**Chapter 2: Business and the Constitution**

**CHAPTER OVERVIEW**

This chapter begins with a very brief history and description of the structure of the U.S. Constitution with a focus on the first three articles and the powers of Congress (especially the Commerce Clause). As a practical matter, it may be best to assume that students have only a very basic knowledge of the purpose, history or challenges associated with having a written constitution. Making the leap between understanding the nature of the constitution and how it impacts business entities can be a significant hurdle for students. Therefore, the chapter first lays out the nuts and bolts, then covers black letter law, and concludes with applications and impact of the constitutional principles in a business context.

**Teaching tip: Capturing the Vast Universe of Con Law**

Teaching such a vast and fascinating subject area in such a short period of time is a challenge primarily because of the temptation to delve into an interesting foray that intrigues the instructor. Although a dose of this intrigue in your lectures may be helpful, limiting your discussion and study to context of the ***constitution’s impact on business*** helps keep both students and instructor focused and on track. For example, students tend to be enthusiastic about material related to the Bill of Rights—they may even wish to offer their own experiences if time permits. However, the instructor’s role is to bring the focus back to a business context (e.g., regulation of commercial speech).

**KEY LEARNING OUTCOMES**

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| **Outcome** | **Accreditation Categories** |
| Explain the structure, nature, and importance of the U.S. Constitution and describe the enumerated powers of government to regulate individuals and businesses. | Knowledge |
| Recognize the role of judicial review in Constitutional law.  | Application |
| List the major protection of the Constitution’s Bill of Rights and how they apply in a business environment. | Application; Critical Thinking |

**TEACHING OUTLINE**

**A. Structure and Nature of the Constitution: Federal Powers**

*Points to emphasize:*

* The U.S. uses a **federal system** in which a national government, having limited regulatory powers granted by the Constitution, **coexists** with the government of each state.
* The Constitution functions to (1) establish a **structure** for the federal government and rules for amending the Constitution; (2) grant **specific powers** for the different branches of government; and (3) provide **procedural protections** for U.S. citizens from wrongful government actions.
* ***Structure of the Constitution:***Composed of a preamble, seven articles and 27 amendments.
	+ The preamble states the Constitution’s broad objectives and the articles then set out structure, power, and procedures **(Reference to****Table 2.1: Overview of Articles in the U.S. Constitution ).**

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* The Constitution also establishes boundaries of jurisdiction.
* ***Amendments:***Additions or changes to the Constitution, the first 10 of which form the Bill of Rights.

**B. Overview of Federal Powers**

*Points to emphasize:*

* Federal legislation or regulation must be authorized by a specific, **enumerated** power in the Constitution and theses powers are limited in scope.
* ***Separation of Powers:***The system of checks and balances whereby the three branches have unique powers that allow them to resolve conflicts among themselves, thus ensuring no one branch exceeds its constitutional authority.
* **Reference to Table 2.2: Example of Constitutional Checks and Balances**

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* ***Judicial Review:***Federal courts have the right to **invalidate state or federal laws** that are inconsistent with the U.S. Constitution in some way.

**Case 2.1: U.S. v. Alvarez**

**Facts:** The Stolen Valor Act of 2005 made it a federal crime to make false claims related to receiving military decoration or honors. The penalty for false claims about the Congressional Medal of Honor was enhanced to include up to one year in prison. Alvarez was an individual who served as a member of a municipal water district board and introduced himself and included facts about his past including that he served as a marine, was wounded, and received the Congressional Medal of Honor. None of these representations were true. Alvarez was charged with violating the Stolen Valor Act and pled guilty, but reserved the right to challenge the constitutionality of the law based on the First Amendment upon appeal.

**Issue:** Since Alvarez’s statements were false, is he entitled to First Amendment protection?

**Ruling**: The U.S. Supreme Court ruled in favor of Alvarez and upheld the lower court’s decisions that the statute violated the First Amendment. The Court ruled that their previous decisions made clear that content-based restrictions on speech were presumed to be invalid and that it was the government’s responsibility to demonstrate a compelling interest. The Court rejected the government’s argument that false speech is not protected and pointed out several instances in which they had previously ruled that falsity alone does not make a statement automatically outside the protection of the First Amendment.

