Definition and Purpose

**Constitution:** (a) the structure of the government and its relation to the people under its authority or, (b) *when capitalized*, the written document establishing the structure and powers of government

**Constitutional law,** then, is the body of law created by judicial interpretation of the Constitution
System of Checks & Balances

The U.S. Constitution establishes a tripartite (3 part) government structure: legislative, executive, and judicial branches.

Purpose of system is to ensure separation of powers ("checks and balances") so no one branch is omnipotent.
The Federal System

In a federal system, the central government has power to administer national concerns, but states retain power to administer local concerns.

Power given by states to the national government are “delegated powers”:

- some exclusive to the national government (e.g., war), some shared (e.g., taxation)
State Police Power

- States possess exclusive power to enact laws to protect general welfare, health, and safety

- State police power is limited
  - may not unreasonably interfere with federal powers

Protest of 2000 IMF talks, Washington DC
“Enumerated” Federal Powers Give the Federal Government Power to:

- **Regulate commerce** (Art. 1, Sec. 8, Cl. 1)
- **Tax**: shared with states (Art. 1, Sec. 8, Cl. 1)
- **Borrow**: shared with states (Art. 1, Sec. 8, Cl. 2)
- **Mint currency**: exclusive to fed. govt (1,8, 5-6)
- **Regulate banks**: banks created under state laws, but regulated by federal government
“Enumerated” Federal Powers Give the Federal Government Power to:

- **Spend**: to pay debts, provide for common defense and general welfare of U.S. (1,8,Cl.1)

- **Own Businesses**: rare, but federal and state governments may own businesses and sell and distribute government production (i.e., city-owned cable TV, energy corporations, or bond issuance to finance municipal activity)
Federal Preemption

Art. I, Sec. 8 lists issues on which Congress may pass statutes

These are the enumerated powers

Meaning: if Congress enacts a law on a certain issue, then Congress “preempts” state regulation of that issue

For example, a state cannot enact a law allowing discrimination based on race, religion, gender, age, or disability
Federal Supremacy

- The Constitution and statutes enacted by Congress (including treaties) are the supreme law of the land (U.S. Const. Art. VI, Cl. 2)
Judicial Review

In *Marbury v. Madison* (1803), the Supreme Court interpreted the Constitution to grant federal courts the power of judicial review – the power to declare a statute or governmental action unconstitutional and void.

Irony was that the statute in question gave the Supreme Court special powers.
The U.S. Supreme Court

The Court hears 3 types of cases
- original jurisdiction (e.g., state v. state)
- federal question cases from state court
- writs of certiorari (petition for review of lower court decisions)

In the 2007 term, there were 8,241 petitions for review; 75 cases were argued and 72 were disposed of in 67 signed opinions
- Another 6,627 filings were in forma pauperis (those unable to pay costs), mostly from prison inmates
Judicial Review

In *Youngstown Sheet & Tube v. Sawyer* (1952), the Supreme Court used judicial review power to nullify an executive order.

- **What were the facts?**
- **What was the issue?**
- **What was the result?**
Interpreting the Constitution

- Originalism: Constitution is a bedrock and principles exist for all time
- Living Constitution: Constitution written in flexible terms and intended to change with time
Does the Constitution Affect Business?

Primary Applicable Clause: Commerce Clause

- Congress has *power* “to regulate commerce* with foreign nations, and among the several states, and with the Indian tribes”

- The federal power to regulate commerce limits states from interfering with interstate commerce
Commerce Clause Cases

The Supreme Ct. expanded the power to regulate commerce with several decisions in the 1930s and 40s, including *NLRB v. Jones & Laughlin Steel*

“... the recognition of the right of employees to self-organization ... is often an essential condition of industrial peace.”

