Chapter 5
Constitutional Law

The Articles of Confederation
- In effect from 1781 to 1788
- Two main problems:
  1. Federal government had no ability to raise money.
  2. States were imposing import taxes on each others’ products.

Separation of Powers
- Article I created the U.S. Congress
- Article II created the office of the president
- Article III created the U.S. Supreme Court
A Government of Enumerated Powers

✓ Article I, section 8 enumerates those issues on which Congress may pass statutes.
✓ The Tenth Amendment says if they forgot to put it on the list, then that power falls to the states and/or the people.

The Bill of Rights

✓ The first 10 Amendments to the Constitution
✓ Became law December 1791
✓ Amendments 1, 5, and 14: chapter 5
✓ Amendments 4, 5, and 6: chapter 7

The Commerce Clause

(The Congress shall have power…)
“To regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”
The Commerce Clause

The Negative or Dormant Aspect: Any state law that discriminates against interstate commerce will be struck down as unconstitutional.

The Positive Aspect: Congress is permitted to regulate interstate and international commerce.

Wickard v. Filburn (1942)

✓ Either originated or reinforced the Substantial Effect Rule, depending who you talk to.

✓ The U.S. Supreme Court upheld Congress’s right to place national production limits on wheat, and to allocate those quotas to individual states and farms.

The Substantial Effect Rule

“Congress may regulate any activity that has a substantial economic effect on interstate commerce,” even if the activity itself occurs entirely within state boundaries, and even if the products of that activity never actually enter the stream of interstate commerce.
The Aggregation Argument
“That (Mr. Filburn’s) contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”

The Commerce Clause’s Positive Aspect: Federal Regulation of Business
✓ In 1969, the Court ruled that the federal government could tell an Arkansas recreational facility it had to admit blacks because three of the four items sold at its snack bar were purchased from outside the state. (Daniel v. Paul)

✓ In United States v. Lopez (1995), the Court struck down the “Gun-Free School Zones Act.”
✓ This was the first time in 60 years (since 1936) that the Court had found an act of Congress to fall outside the scope of the Commerce Clause!
The Federal Courts Have Two Key Powers or Functions

1. Adjudication, and
2. Judicial Review: The power to decide whether a given governmental act or law is unconstitutional and therefore void.

Judicial Review

✓ Courts’ exercise of the power of judicial review is often controversial
✓ This is because it often protects the fundamental (constitutional) rights of minorities while thwarting the will of the majority.

Judicial Activism vs. Judicial Restraint

Judicial activism: A court’s willingness, or even eagerness, to use the power of judicial review to shape the substantive law.

Judicial restraint: A court’s willingness to limit its role to enforcing the laws passed by Congress or the state legislatures.

- Gregory Johnson burned a U.S. flag as part of a political demonstration in Texas.
- He was convicted under a Texas statute, but the Texas Court of Criminal Appeals reversed on the grounds that the conviction violated the First Amendment.

Texas v. Johnson

- Issue: Does the First Amendment protect flag burning by protestors?
- Yes, said the Supreme Court, in a narrow (5-to-4) decision.
- The majority held that the First Amendment would be rendered virtually meaningless unless it protects speech that is likely to offend other people.

Texas v. Johnson

- When this case went to trial, every single state had a statute making it illegal to burn an American flag in public as an act of disrespect!
- So this decision by the Supreme Court was very unpopular.
- That is true to some degree in almost every application of judicial review.
Brown v. Board of Education  
(1954)

✓ The Supreme Court ruled that segregation of the state public schools was a denial of “equal protection under the laws” under the Fourteenth Amendment.  
✓ Overturned the “separate but equal” doctrine of *Plessy v. Ferguson*  
(1896)

Political Speech Receives the Highest Level of Protection

✓ Government may abridge (punish) the speech only if it is intended and likely to cause imminent lawless action. (*Brandenburg v. Ohio*, 1969)

Time, Place, and Manner

✓ Time: When people are normally awake.  
✓ Place: Where it does not pose a danger to others, nor abridge the rights of others.  
✓ Manner: Such that it does not pose a danger to others, nor abridge the rights of others.
Madsen v. Women’s Health Center, Inc. (1994)
✓ Supreme Court upheld local judge’s order banning protesters from coming within 36 feet of a family planning clinic’s doors
✓ But overturned the portion of his order relating to posters of graphic images displayed across the street.