**Case Questions**

1. This question is intended to spur discussion on the topic of protection of First Amendment rights.

2. If Congress drafts a different law, it could not be content-based regulation.

3. *Critical Thinking*: This question is intended to stimulate discussion on the difficulty in drawing lines for free speech. Justice Holmes’ famous counsel on the limits of the First Amendment as not protecting “one who yells fire in a crowded theatre” may be a familiar starting point for students. But is Alvarez’s speech “harmful”?

* ***Applying the Constitution: Standards of Review:***When reviewing a government action for constitutional soundness, the Court classifies the action into one of three categories of **scrutiny**: (1) the rational basis category, or (2) intermediate-level scrutiny, or (3) Strict scrutiny.
	+ ***Rationale Basis:*** The government need only show that their action advanced a legitimate government objective and the action was minimally related to the government’s objective.
	+ ***Intermediate-Level Scrutiny:***The government must prove that their action advanced an important government objective and that the action is substantially related to the government’s objective.
	+ ***Strict Scrutiny:***(1) The government’s objective must be compelling, (2) the means chosen by the government to advance that objective is necessary to achieve that compelling end, and (3) no less-restrictive alternatives existed.

**Case 2.2: Brown v. Entertainment Merchants**

**Facts:** In 2005, the state of California passed a law that banned the sale or rental of violent video games to anyone under age 18 and required warning labels beyond the existing Entertainment Software Ratings Board’s voluntary rating system. The law covered games in which players had the options of killing, maiming, dismembering, or sexually assaulting characters that represent human beings. Entertainment Merchants Association sought to have the law declared unconstitutional.

**Issue:** Are video games are considered speech, similar to plays and movies, and are therefore protected by the First Amendment despite the fact that some people find the video games offensive?

**Ruling:** The U.S. Supreme Court ruled in favor of the video game industry and struck down the law as unconstitutional. Because the law tried to restrict speech, the Court applied a strict scrutiny analysis to the statute and found that California failed to meet their burden of proving a compelling government interest through the use of expert testimony, and the law was both too broad/ too narrow.

**Case Questions:**

1. Content-based regulation of speech by the government triggers strict scrutiny.

2. Perhaps. While we can’t know for sure, the Court did point out that the government had failed to carry their burden and this suggests that scientific proof may help the government overcome a strict scrutiny analysis.

3. *Critical Thinking*: This question is intended to stimulate discussion on the appropriate role of government. While the government certainly defines conduct for minors in certain areas (e.g., use of alcohol), at what point have they substituted their ethical judgment for the judgment of parents or individuals?

* ***The Supremacy Clause and Preemption:*** Under the Supremacy Clause, federal laws preempt (override) any conflicting state laws.

**C. Commerce Powers**

*Points to emphasize:*

* Congress’s **broadest power** is derived from the Commerce Clause whereby Congress is given the power to “regulate Commerce among the several states.”
* ***Application of Commerce Powers:***The direct and broad power to regulate all persons and products related to the flow of intrastate commerce is the fundamental source of its authority.
	+ ***Interstate versus Intrastate Commercial Activity:***Congress has the authority to regulate (1) channels of interstate commerce, (2) the instrumentalities of interstate commerce, (3) the articles moving in interstate commerce, and (4) intrastate commerce when it has a substantial economic effect on interstate commerce.
		- The Supreme Court has even deferred to congressional regulation of a product that is cultivated for noncommercial purposes solely in one state as **sufficiently related** to interstate commerce, citing *Gonzalez v. Raich*.
	+ ***Civil Rights Legislation:***In the 1964 Civil Rights Act, Congress used its commerce power to **ban discrimination** in places of public accommodation such as restaurants (*Katzenbach v. McClung)* and hotels (*Heart of Atlanta Motel v. U.S.)*
	+ ***Noncommercial Activity:***Some limits on Congress’s commerce power still exist, such as in cases where the activity is purely noncommercial, the activity Congress seeks to regulate must have a sufficient nexus to some **legitimate economic interest** (*U.S. v. Lopez; U.S. v. Morrison).*
* ***Constitutional Restrictions on State Regulation of Commerce:***States are free to regulate commerce that crosses into their state borders so long as (1) it does not impose a **discriminatory** law, and (2) the state law is a **legitimate effort to regulate** health, safety, and welfare.