And *Wickard v. Filburn*

Congress may regulate any activity that has a *substantial economic effect* on interstate commerce
Dormant Commerce Clause

The Supreme Ct. has consistently held that a state statute that discriminates against interstate commerce violates the Commerce Clause

- *Heart of Atlanta Motel* case (civil rights)
- Fisheries and hazardous waste cases (access to resources and products)
- *Camps Newfound* case (tax breaks)
Reflecting a strong states rights perspective, the 1995 Supreme Court decision of *United States v. Lopez* (re: Gun-Free School Zones Act) significantly expanded STATE power to regulate commerce.
Constitutional Limitations on Govt

*Due process*: 5th and 14th Amendments to the Constitution prohibit nat’l and state govts from depriving any person of life, liberty, or property without due process of law

- interpreted liberally to be guarantee of protection from unreasonable procedures (procedural due process) and laws (substantive due process)
- interpreted to be guarantee of equal protection
- no protection if matter reasonably debatable
Constitutional Limitations on Govt

**Due process (cont.):**

- “depriving a person … of property” phrase known as the *takings* clause
  - *Palazzolo v. Rhode Island* – controversial issue regarding environmental laws that arguably “take” land from the property owner
  - interpreted to require just compensation in exchange for taking property through eminent domain
Constitutional Limitations on Govt

*Equal Protection*: 14th Amendment applies protection to states; modern interpretation of 5th Amend. refers to national government

- Prohibits a government from treating one person differently from another without reasonable ground for classifying them differently
What if US or State Congress Enacts a Law that Seems Discriminatory?

• A “test case” challenges the law
• Courts apply 3 levels of scrutiny in review of an allegedly unconstitutional statute

Clarence Darrow & William Jennings Bryan during Scopes Trial
Levels of Scrutiny

- **Minimal**: economic and social regs
  - if classification has rational basis, it will stand

- **Intermediate**: gender-based classifications
  - law must substantially relate to important govt’l objectives to stand

- **Strict**: race/ethnicity, religion classifications
  - classification presumed invalid if, on its face, based on race, ethnicity, and religion
**Gonzales v. Raich**

**Facts:**
- Federal Controlled Substances Act (CSA) prohibits possession and sale of marijuana.
- California statute created criminal prosecution exemption for patients (Raich and Monson) possessing and using marijuana for physician-approved medicinal purposes.
- Federal Drug Enforcement Administration agents seized Monson’s cannabis plants.
Gonzales v. Raich

Facts:

Raich and Monson filed for an injunction to bar enforcement of the Federal CSA as applied to medical use because enforcement violated the Commerce Clause and the Due Process Clause of the Fifth Amendment.

Angel Raich vaporizing medical cannabis, 2004
Gonzales v. Raich

Procedural History:
- Federal District Court denied preliminary injunction
- U.S. Ninth Circuit Court of Appeals agreed with Commerce Clause argument and directed lower court to issue a preliminary injunction
- U.S. Supreme Court granted government’s petition for a writ of certiorari

Issue:
- [W]hether Congress’ power to regulate interstate markets for medicinal substances encompasses markets that are supplied with drugs produced and consumed locally?
Gonzales v. Raich

Reasoning:
- Discussed legislative history, public policy
- Judicial precedent (Wickard v. Filburn): Congress has power to regulate activities substantially affecting interstate commerce
  - Wickard (wheat) and this case (marijuana) are similar; Lopez and Morrison are distinguishable

Holding:
- Locally cultivated product used domestically is subject to federal regulation
- Appellate decision vacated, case remanded
Constitutional Limitations on Govt

*Privileges & Immunities*: Art. IV, Sec. 2, Cl. 1 states that the “citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

- Thus, each state must offer same privileges to a person from another state as it would to its citizens.
- For business, that means that rights established under deeds and contracts and court orders in one state will be honored by other states.
Constitutional Limitations on Govt

Protection of the Person: No words in the Constitution prohibit government from impairing rights of persons

However, courts have interpreted the Constitution to protect many rights, including right of privacy, protection of discrimination due to poverty, protection from gender discrimination
Public Policy

- Constitution fully protects *only* “living persons”
- Businesses are “citizens” and receive *most, but not all*, Constitutional rights and protections
  - For example, a corporation cannot “plead the Fifth” since it cannot be imprisoned

View from witness stand,
Judge Fish’s courtroom,
Earl Cabell Federal Bldg,
Dallas, TX
The First Amendment

- The First Amendment guarantees freedoms of religion, speech, press, assembly, and petition
- Protection has never been afforded to certain classes of speech
  - lewd, obscene, profane, libelous, and insulting ("fighting words") speech is not protected speech
Texas v. Johnson


