

FEDERALISM

- **Federal Government:** A form of government where states form a union and the sovereign power is divided between the national government and the various states.

- **The Privileges and Immunities Clause:** Article IV of the U.S. Constitution provides that “Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.”
 - In other words, a state may not treat citizens of other states differently from citizens of its own state without a *substantial reason* that is *substantially related* to the purpose of the rule.

- **The Full Faith and Credit Clause:** Article IV also requires the states to afford “Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State.”
 - As a consequence, rights established under deeds, wills, contracts, and the like in one state must be recognized by other states.

 - Likewise, a judgment of a court of competent jurisdiction in one state must be recognized and enforced by the courts of another state.

CHECKS AND BALANCES

- **Tri-Partite Government:** The national government of the United States of America is composed of three separate branches, each of which acts as a check on the others' power:
 - The **Executive Branch** (*i.e.*, the President), which has the power to veto legislation passed by Congress and to appoint the members of the Judiciary;
 - The **Legislative Branch** (*i.e.*, Congress), which may override the President's veto and which may define the jurisdiction of the Judiciary and must confirm Judiciary appointees; and
 - The **Judicial Branch** (*i.e.*, the Supreme Court and the federal court system), which has the power to void the acts of the Executive and Legislative branches because they are unconstitutional.

THE COMMERCE CLAUSE

- **Commerce Clause:** Article I, Section 8 of the U.S. Constitution empowers Congress “[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes.”

- **Interstate and Intrastate Commerce:** Since 1824, the Supreme Court has interpreted the Commerce Clause to permit Congress to regulate both
 - **Interstate Commerce** (*i.e.*, commerce between two or more states) and

 - **Intrastate Commerce** (*i.e.*, commerce within a single state),

as long as the intrastate commerce at issue “**substantially affects**” interstate commerce.

THE REGULATORY POWERS OF THE STATES

- **Police Powers:** As part of their sovereign powers, states possess the power to regulate private activities in order to protect or promote public order, health, safety, morals, and general welfare.

- **Balancing the Commerce Clause with States' Police Powers:** When state regulations impinge on interstate commerce, courts must balance the state's interest in the merits and purposes of the regulation against the burden that the regulation places on interstate commerce. Generally speaking,
 - state laws enacted pursuant to the state's police powers are **presumed to be valid** notwithstanding their effect on interstate commerce; however,

 - if the state law **substantially interferes** with interstate commerce, it will most likely be held to violate the Commerce Clause (*i.e.*, to be unconstitutional).

THE SUPREMACY CLAUSE AND PREEMPTION

- Federal constitutional and statutory law and treaties supersede their state counterparts due to the **Supremacy Clause**, Article VI, Section 2 of the U.S. Constitution:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

- **Preemption:** Federal law is said to *preempt* a conflicting state or local law, regulation, or ordinance if
 - federal law is so **pervasive, comprehensive, or detailed** that it leaves state and local law no room to supplement it, or
 - federal law creates a **federal regulatory agency** that is empowered to enforce federal law.

TAXING AND SPENDING POWERS

- **Taxing Power:** Article I, Section 8 empowers Congress to “lay and collect Taxes” Generally speaking, as long as a proposed measure **bears a reasonable relationship to revenue production**, it will be deemed to fall within Congress’ taxing authority.
- **Uniformity of Taxes:** Article I, Section 8 further provides that taxes “shall be uniform throughout the United States.” Therefore, Congress may not tax some states while not taxing others – though, certainly, some taxes may affect some states more than others.
- **Spending Power:** Article I, Section 8 also empowers Congress “to pay the Debts and provide for the common Defence and general welfare of the United States.”
- This combination of taxing and spending authority has led many to characterize Congress as having “the **power of the purse-string**” – meaning that, no matter what policies the Executive proposes nor what reading of the law the Judiciary mandates, the Legislative Branch determines how the funds spent by the federal government are to be raised and how the funds raised by the federal government are to be spent.

THE BILL OF RIGHTS

- The first ten amendments to the U.S. Constitution comprise the **Bill of Rights** – a series of protections for individuals against various types of government action.
- The Bill of Rights, with certain notable exceptions, protects *legal persons*, such as corporations and sole proprietorships, as well as *natural persons*.
- The protections afforded by the Bill of Rights are only against action by the federal government.
- In order to extend the same protections against actions by state and local governments, the U.S. Supreme Court has *incorporated* the protections afforded by the Bill of Rights into the following language of the Fourteenth Amendment:

. . . . No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without **due process of law**; nor deny to any person within its jurisdiction the **equal protection** of the laws.

THE BILL OF RIGHTS IN A NUTSHELL

- Most significantly, for our purposes, the Bill of Rights:
 - guarantees **freedom of religion, speech, and the press**, as well as the rights to **peaceably assemble**, and to **petition the government** [Amend. 1];
 - guarantees the right to **keep and bear arms** [Amend. 2];
 - prohibits **unreasonable searches and seizures** of persons or property [Amend. 4] and guarantees **fair payment for property** taken for public use [Amend. 5];
 - guarantees the rights to **due process of law**, including **indictment by grand jury** [Amend. 5], as well as the rights to a **speedy and public (criminal) trial** with the **assistance of counsel** and to **cross-examine witnesses and to solicit favorable testimony** [Amend. 6];
 - guarantees the right to **trial by jury** in both criminal cases [Amend. 6] and civil cases involving more than \$20 [Amend. 7]; and
 - prohibits **excessive bails and fines**, as well as **cruel and unusual punishment** [Amend. 8].

