Chapter 2

Constitutional Law

Answers to Learning Objectives/ For Review Questions at the Beginning and

the End of the Chapter

Note that your students can find the answers to the even-numbered For Review questions in Appendix F at the end of the text. We repeat these answers here as a convenience to you.

1A Structure of the government

The Constitution divides the national government’s powers among three branches. The legislative branch makes the laws, the executive branch en­forces the laws, and the judicial branch interprets the laws. Each branch per­forms a separate function, and no branch may exercise the authority of an­other branch. A system of checks and balances allows each branch to limit the actions of the other two branches, thus preventing any one branch from exer­cising too much power.

2A Commercial activities

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.”

3A Priority of laws

The supremacy clause—Article VI of the Constitution—provides that the Constitution, laws, and treaties of the United States are “the supreme Law of the Land.” This article is important in the ordering of state and federal rela­tion­ships. When there is a direct conflict between a federal law and a state law, the state law is rendered invalid.

4A Bill of Rights

The Bill of Rights consists of the first ten amendments to the U.S. Constitution. Adopted in 1791, the Bill of Rights embodies protections for individuals against interference by the federal government. Some of the protections also apply to business entities. The First Amendment guarantees the freedoms of religion, speech, and the press, and the rights to assemble peaceably and to petition the government.

5A Due process clause

Both the Fifth and the Fourteenth Amendments to the U.S. Constitution pro­vide that no person shall be deprived “of life, liberty, or property, without due process of law.” The due process clause of each of these constitutional amend­ments has two aspects—procedural and substantive.

Answers to Critical Thinking

Questions in the Features

Beyond Our Borders—Critical Thinking (Page 42)

Should U.S. courts, and particularly the United States Supreme Court look to the other nations’ laws for guidance when deciding important issues— including those involving rights granted by the Constitution? If so, what impact might this have on their decisions? Explain. U.S. courts should consider foreign law when deciding issues of national impor­tance because changes in views on those issues is not limited to domestic law. How other jurisdictions and other nations regulate those issues can be infor­mative, enlightening, and instructive, and indicate possibilities that domestic law might not suggest. U.S. courts should not consider foreign law when decid­ing issues of national importance because it can be misleading and irrelevant in our domestic and cultural context.

Adapting the Law to the Online Environment—Critical Thinking (Page 43)

How might the outcome of this case have been different if the girls had posted the photos on the high school’s public Web site for all to see? Presumably, such speech could reasonably be restricted by high school administrators. There would be no question that suggestive photos viewed on the high school’s public Web site could and would certainly be seen by most students, teachers, and parents.

Answers to Critical Thinking

Questions in the Cases

Case 2.2—What If the Facts Were Different? (Page 45)

If Bad Frog had sought to use the offensive label to market toys instead of beer, would the court’s ruling likely have been the same? Probably not. The rea­soning underlying the court’s decision in the case was, in part, that “the State’s prohibi­tion of the labels .  .  . does not materially advance its asserted interests in insulating children from vulgarity .  .  . and is not nar­rowly tailored to the interest concerning chil­dren.” The court’s reason­ing was supported in part by the fact that children cannot buy beer. If the labels adver­tised toys, however, the court’s reasoning might have been different.

Case 2.3—What If the Facts Were Different? (Page 49)

Suppose that Mitchell County had passed an ordinance that allowed the Mennonites to continue to use steel cleats on the newly resurfaced roads provided that the drivers paid a $5 fee each time they were on the road. Would the court have ruled differently? Why or why not? The Mennonites would still have been singled out for differential treatment under the law because of their use of steel cleats. Therefore, the court probably would have ruled similarly. Only if those who used snow chains and metal-studded snow tires were similarly asked to pay a fee would the court possibly have ruled otherwise.

Answers to Questions in the Reviewing Feature

at the End of the Chapter

1A. Equal protection

When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to mo­torcycle operators and passengers, it raises equal protection issues.

2A. Levels of scrutiny

The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are strict scrutiny (if fundamental rights are at stake), intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and the “rational basis” test (in matters of economic or social welfare).

3A. Standard

The court would likely apply the rational basis test, because the statute regu­lates a matter of social welfare by requiring helmets. Similar to seat-belt laws and speed limits, a helmet statute involves the state’s attempt to protect the welfare of its citizens. Thus, the court would consider it a matter a social wel­fare and require that it be rationally related to a legitimate government objective.