- **Facts:** Johnson arrested for burning flag
- **Issue:** Is state law prohibiting flag burning constitutional?
- **Court’s holding:** 1st Amendment rules
- **Lesson:** Symbolic speech (gesture, clothing) is protected speech
Texas v. Johnson
U.S. Supreme Court (1989)
5-4 opinion: TX statute can’t be used to convict Johnson

↑

Johnson v. State
Court of Criminal Appeals (1988)
overturns conviction

↑

Gregory Lee Johnson v. State
Court of Appeals for Fifth District of Texas (1986)
Affirms conviction

↑

State v. Gregory Johnson
County Criminal Court #8 in Dallas County, Texas (1984)
arrested & fined $2000
Will TX v. Johnson remain Law?

Congress has made seven attempts to overrule the U.S. Supreme Court by passing a constitutional amendment making an exception to the First Amendment in order to allow the government to ban flag desecration. Each attempt has failed.

Cartoon printed during Texas v. Johnson case
Business & The First Amendment

- Commercial speech (e.g., advertisements) not protected as fully as non-commercial speech
  - Dominant theme is commercial transaction
  - Interesting websites:
    - http://www.firstamendmentcenter.org

- A restriction on commercial speech is valid if it (1) seeks to implement a substantial gov’t interest, (2) directly advances the interest, and (3) is the least restrictive method of achieving the interest
Rhode Island passed a statute banning ads for retail liquor prices in places where liquor is not sold. Plaintiffs claimed the statute violated their First Amendment right to freedom of speech.

Held unconstitutional: “[state] regulatory power is not to be exercised to the detriment of its constitutional obligation to protect and abide by the First Amendment's freedom of speech guarantee.”
Under establishment clause, gov’t can neither establish or prohibit free exercise of religion.

But gov’t regulation that does not promote or place a significant burden on religion is constitutional even if some impact.

Ex: blue laws upheld that require businesses to close Sunday.

Businesses may be restricted in efforts to promote or restrict religion.
Business & The Fifth Amendment

- Only natural persons (not fictitious entities, such as corporations) are protected by the Fifth Amendment privilege against self-incrimination.

- The right is only available in a criminal case or potential charge!
Business & The Fourth Amendment

- To conduct search or seizure, a warrant based on probable cause is required.
- Standard of probable cause is lower in the business context.

**Warrant:**
- Required to search/seize business records in hands of attorney or accountant.
- Not required for regulated industries.
Other Constitutional Issues

Does the university have the right to read your e-mails on campus computers?
- How about an employer reading your e-mail you create on your computer workstation?

Assume you were in a county hospital for a broken arm. Can the government (e.g., research lab) take samples of your DNA or blood and create and develop medical products (i.e., blood plasma) for sale?
Test Your Knowledge

True = A, False = B

- The Constitution establishes a tripartite government
- The federal government has exclusive power over matters of war and taxation
- States possess exclusive power to enact laws to protect welfare, health, and safety
- The Fifth Amendment prohibits depriving any person of life, liberty or happiness
- Federal supremacy means that the U.S. Constitution is the supreme law of the land
Test Your Knowledge

True = A, False = B

- The Federal government may not interfere with interstate commerce
- The federal government may not restrict individual or commercial speech
- Constitutional limitations on governmental power includes the Fifth Amendment
- The “takings clause” means that the federal government cannot take away an individual’s freedom
Multiple Choice

Courts apply a means-ends test to review an allegedly unconstitutional statute. Which level of scrutiny applies to a statute that gives benefits to people based on their religion?

(a) Minimal scrutiny
(b) Intermediate scrutiny
(c) Strict scrutiny
Substantive due process refers to a prohibition against:

(a) Unreasonable procedures
(b) Unreasonable laws
(c) Unreasonable (unfair) results
What Constitutional Issues Are Important to YOU?

[Cartoon image: A cartoon showing two characters. One says, "No one should be allowed to burn something that embodies our nation's highest ideals and noblest principles!!" The other says, "Of course, there are exceptions!" with a burning document labeled "1st Amendment." The character on the left is from the US House.]
Next

- Business Ethics & Critical Legal Thinking
- International Law
- Business Formation

“Actually, I’m a litigator.”