**Case 2.3 Gonzalez v. Raich,**

**Facts:** In 1996, California voters approved a proposition legalizing the use of marijuana for medical purposes. The California legislature then adopted the Compassionate Use Act of 1996 to ensure that its residents had access to marijuana for medical use as an alternative to conventional methods. Raich and Monson were patients diagnosed with a variety of medical conditions which were not alleviated through traditional methods and medications. As a result, physicians in each case prescribed marijuana. In 2002, U.S. drug agents arrived at Monson’s home and confiscated and destroyed her marijuana plants pursuant to a federal law called the Controlled Substances Act (CSA).

**Issue:** Does enforcement of the CSA violate the Commerce Clause because the medical marijuana was cultivated and possessed within state borders and did not enter the stream of commerce?

**Ruling:** The U.S. Supreme Court ruled in favor of the government and held that the CSA was a valid exercise of Congressional powers derived from the Commerce Clause. In analyzing the question of purely intrastate production and use of marijuana, the Court pointed out that Congress need only supply a rational basis for believing that locally cultivated marijuana would end up in interstate commerce.

Case Questions:

1. This is Congressional authority that derives from the Commerce Clause and this question is intended to spur discussion of the appropriate scope of the Commerce Clause to regulate intra-state activities.

2. This question is intended to spur discussion on the role of the federal government in regulation of controlled substances.

3. *Critical Thinking*: This question is intended to stimulate discussion on the appropriate role of the government when a law directly contravenes the advice of a physician. In this case, the patients were indisputably in chronic pain and their physicians testified that marijuana was the only method of relieving pain. Should that weigh into the Court’s reasoning?

**The Commerce Clause and Civil Rights**

An unorthodox use of the federal commerce power has been in civil rights. In the 1964 Civil Rights Act, Congress used its commerce power to ban discrimination in places of public accommodation, such as privately owned restaurants and hotels.

**Noncommercial Activity**

There are limits on congressional commerce power. In caases where the activity is noncommercial in nature, the Supreme Court has issued levels of scrutiny to be sure that the activity that Congress seeks to regulate has a sufficient nexus to some legitimate economic interest.

**The Dormant Commerce Clause**

Federal commerce power prohibits the states from discriminating against or unduly burdening interstate commerce.

**Legal/Ethical Reflection and Discussion:** *Gonzalez v. Raich*

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**D. Tax and Spend Power**

*Points to emphasize:*

* Congress hast the power to **tax** the citizenry and to **spend** the federal government’s money in any way that promotes the **common defense and general welfare**.
* ***Necessary and Proper Clause:***Under the Necessary and Proper Clause, Congress may also place **conditions** on the use of federal money in order to achieve some public policy objective. (Refer to *South Dakota v. Dole).*

**Self-Check:** What is the constitutional source of authority for each of the following laws?

**Concept Summary**: Structure and Nature of the Constitution: Federal Powers

**E. Constitutional Protections**

*Points to emphasize:*

* The Bill of Rights contains protections for citizens from unlawful or repressive acts by the government and guarantee right of due process.
* ***The Bill of Rights and Business:***Corporations and other business entities do not always receive the same level of constitutional protections as individuals.

**Teaching Tip: The First Amendment as a Cultural Icon**

As you begin your discussion of the First Amendment, it can be an ideal time to bring up the fact that the free speech and expression rights are somewhat unique to Americans. For example, many European nations ban the sale of Nazi memorabilia and do not permit marches or other signs of expression if it is related to recognition of the Nazi regime. A nation’s history influences its laws. I have found that pointing this out is a good teaching moment for students to recognize that their frame of reference is almost inherently American-centric.

* ***First Amendment:***Contains the important introductory phrase “**Congress shall make no law”** and then articulates several specific protections against government encroachment in the areas of religion, press, speech, assembly, and petition of grievances.
	+ ***Limits on Free Speech:***Although the Supreme Court has given broad protections to speech that involves political expression, the First Amendment is **not absolute** and the government may place reasonable restrictions related to time and place of political expression in certain cases.

**Teaching Tip: Famous Holmes Quote**

Students remember that free speech is not an absolute right by recalling Justice Oliver Wendell Holmes’s point that the Constitution does not protect one who falsely yells “fire” in a crowded theatre.