4A. Application

The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

Answer to Debate This Question in the Reviewing Feature at the End of the Chapter

Legislation aimed at protecting people from themselves concerns the individual as well as the public in general.  Protective helmet laws are just one example of such legislation.  Should individuals be allowed to engage in unsafe activities if they choose to do so? Certainly many will argue in favor of individual rights.  If certain people wish to engage in risky activities such as riding motorcycles without a helmet, so be it.  That should be their choice.  No one is going to argue that motorcycle riders believe that there is zero danger when riding a motorcycle without a helmet.  In other words, individuals should be free to make their own decisions and consequently, their own mistakes.

In contrast, there is a public policy issue involved.  If a motorcyclist injures him- or herself in an accident because he or she was not wearing a protective helmet, society ends up paying in the form of increased medical care expenses, lost productivity, and even welfare for other family members.  Thus, the state has an interest in protecting the public in general by limiting some individual rights.

Answers to Issue Spotters in the ExamPrep Feature at the End of the Chapter

1A Can a state, in the interest of energy conservation, ban all adver­tising by power utilities if conservation could be accomplished by less restrictive means? Why or why not? No. Even if commercial speech is not re­lated to illegal activities nor mis­leading, it may be re­stricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this case, the interest in energy con­servation is substantial, but it could be achieved by less restric­tive means. That would be the utilities’ defense against the enforcement of this state law.

2A Would it be a violation of equal protection for a state to impose a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies if the only reason for the tax is to pro­tect the local firms from out-of-state competition? Explain. Yes. The tax would limit the lib­erty of some persons (out of state busi­nesses), so it is subject to a review under the equal protection clause. Protecting local businesses from out-of-state com­peti­tion is not a legitimate government objective. Thus, such a tax would vio­late the equal protection clause.

Answers to Questions and Case Problems

at the End of the Chapter

Business Scenarios and Case Problems

2–1A Freedom of speech

(BLTS page 41)

To protect citizens from those who would abuse the right to free expression, speech is subject to reasonable restrictions. But a restriction must aim at a social problem and not at the content of the speech. Thus, the court in this problem is likely to consider the reasonableness of the restriction on the posting of signs on public property in terms of its purpose and the means it uses to achieve that purpose.

Here, the purpose of the ordinance is to improve the appearance of public property. The posting of all signs—not just political campaign signs—is prohibited. There are alternatives to posting signs on public property for a candidate’s supporters to communicate their message. In other words, this prohibition on signs did not go so far as to ban political campaign speech altogether.

In the actual case on which this problem is based, the United States Supreme Court upheld a similar ordinance on the reasoning stated above.

2–2A Question with Sample Answer—The free exercise clause

Thomas has a constitutionally protected right to the free exercise of his re­ligion. In denying his claim for unemployment benefits, the state violated this right. Employers are obligated to make reasonable accommodations for their employees’ beliefs that are openly and sincerely held, as were Thomas’s beliefs. By moving him to a department that made military goods, his employer effectively forced him to choose between his job and his religious princi­ples. This unilateral decision on the part of the employer was the reason Thomas left his job and why the company was required to compensate Thomas for his resulting unemployment.

2–3A The equal protection clause

(BLTS page 51)

According to the standards applied to determine compliance with the equal protection clause, this ordinance’s classification—a gender-based distinc­tion—is subject to intermediate scrutiny. Under this standard, the court could dismiss the plaintiffs’ complaint. Gen­der-based distinctions are acceptable in circumstances in which the two gen­ders are not similarly situated. The city’s ob­jectives of preventing crime, maintaining property values, and preserving the quality of urban life, are legitimate and important. Regu­lation of female, but not male, topless dancing, in the context of the overall regu­lation of sexu­ally explicit commercial establishments, could reasonably be interpreted as substantially re­lated to achieving these objectives. The court might point out, for example, that males are often topless on beaches, in sporting events, during performances at the ballet, and in magazine pho­tos with­out sexual sugges­tiveness. Female breasts are rarely exposed in public venues without sexual overtones, however. This arguably makes it permissible for the law to regard female toplessness differently from male toplessness.

2–4A Spotlight on Plagiarism—Due process

To adequately claim a due process violation, a plaintiff must allege that he was deprived of “life, liberty, or property” without due process of law. A faculty member’s academic reputation is a protected interest. The question is what process is due to deprive a faculty member of this interest and in this case whether Gunasekera was provided it. When an employer inflicts a public stigma on an employee, the only way that an employee can clear his or her name is through publicity. Gunasekera’s alleged injury was his public association with the plagiarism scandal. Here, the court reasoned that “a name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera’s name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved.” Thus the court held that Gunasekera was entitled to a public name-clearing hearing.

