate from other food substantially burdened a Muslim prisoner’s religious practice because it forced him to “an improper choice between adequate nutrition and observance of the tenets of his faith”). |
|  |
| • *Love v. Reed*, 216 F.2d 682 (8th Cir. 2000) (ruling prison’s failure to accommodate prisoner’s religious diet substantially burdensome and rejecting prison’s suggestion that the prisoner could fast as an alternative to the prison’s accommodation of the desired diet). |
|  |
| • *McElyea v. Babbitt*, 833 F.2d 196 (9th Cir. 1987) (“Inmates .  .  . have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion.”), |
|  |
| • *Ford v. McGinnis*, 252 F.3d 382 (2d Cir. 2003) (a prisoner has a “clearly established .  .  . right to a diet consistent with his .  .  . religious scruples,” including proper food during Ramadan). |
|  |

**c. Public Welfare Exception**

The government can act against religious practices to protect an individual’s life or the public in general.

**D. Searches and Seizures**

• To conduct a search or seizure, law enforcement officers must ob­tain a search war­rant. To obtain a warrant, a po­lice officer must have probable cause. The warrant must be specific.

**•** A general and neutral enforcement plan will justify issuance of a warrant in a busi­ness context. A warrant is required to search or seize business records in the hands of an attor­ney or ac­countant, for example.

• But no warrant is required for seizures of spoiled or contaminated food or to search a business in a highly reg­u­lated industry.

**E. Self-Incrimination**

No person can be compelled in any criminal case to be a witness against himself or herself. An ac­cused person cannot be compelled to give evidence of a tes­timonial or communicative nature that might subject him or her to any criminal prosecu­tion. This guarantee extends only to natu­ral per­sons. A corporation is not a natu­ral person, and the privilege against self-incrimination is not available to it.

**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 state 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**

• These statutes include the Freedom of Information Act of 1966, the Privacy Act of 1974, the Driver’s Privacy Protection Act of 1994, and other laws.

• The Health Insurance Portability and Accountability Act (HIPAA) of 1996 defines the circumstances in which an individual’s health information may be used or disclosed. Health-care providers, health-care plans, certain employers, and others must inform patients of their rights and how the information might be used.

**B. The USA Patriot Act and the USA Freedom Act**

The USA Patriot Act of 2001 gave officials the authority to monitor Internet activities and access personal information without proof of any wrongdoing. Most of the surveillance provisions that expired in 2015 were reauthorized through 2019 by the USA Freedom Act.

|  |
| --- |
| **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 are due to “sunset” within a few years.) |
|  |
| **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 been interpreted as 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 gov***­***ern­ment to open e-mail between consenting adults?*** |
|  |

**Discussion Questions**

**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 *po*­*lice 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. *In re***­***viewing tax laws, what does the United States Supreme Court focus on?*** Taxes must be as­sessed with ge­o­graphic uniformity among the states—that is, Congress may not tax some states and ex­empt others. In determining whether a tax can be upheld as a valid exercise of federal regulation, the Court considers whether the tax bears some reason­able relation to revenue production. If it does, it is generally upheld. Also, the commerce clause may provide a ba­sis for sustaining a federal tax.

**7. *What is the distinction between the degrees of regulation that may be imposed on commer***­***cial 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.

**8. *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.

**9.** ***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.

**10.** ***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.

**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 intro***­***duced 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 7:** The regulation in ***Wickard v. Filburn*** involved a marketing quota. The 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 11:** Massachusetts imposes a three-tier system on the sale of alcoholic beverages. Producers can sell only to in-state wholesalers, who must obtain licenses to sell to retailers, who must be licensed to sell to consumers. Wineries can obtain licenses to sell outside this network directly to consumers, but only small wineries—producing less than 30,000 gallons—can sell through both methods. Under this definition, the “large winery” category encompasses the producers of 98 percent of the wine in the United States—all of whom are located outside Massachusetts. The Family Winemakers of California and others filed a suit in a federal district court against Eddie Jenkins and other members of the Massachusetts Alcoholic Beverages Control Commission. The court held that the state’s system violated the dormant commerce clause. The defendants appealed.

In ***Family Winemakers of California v. Jenkins,*** the U.S. Court of Appeals for the First Circuit affirmed. The state’s wine licensing and distribution system “altered the competitive balance to favor Massachusetts's wineries and disfavor out-of-state competition by design.” The preferential treatment of small wineries was discriminatory because it conferred a “clear competitive advantage” on small wineries and imposed a “comparative disadvantage” on large, out-of-state wineries. Furthermore, the state legislature’s purpose in imposing the system had been to “ensure that Massachusetts’ wineries obtained advantage over their out-of-state counterparts.”

The Twenty-First Amendment to the U.S. Constitution provides that the “transportation or im­porta­tion into any State, Territory, or possession of the United Sates for delivery or use therein of in­toxicating liquors, in violation of the laws thereof, is hereby prohibited.” ***Doesn’t this allow states to enforce discriminatory liquor regulations?*** No. State regulation of alcohol is lim­ited by the nondiscrimination principle of the commerce clause. State laws violating other provisions of the Constitution are not saved by the Twenty-First Amendment, which does not abrogate Congress’s com­merce clause power with regard to liquor. The purpose of the Twenty-First Amendment was not to empower individual states to favor local liquor industries by restricting out-of-state competitors.

***When it is difficult to predict how the law might be applied—as in cases arising under the dormant commerce clause—what is the best course of conduct for a business?*** There are many “gray areas” of the law in which it is difficult to predict how a court will rule in a particular set of cir­cumstances. For example, if a consumer’s misuse of a product harms the consumer or someone else, should liability be imposed on the manufacturer or seller? The best course for a business to pursue in ar­eas in which the application of the law is uncertain is to act responsibly and in good faith.

***How might the issues related to the purchase of out-of-state wines have changed as a result of consumers’ increased use of the Internet?*** In some ways, the Internet has “leveled the playing field” to make the smallest, most remote wine makers competitive with the largest, formerly most accessible wine producers and distributors. This undercuts, however, the ability of local govern­ments to regulate wine, which has been within their authority since the repeal of Prohibition.

***The court held that the Massachusetts statute discriminated against out-of-state wineries “by design” (intentionally). How can a court determine legislative intent?*** Courts often look to legislative proceedings (transcriptions of meeting minutes, hearings, floor debates, and the like) to determine legislative intent. In this case, for example, the court cited comments during floor debate made by several Massachusetts legislators about the new winery-regulating law. One senator acknowledged that “we are really still giving an inherent advantage indirectly to the local wineries.” Another senator urged that apple and other fruit wines not be included in the gallonage cap of 30,000 because otherwise, Massachusetts’s then largest winery, which was located in the senator’s district, would exceed that cap. Shortly afterward, the draft of the law was amended to exempt nongrape fruit wine production from the 30,000 cap. The courts also can make an inference of discriminatory intent, or purpose, based on the effects of the law. For example, in this case the court noted that Massachusetts’s definition of “small” wineries as those producing less than 30,000 gallons of wine per year departed considerably from the wine industry’s definition of “small” wineries. The wine industry defined “small” wineries as those producing 120,000 or fewer gallons per year, and no other state had set a gallonage cap as low as Massachusetts’s cap for defining “small” wineries. Additionally, observed the court, the industry did not differentiate between wineries that produce fruit as opposed to grape wine. According to the court, these and other effects of the law evinced an intent to discriminate on the part of the Massachusetts legislature.

**Footnote 29:** 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 onlyone 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.