* + ***Commercial Speech:***Traditionally, advertising had little or no First Amendment protection, but the Supreme Court has gradually increased the constitutional protections related to advertising allowing purely commercial speech to have **partial First Amendment** protection so long as it is truthful *(Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council).*
		- *Central Hudson Gas v. Public Service Commission* created a framework for a **four-part test** that subjects government restrictions on commercial speech to a form of intermediate-level scrutiny.
		- (1) Qualifies for First Amendment protection so long as it concerns lawful activities and is not misleading; --if it qualifies-- (2) A **substantial government interest** in regulating the speech must exist; (3) The government must demonstrate that the restriction directly **advances** the claimed government interest; and (4) The governments restriction must **not more extensive** to achieve the government’s asserted interest.

**Case 2.4: Masterpiece Cake Shop v. Colorado Civil Rights Commission**

**Facts:** Jack Phillips owns Masterpiece Cake Shop in Lakewood, Colorado. He was approached by a gay couple to bake them a cake for their wedding. Mr. Phillips refused on religios grounds. The gay couple sued stating that Phillips violated state antidiscrimination laws.

**Issue:** Are acts taken by business owners based on their religious views protected by the First Amendment?

**Holding:** The Court did not address the First Amendment issue, but rather ruled in favor of the baker due to the hostility shown towards Phillips and his religious views by the Colorado Civil Rights Commission.

**Commercial Speech**

The most common form of commercial speech is advertising. Traditionally, advertising has received little or no First Amendment protection, but the Supreme Court has gradually increased protections for advertising. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, the Supreme Court held that purely commercial speech (speech with no political implications) was entitled to First Amendment protection so long as the speech was truthful and concerned lawful activity.

**Case 2.5 R.J. Reynolds v. FDA**

 Facts: Among those proposed by the FDA were images of a man exhaling cigarette smoke through a tracheotomy hole in his throat and a pair of diseased lungs next to a pair of healthy lungs. R.J. Reynolds and four other tobacco companies (RJR) challenged the rule arguing that it would infringe on their commercial speech rights under the First Amendment. The trial court ruled in favor of RJR and the FDA appealed.

Issue: Did the government violate RJR’s First Amendment rights?

Ruling: U.S. Court of Appeals for the District of Columbia upheld the trial court’s decision in favor of RJR. The court applied the *Central Hudson* test and ruled that the FDA had failed to supply any evidence that the rule which restricted the commercial speech directly advances a substantial government interest. The court ruled that the labels were not purely factual because they did not convey any warning information or offer any information about the impact of smoking. Rather, the images were intended to generate emotional responses. Therefore, the FDA could not meet their burden under the *Central Hudson* test with respect to how the graphic warnings directly advance the government’s interest.

Case Questions:

1. This question is intended to focus attention on different levels of scrutiny and the impact on the final decision.

2. The FDA needed more persuasive evidence that the rule advanced the interest of the government.

3. *Critical Thinking:* This question is intended to stimulate discussion on the difference between when the government imposes a particular set of words or displays on a business versus restricting their speech (banning advertising). Is there any difference?

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* ***Advertising and Obscenity Regulation:***Obscenity regulation of commercial speech is subject to the same scrutiny as any other government regulation of commercial speech, referencing *Bad Frog Brewery, Inc. v. N.Y. State Liquor Authority.*

**Note to Instructor:** The “Bad Frog” label at issue is available through Connect or through an Internet search.

* ***Political Speech by Corporations:***Typically, **political speech** by corporations is fully protected by the First Amendment.
* ***Political Spending and Corporations:***In *Citizens United v. Federal Election Commission,* the Supreme Court ruled that the government may not ban all political spending by corporations in candidate elections. **See Case 2.6: Citizens United v. FEC**

**Case 2.6 Citizens United v. FEC**

**Facts**: an attempt to regulate big money campaign contributions by corporations and labor unions in federal elections, Congress enacted the Bipartisan Campaign Reform Act in 2002 (commonly referred to as the “McCain-Feingold Act”), which imposed a wide variety of restrictions on “electioneering communications,” including an outright ban on issue advocacy advertising or issue ads paid for by corporations and labor unions. Citizens United, a conservative nonprofit corporation, produced a 90-minute documentary called *Hillary: The Movie,* which criticized then Senator Hillary Clinton and questioned her fitness for office.In a court challenge, the District Court ruled in favor of the FEC, and Citizens United appealed to the U.S. Supreme Court, arguing that the campaign reform finance law violated the First Amendment on its face and when applied to *Hillary: The Movie* and to ads promoting the film.

**Issue:** Does the Bipartisan Campaign Reform Act ban on electioneering communications violate the First Amendment rights of Citizens United to distribute *Hillary: The Movie*?