2–5A The commerce clause

(BLTS page 35)

Under the commerce clause, the national government has the power to regulate every commercial enterprise in the United States. The commerce clause may not justify national regulation of noneconomic conduct. Interstate travel involves the use of the channels of interstate commerce, however, and is properly subject to congressional regulation under the commerce clause. Thus, SORNA—which makes it a crime for a sex offender to fail to re-register as an offender when he or she travels in interstate commerce—is a legitimate exercise of congressional authority under the commerce clause.

In the actual case on which this problem is based, a federal district court dismissed Hall’s indictment. On the government’s appeal, the U.S Court of Appeals for the Second Circuit reversed the dismissal and remanded the case for further proceedings, based on the reasoning stated above.

2–6A Case Problem with Sample Answer—Establishment clause

The establishment clause prohibits the government from passing laws or taking actions that promote religion or show a preference for one religion over another. In assessing a government action, the courts look at the predominant purpose for the action and ask whether the action has the effect of endorsing religion.

Although here DeWeese claimed to have a nonreligious purpose for displaying the poster of the Ten Commandments in a courtroom, his own statements showed a religious purpose. These statements reflected his views about “warring” legal philosophies and his belief that “our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments.” This plainly constitutes a religious purpose that violates the establishment clause because it has the effect of endorsing Judaism or Christianity over other religions. In the case on which this problem is based, the court ruled in favor of the American Civil Liberties Union.

2–7A Dormant commerce clause

(BLTS page 38)

The court ruled that like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. The law requiring companies that sell cement in Puerto Rico to place certain labels on their products is clearly an attempt to regulate the cement market. The law imposed labeling regulations that affect transactions between the citizens of Puerto Rico and private companies. State laws that on their face discriminate against foreign commerce are almost always invalid, and this Puerto Rican law is such a law. The discriminatory labeling requirement placed sellers of cement manufactured outside Puerto Rico at a competitive disadvantage. This law therefore contravenes the dormant commerce clause.]

2–8A A Question of Ethics—Free speech

1. The answers to these questions begin with the protection of the freedom of speech under the First Amendment. The freedom to express an opin­ion is a fundamental aspect of liberty. But this right and its protection are not absolute. Some statements are not protected because, as explained in the Balboa decision, “they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be de­rived from them is clearly outweighed by the social interest in or­der and mo­rality.” Defamatory statements are among those that are not protected.

Arguments in favor of protecting such statements include the perception of the right to freedom of speech as necessary to liberty and a free society. Arguments opposed to such protection include “the social interest in order and morality.” In between these positions might fall a balancing of both their con­cerns. Under any interpretation the de­gree to which statements can be barred before they are made is a significant question.

In the Balboa case, the court issued an injunction against Lemen, ordering her to, among other things, stop making defamatory statements about the Inn. On appeal, a state intermediate appellate court invalidated this part of the injunction, ruling that it violated Lemen’s right to freedom of speech under the Constitution because it was a “prior restraint”—an attempt to restrain Lemen’s speech before she spoke. On further appeal, the California Supreme Court phrased “the precise question before us [to be] whether an injunction prohibiting the repetition of statements found at trial to be de­famatory violates the First Amendment.” The court held it could enjoin the repetition of such statements without infringing Lemen’s right to free speech. Quoting from a differ­ent case, the court reasoned, “The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, be­fore an adequate determination that it is unprotected by the First Amendment. An in­junction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudica­tion on the merits that the speech is unprotected does not constitute an unlaw­ful prior restraint.” The court added that the injunction could not prevent Lemen from complaining to the authorities, however.

2. To answer this question requires a standard to apply to the facts. A differ­ent chapter in the text sets out two fundamental approaches to ethical reasoning: one involves duty-based standards, which are often derived from re­ligious precepts, and the other focuses on the consequences of an action and whether these are the “greatest good for the greatest number.”