Obscenity
✓ Has never received constitutional protection
✓ But profanity and offensive works have.
✓ Where’s the boundary?

The Miller Test: 3 Yeses → Obscene
✓ Whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest.
✓ Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law.
✓ Whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
Barnes v. Glen Theater, Inc.
✓ You Be the Judge (page 116)

Commercial Speech
“Speech that has as a dominant theme to propose a commercial transaction.”
✓ Receives a lower level of protection than political speech.

False and Misleading Commercial Speech
Is in general prohibited, and the courts are OK with that.
✓ Federal Trade Commission (FTC)
✓ Federal Communications Commission (FCC)
✓ Food and Drug Administration (FDA)
✓ The Federal Reserve (the Fed)
✓ Various state agencies
Regulations on Commercial Speech that is not false or misleading
“Must be reasonable and directed to a legitimate (government policy) goal.”
✓ Regulations that limit commercial speech more than necessary to achieve the goal will be overturned.

Salib v. City of Mesa
Arizona Court of Appeals
✓ Mr. Salib argued that the city code that prohibited covering more than 30% of a store’s windows with signs was unconstitutional.
✓ The rule(s) must be reasonable, and directed to a legitimate goal.

Salib v. City of Mesa
Three part test:
1. The government has a substantial interest
2. The restriction directly advances this interest
3. The restriction is narrowly tailored to achieve the goal
The Fifth Amendment
✓ “No person shall be...deprived of life, liberty, or property without due process of law;”
✓ “Nor shall private property be taken for public use, without just compensation.”

Procedural Due Process and Substantive Due Process
✓ Before depriving anyone of liberty or property, the government must go through certain procedures to ensure that the result is fair.
✓ Some rights are so fundamental that the government cannot take them from us at all.

Procedural Due Process
✓ The purpose is to ensure that before the government takes liberty or property, we have a fair chance to oppose the action.
✓ The amount of process due is dependent on the value of the property or liberty interest at stake.
Procedural Due Process
✓ Is the government attempting to take liberty or property?
✓ If so, the government must provide a neutral fact-finder.
✓ Beyond that, the court must decide how much process was due and whether that amount was given.

How Much Process is Due?
Government Employment
✓ Employee must receive due process before being fired.*
Is entitled to:
✓ Know the charges
✓ Hear the employer’s evidence
✓ Tell his side of the story
*But may be suspended with pay first if he is a danger to others.

How Much Process is Due?
Student’s Disciplinary Suspension
✓ Must receive due process before being suspended.
Is entitled to:
✓ Know the charges before the hearing
✓ Hear the school’s evidence
✓ Have a real chance to rebut the charges
The Takings Clause

✓ Prohibits the government from taking private property for public use without just compensation.
✓ The power of eminent domain
✓ A condemnation proceeding
✓ A government taking of the land

How Much Process is Due?
A Government Taking of Property

✓ Must be notified and have an opportunity to defeat the project.
Is entitled to:
✓ Challenge the purpose to which the land is being put.
✓ Challenge the necessity of taking your land to achieve the purpose.
✓ Challenge the amount being offered.

Kelo v. City of New London
(U.S. Supreme Court)

✓ Nine owners refused to sell
✓ They argued that the city was taking land for private use, not public use
✓ They lost
Substantive Due Process

✓ These days, attempts by the government to regulate economic or social conditions are presumed valid.
✓ But laws that infringe on your right to do what you want with your body in the privacy of your home will be struck down unless necessary to further a compelling government goal.

The Fourteenth Amendment: Interpreting the Equal Protection Clause

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<thead>
<tr>
<th>WHAT</th>
<th>Level of Scrutiny</th>
<th>RULE</th>
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<tbody>
<tr>
<td>“Economic and Social Relations”</td>
<td>Minimal</td>
<td>Must rationally relate to a legitimate state (government) interest.</td>
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<tr>
<td>Gender</td>
<td>Intermediate</td>
<td>Must substantially relate to an important government objective.</td>
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<tr>
<td>Race</td>
<td>Strict</td>
<td>Must be necessary to promote a compelling government interest.</td>
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