**Reasoning:** Yes. Citizens United production and portrayal of the movie is a form of political spending and is therefore protected speech under the First Amendment. The government may not use criminal sanctions to prevent corporations (including non-profits such as *Citizens United*) or labor unions from spending money to support or denounce a candidate for office.

**Case Questions:**

1. Probably, yes. The law was broadly written and doesn’t just cover commercial advertising or visual media. Thus, a book distributed by the publisher during the blackout period could potentially qualify (although the FEC never took that position).

2. This question is intended to spur discussion on the notion of a corporation as a “legal person.” It is useful for student to try to apply other fundamental rights to corporations and determine how difficult it may be.

3. *Critical Thinking:* This question is intended to drive students to watch the video indicated and make their own judgment on President Obama’s critique.

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**F. THE FOURTH AMENDMENT**

**Note to Instructor:** The Fourth Amendment coverage has been increased in the new edition and a new case was added.

**1. Basic Requirement:** Warrantless search or seizure by government actor is illegal.

Exceptions:

-Exigent circumstances

-Consensual searches

-incident to arrest

-plain view

-*Terry* stops

**2. Expectation of Privacy**

* Not protected if “person knowingly exposes to the public, even in his own home or office, is not a subject of 4A protections”
* Includes body, clothing, personal belongings
* No expectation for public records or personal characteristics (e.g., DNA)

**3. Reasonableness Requirement**

* Totality of circumstances test

**4. Is it a Search or Seizure under the Fourth Amendment?**

* Physical searches: Dog sniffs and electronic surveillance
* Physical seizure of persons: Occurs when a person is detained by the government and not free to leave at will.
* Physical seizures of Property: Occurs when a meaningful interference with the individual’s possessory interest in property.
* Electronic Searches: **See Case 2.6, *U.S. v. Johnson***

**CASE 2.7 U.S. v. Jones**

**Facts:** Police suspected Jones of drug traf­ficking and asked a judge for a search warrant to attach a global positioning system (GPS) tracking device to the underside of Jones’s Jeep. The judge granted the warrant, but the police exceeded the scope of the warrant in both geography and length of time. Using evidence obtained from the GPS device, Jones was eventually charged and convicted of par­ticipating in a criminal conspiracy. Jones appealed his conviction, arguing that 24-hour surveillance through a GPS tracker violates the Fourth Amend­ment’s right against unreasonable search and seizure. The appellate court overturned Jones’s conviction, hold­ing that the police action was an unlawful search because it violated Jones’s reasonable expectation of privacy.

**Issue:** Was the use of a GPS tracker attached to Jones’s vehicle a “search” within the meaning of the Fourth Amendment that requires a warrant?

**Ruling:** Yes. A vehicle is an “effect” as defined in the Fourth Amendment and the government’s use of a GPS device “physically occupied private property for purposes of obtaining information.”The government needs a warrant.

**Case questions:**

1. Some examples of other personal effects: wallets, purses, smartphones, and the like. One has only a limited reasonable expectation of privacy when driving or walking on public roads. Still, the physical occupation of the GPS device was an important factor in this case even if the vehicle is taken into the public.

2. Probably not since it would fall outside of reasonable expectation of privacy.

3. *Critical Thinking:* This question is intended to stimulate discussion on the government’s increase use of technology for crime detection, investigation, and prevention. If one is moving in a public space and the government is using readily-available technology (i.e., drones), does an individual still have a reasonable expectation of privacy?

**Postscript: The USA Patriot Act**

The USA Patriot Act, enacted after the September 11, 2001 terrorist attacks vasly increased the ability of law enforcement agencies to search email and telephonic communications as well as medical, financial and library records.

**G. Due Process Protections**

*Points to emphasize:*

* The Due Process Clause of the Fifth and Fourteenth Amendments protect individuals from being deprived of “life, liberty, or property” without due process of law.
* ***Fourteenth Amendment:***Makes the Bill of Rights applicable to the states.
* The Due Process Clauses serves two purposes: (1) to impose **procedural requirements** on federal and state governments, and (2) to limit the **substantive power of the states** to regulate certain areas affecting individual liberties.
	+ ***Equal Protection:***The Clause that guarantees that the government will treat people who are similarly situated equally.