INCORPORATION OF THE BILL OF RIGHTS

- The protections afforded by the Bill of Rights to natural persons and, in some cases, legal persons such as corporations and partnerships, are only against action by the federal government.
- In order to extend the same protections against actions by state and local governments, the U.S. Supreme Court has **incorporated** the protections afforded by the Bill of Rights into the following language of the Fourteenth Amendment:

. . . . No State shall make or enforce any law which shall abridge the **privileges or immunities** of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without **due process of law**; nor deny to any person within its jurisdiction the **equal protection** of the laws.

FREEDOM OF SPEECH

- The First Amendment safeguards freedom of speech, including *corporate political speech* and *symbolic speech*.
 - **Symbolic speech** includes all forms of expressive conduct, including gestures, movements, and clothing.
- **Commercial speech** (*i.e.*, advertising) may be restricted as long as the restriction
 - (1) promotes a **substantial government interest**,
 - (2) directly advances said interest, and
 - (3) is **no more restrictive than necessary** in order to achieve the substantial government interest.
- **Unprotected speech:** Certain types of speech may be prohibited, for example:
 - speech (*i.e.*, *slander*) or writing (*i.e.*, *libel*) that **defames** or **harms the good reputation** of another person,
 - threatening or “**fighting**” words, and
 - **obscene** or **pornographic** speech.

CYBERSPEECH

- An increasingly significant constitutional issue is the extent to which the First Amendment’s protection of free speech covers the content of web sites and messages transmitted over the Internet – particularly those whose content is sexually explicit, “indecent,” racist, violent, etc.
- Attempts to regulate speech on the Internet are hampered by the fact that it is a “seamless” global web, and many of its users are not subject to U.S. law.
- One approach employers, schools, and parents have taken to restrict their employees’, students’, and children’s access to inappropriate material is to use one or more types of *filters*. The Supreme Court appears to have approved the use of filters by government employers, public schools, and public libraries.

FREEDOM OF RELIGION

- The First Amendment also provides that “Congress shall make no law respecting an **establishment** of religion, or prohibiting the **free exercise** thereof”
 - These two provisions are commonly referred to as the **establishment clause** and the **free exercise clause**.
- The key to analyzing a federal or state law or regulation as it relates to these provisions is to focus on the **primary effect** of the law or regulation, not any secondary effect. As long as the law or regulation does not promote or place a **significant burden** on religion, it will not be deemed unconstitutional simply because it has some impact on religion.

SEARCHES AND SEIZURES

- The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects.” As a consequence, law enforcement officers must have **probable cause** before they may search and/or seize any person’s property, etc.
- In most instances, officers must obtain a **search warrant**, issued by a judge or other public official, and based on probable cause, before searching a person’s property.
- However, if an officer has probable cause and a genuine concern that the delay involved in obtaining a search warrant may result in the relocation or destruction of the property sought to be searched (most notably, an automobile), a warrantless search may be performed.
- For Fourth Amendment purposes, a “person” includes a corporation, partnership, and other legal entities, although the standard for probable cause with respect to such entities is lower than required to search the person and/or property of a natural person.

SELF-INCRIMINATION

- The Fifth Amendment guarantees that no person “shall be compelled in any criminal case to be a witness against himself.”
- Unlike the Fourth Amendment’s protections against unreasonable search and seizure, the self-incrimination privilege does not extend to corporations or partnerships, but it does protect sole proprietorships and sole practitioners to the same extent as natural persons are protected.

DUE PROCESS OF LAW

- **Procedural Due Process** requires that any government decision to take life, liberty, or property must be made fairly, giving the person(s) from whom life, liberty, or property is to be taken **prior notice** and the **opportunity to be heard** by an impartial decisionmaker.
- **Substantive Due Process** requires that the interest of the state to be served by any law or other governmental action be weighed against the right of the individual(s) against whom the law or action is directed.
 - A **fundamental** right (*e.g.*, free speech, interstate travel, privacy) will be protected unless the government can show a **compelling state interest** (*e.g.*, public safety).
 - In all other cases, a law or action will not violate substantive due process as long as it is **rationaly related** to any legitimate governmental purpose.

EQUAL PROTECTION

- The Fourteenth and Fifth Amendments, respectively, prohibit any state or the federal government from denying “any person within its jurisdiction the equal protection of the laws.”
- Like *substantive due process*, the equal protection clauses require the substantive effect of a law or other government action be weighed against the right of the individual(s) against whom the law or action is directed.
 - If the law or action inhibits a group’s exercise of a **fundamental right** or if it embodies a classification based on a **suspect trait** (*e.g.*, race, national origin), the law or action is subject to *strict scrutiny*, and will only be upheld if it serves a **compelling state interest**.
 - If the law or action embodies a classification based on **gender** or **legitimacy**, it is subject to *intermediate scrutiny*, and will only be upheld if it is **substantially related** to important government objectives.
 - If the law or action inhibits only rights related to **economic or social welfare**, it will be upheld so long as there is any *rational basis* on which the classification might relate to a legitimate government interest.

PRIVACY RIGHTS

- Despite the lack of any explicit right to privacy in the Bill of Rights, the courts have implied a **fundamental right to personal privacy** from the provisions of the First, Third, Fourth, Fifth, and Ninth Amendments.

- In addition, Congress has passed a number of statutes protecting individuals' privacy rights, including the
 - **Freedom of Information Act**, which affords individuals access to information collected about them by the federal government;

 - **Family and Educational Rights and Privacy Act**, which limits access to education-related records of public and private colleges and universities;

 - **Right to Financial Privacy Act**, which prohibits financial institutions from providing a customer's records to the federal government without the customer's authorization; and

 - **Electronic Communications Privacy Act**, which prohibits intercepting information communicated by electronic means.