Under the former approach, a pre-established set of moral values founded on relig­ious beliefs can be taken as absolute with regard to behavior. Thus, if these values pro­scribed Lemen’s name-calling as wrong, it would be construed as wrong, regardless of the truth of what she said or any effect that it had. Similarly, if the values prescribed Lemen’s conduct as correct, it might be unethical not to engage in it. A different duty-based approach grounded on philosophical, rather than religious, principles would weigh the consequences of the conduct in light of what might follow if everyone engaged in the same behavior. If we all engaged in name-calling, hostility and other undesirable consequences would likely flourish. A third duty-based approach, referred to as the principle of rights theory, posits that every ethical precept has a rights-based corollary (for example, “thou shalt not kill” recognizes everyone’s right to live). These rights col­lectively reflect a dignity to which we are each entitled. Under this approach, Lemen’s name-calling would likely be seen as unethical for failing to respect her victims’ dignity.

Finally, an outcome-based approach focuses on the consequences of an act, requir­ing a determination as to whom it affects and assessments of its costs and benefits, as well as those of alternatives. The goal is to seek the maximum societal utility. Here, Lemen’s behavior appears to have had little positive effect on herself or the objects of her criticism (the Inn, its employees, its patrons, and its business). The Inn’s business seems to have been affected in a substantial way, which in Lemen’s eyes may be a “benefit,” but in the lives of its owners, employees, and customers, would more likely be seen as a “cost.”

Critical Thinking and Writing Assignments

2–9A Business Law Writing

For commercial businesses that operate only within the borders of one state, the power of the federal government to regulate every commercial enterprise in the United States means that even exclusively intrastate businesses are sub­ject to federal regulations. This can discourage intrastate commerce, or at least the commercial activities of small businesses, by adding a layer of regulation that may require expensive or time-consuming methods of compliance. This may encourage intrastate commerce, however, by disallowing restrictions, such as arbitrary discriminatory practices, that might otherwise impair the operation of a free market. This federal power also affects a state’s ability to regulate activities that extend beyond its borders, as well as the state’s power to regulate strictly in-state activities if those regulations substantially burden interstate commerce. This effect can be to encourage intrastate commerce by removing some regulations that might otherwise impede business activity in the same way that added federal regulations can have an adverse impact. A state’s inability to regulate may discourage small intrastate businesses, how­ever, by inhibiting the state’s power to protect its “home” or “native” enterprises.

2–10A Business Law Critical Thinking Group Assignments

1. The rules in this problem regulate the content of expression. Such rules must serve a compelling governmental interest and must be narrowly written to achieve that interest. In other words, for the rules to be valid, a compelling governmental interest must be furthered only by those rules. To make this determination, the government’s interest is balanced against the individual’s constitutional right to be free of the rules. For example, a city has a legitimate interest in banning the littering of its public areas with paper, but that does not justify a prohibition against the public distribution of handbills, even if the recipients often just toss them into the street. In this problem, the prohibition against young adults' possession of spray paint and markers in public places imposes a substantial burden on innocent expression because it applies even when the individuals have a legitimate purpose for the supplies. The contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti also undercuts any claim that the interest in eliminating illegal graffiti could not be achieved as effectively by other means.

2. The rules in this problem do not regulate the content of expression—they are not aimed at suppressing the expressive conduct of young adults but only of that conduct being fostered on unsuspecting and unwilling audiences. The restrictions are instead aimed at combating the societal problem of criminal graffiti. In other words, the rules are content neutral. Even if they were not entirely content neutral, expression is always subject to reasonable restrictions. Of course, a balance must be struck between the government’s obligation to protect its citizens and those citizens’ exercise of their right. But the rules at the center of this problem meet that standard. Young adults have other creative outlets and other means of artistic expression available.

3. Under the equal protection clause of the Fourteenth Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws.” This clause requires a review of the substance of the rules. If they limit the liberty of some person but not others, they may violate the equal protection clause. Here, the rules apply only to persons under the age of twenty-one. To succeed on an equal protection claim, opponents should argue that the rules should be subject to strict scrutiny—that the age restriction is similar to restrictions based on race, national origin, or citizenship. Under this standard, the rules must be necessary to promote a compelling governmental interest. The argument would be that they are not necessary—there are other means that could accomplish this objective more effectively. Alternatively, opponents could argue that the rules should be subject to intermediate scrutiny—that the age restriction is similar to restrictions based on gender or legitimacy. Under this level of scrutiny, the restrictions must be substantially related to an important government objective. In this problem, the contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti undermines any claim that the restrictions are substantially related to the interest in eliminating illegal graffiti. If neither of these arguments is successful, opponents could cite these same numbers to argue that the rules are not valid because there is no rational basis on which their restrictions on certain persons relate to a legitimate government interest.