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**Concept Summary:** Constitutional Protections

**H. Privacy**

*Points to emphasize:*

* The right of privacy, although not explicitly mentioned in the Constitution, is implied by language in the First, Third, Fourth, Fifth, and Ninth Amendments, which created a constitutionally protected zone of privacy (*Griswold v. Connecticut; Roe v. Wade).*.
* ***Federal Statutes:***In addition to privacy rights afforded by the Constitution, Congress has legislates specific privacy rights such as the Health Insurance Portability and Accountability Act and Freedom of Information Act.
	+ The USA Patriot Act provides increased authority for government officials to surreptitiously access and/or monitor individual and corporate financial records, e-mail, telephone conversations, and Internet activity when investigating possible terrorism-related activity.
* ***Workplace Privacy:*** Most privacy rights afforded by the Constitution do not extend to the workplace; nonetheless, privacy rights have become increasingly important to business owners and managers as Congress and state legislatures seek to clarify workplace privacy rights.

**CHAPTER REVIEW QUESTIONS**

*Answers and Explanations*

**END OF CHAPTER PROBLEMS, QUESTIONS AND CASES**

**Theory to Practice**

1. Congress is using the Commerce Clause as their authority for passing the law. Quick will likely challenge the law as an unconstitutional exercise of congressional power because the activity being regulated is purely local and no enumerated power exists. [Ties to “Overview of Federal Powers” and “Commerce Powers” ]

2. In this case, Congress is using its Spending Power to implement policy. This changes the analysis because Congress has greater latitude to set policy via conditions on spending. [Ties to “Tax and Spend Power”]

3. Holmestown’s actions amount to a discriminatory tax because it impermissibly impacts interstate commerce. Therefore, the law is likely to be ruled unconstitutional. [Ties to “Constitutional Restrictions on State Regulation of Commerce”]

4. The Due Process Clause requires the government to provide a hearing and/or procedure whenever the government has taken some action to deprive. [Ties to “Due Process Protections”]

5. The Fourth Amendment is at issue. If the search is related to a criminal investigation, the government must have probable cause. If the search is related to an administrative investigation, the standard for the government to obtain a warrant is lower. [Ties to Fourth Amendment]

**STRATEGY 101**

*Subject:* Use of the NCAAP’s “equalization and incremental strategy” in fighting segregation. They used existing “separate but equal” case law to force universities to provide equal professional (e.g., law) and graduate schools which they knew would be costly and burdensome on the universities funds. That paved the way for an incremental strategy starting in 1936 (Murray v. Maryland) and eventually gave the Supreme Court enough room to decide *Brown v. Board of Education*.

*Critical Thinking Question:* This question uses the civil rights struggle as context for the tension between precedent and social change. Is the slow movement of the erosion of the separate but equal doctrine a good thing or a bad thing?

**Manager’s Challenge**

A sample answer to Manager’s Challenge is provided in Connect.

**Case Summary 2.1: Executive Power: Trump v. Hawaii**

1. In deciding whether the new travel ban is constitutional or not, does it matter that the new travel ban was issued as a presidential proclamation and not as an executive order?

 a. A presidential proclamation that is substantive in nature is valid if it deals with matters of immigration, as it does here.

 2. What if the travel ban had been issued on September 12, 2001, a day after the 9/11 attacks? Should that fact, standing alone, be relevant in deciding whether the travel ban is consitutional?

 a. No, matters of immigration and national security are exclusively vested in the executive branch.

**Case Summary 2.2: Carpenter v, United States**

1. What if Mr. Carpenter were a spy for Russia or a terrorist plotting to bomb a national monument? Should the government be required to obtain a search warrant in cases involving foreign affairs or national security?

 a. No, this would qualify as an exception under the "exigent circumstances" exception

 2. If an individual voluntarily enables the “location tracking” feature of his cellphone, does he really have a reasonable expectation of privacy in his cell­phone data?

 a. No, but only to his or her location information.

**Case Study 2.3: Preemption: Cipollone v. Liggett Group, Inc.,**

1. Given the Supreme Court’s language and the result of this case, is Congress’s preemption power broad or narrow? Explain your answer.
	1. Congress’s preemption power is limited in scope to invalidate only state law that is in direct conflict with federal law. In the absence of express congressional intent, state law is pre-empted if that law actually conflicts with federal law, or if federal law so thoroughly occupies a legislative field ‘as to make reasonable the inference that Congress left no room for the States to supplement it.’ In this sense, Congress’s preemption power isn’t broadly applied over state law in general, rather it arises only when there is a direct conflict between state and federal law.
2. Does the Supreme Court’s ruling bar all residents of New Jersey, or any other state, from bringing suit against a tobacco company for false advertising or promotion? Why or why not?
	1. Yes. The Supreme Court’s ruling indicates that Congress chose specifically to regulate tobacco related advertising and promotion and therefore federal law is supreme to New Jersey and any other state that attempts to regulate that same category of advertising.
3. Why would Congress want to preempt state law regarding the advertising and promotion of tobacco products? Do you agree with their decision to do so? Why or why not?

Congressional preemption of state law regarding the advertising and promotion of tobacco products serves the purpose of maintaining consistency in a public policy matter. One could support the theory that this decision is appropriate because the federal government is in the best position to balance the general welfare of the public with the business interest of the tobacco industry as a whole.

**Case Study 2.4: Commercial Speech: State v. DeAngelo**

1. Is the ordinance constitutionally sound?

A: The ordinance would not be constitutionally sound unless the government can prove that (1) a substantial government interest in regulating the sign exist, (2) the restriction directly advances the claimed government interest, and (3) the restriction must be not more extensive than necessary to achieve the government’s asserted interest.

2. What level of scrutiny will a court apply to the ordinance?

A: In cases of Commercial speech the government applies intermediate-level scrutiny.

**Case Summary 2.5: Commerce Clause: U.S. v. Alderman**

1. I s the law constitutionally sound?

A: Yes, the activity criminalized by the statutes has a sufficient nexus to interstate commerce to fall within the broad congressional power under the Constitution.

2. If Alderman purchased the body armor in the same state as it was manufactured, how does that affect “interstate” commerce?

A: It affects “interstate” commerce in the sense that it has a substantial economic effect on “interstate” commerce.

**Case Summary 2.6: Necessary and Proper Clause: United States v. American Library Association**

1. Is the plan constitutional?

A: Yes, Congress can cite the Necessary and Proper clause as authorization to set conditions on the use of federal money in order to achieve some public policy objective.

2. Is the First Amendment at issue? Explain your answer.

A: Yes. In order to comply with CIPA, the public libraries would have to block a substantial amount of constitutionally protected speech, in violation of the First Amendment.

**Case Summary 2.7: Due process and Punitive Damages: State Farm Mutual v. Campbell**

1. When State Farm appealed the jury's punitive damages award, it argued that such a disproportionately large punitive-damage award ($145 million) was a violation of the Due Process Clause. Do you agree or disagree?

2. The Due Process Clause, like all protections in the Bill of Rights, is meant to apply to government agents, not to private parties. Should a civil jury be considered a government actor or a private actor under the Due Process Clause?

3. How can one determine what constitutes an excessive award of damages that violates a defendant's right to due process, compared to one that does not violate the Due Process Clause? Is this distinction clear?

**Case Summary 2.8 Pagan v. Fruchey and Village of Glendale**

1. Could the ordinance itself be modified to meet the third part of the *Central Hudson test?*

A. It could be argued that a more specific ordinance could better facilitate satisfying the third requirement of the *Central Hudson Test.* Perhaps modifying the ordinance to prohibit parking a vehicle on a public roadway for the purposes of displaying it for sale, when the “For Sale” sign is visible to vehicles traveling in the roadway, would be easier to demonstrate that the restriction directly advances their claimed government interest. However, even in light of such modification, Glendale still would have to offer data to support their contention to meet their burden in showing that the ordinance actually advances its claimed interest in traffic safety.

1. What type of data do you suppose the court wanted from Glendale to support their claim that the ordinance advanced their traffic safety interest? Why didn’t the court give more weight to the police chief’s opinion?

 A. The court wanted actual data and evidence to support their contention that the ordinance advanced their traffic safety interest. This would include statistics such as a showing that accidents increased by “X” amount when a vehicle is posted for sale on a public road. The police chief’s opinion is mere speculation about something that might occur rather than concrete evidence that it has occurred. An opinion of the like does not demonstrate that the restriction directly advances the claimed interest as is needed to satisfy the requirement

**Case Summary 2.9 Commercial Speech: Patel v. Zillow, Inc.**

1. Can data generated by a computer algorithm be a form of commercial speech? Why or why not?

2. Should the government regulate business firms like Zillow? Why or why not?