

Hi students, this is Professor Faith, and I am recording this lecture for my business law students. I wanted to try something different this semester and record lectures that will hopefully be a little bit shorter but become available more at the end of each either unit or a particular area of law that we're working on, more as the summary or the coda of hopefully some things that you've gotten out of the textbook and the other assignments as you've been exploring materials in the class. So, in this lecture, my plan is to talk about sources of law and discuss a little bit about some constitutional issues raised in the first week of the course materials.

There's actually a lot to the U.S. Constitution; there's a lot to law generally in terms of the various places that you might look for it, but it would probably take me more than my lifetime to talk to you about all those things in detail. So, I have just a few things I wanted to focus on for you from the first week, particularly about things that affect business law in the U.S. Constitution. For example, I'll talk about the Commerce Clause, I'll talk about Article III jurisdiction—which we'll again look at next week with a lecture on the court system—and then I'll talk about the Bill of Rights, some of which is covered in more detail this week, and other parts of it we'll talk again about in other sections of the course, for example, the criminal law section. There's a fair amount of constitutional issues there; it comes up again in other parts of the laws when we're talking about employment discrimination and so on, so you'll hear more about that as we get further into it.

If you haven't looked at the U.S. Constitution before, it is maybe a long document, but for the people at the time who had to write it by hand, it was a relatively short document when you consider that the typical court opinion from the U.S. Supreme Court on one specific legal issue could go on for much longer than the whole U.S. Constitution's word count in total. So, it's an interesting document. Again, it is the organization of how the federal government is supposed to work, and it outlines who's supposed to be president, what the qualifications are, who serves in Congress, things like that.

But there are specifics in this Constitution that come up over and over again, even though this document is from a long time ago. There are things that are regularly litigated; you can read cases this year that have been decided about parts of the Constitution. One of them has to do with the Commerce Clause, and what do I mean by that? Well, I'm talking about Article I, Section 8 of the U.S. Constitution. Article I is addressed to the legislature, to the House of Representatives and the U.S. Senate, and there's a lot in that section of the Constitution about how those bodies are supposed to work together, how you're qualified to be a legislator in one or the other part of Congress. But one of the important things is Section 8, which talks about what Congress can do.

Historically, the states came first; they were colonies, they fought a war with Britain, they won their independence from Britain, and there were 13 of them that were loosely connected with each other for a while. They tried the Articles of Confederation, which had a very weak central government, and it didn't really work right. So, there was a Constitutional Convention, and a new plan for government was organized. The people experimenting with a Confederation then realized that 13 independent states that had a little bit of a central government just weren't functional. We weren't going to be a nation, and there was a good

chance we wouldn't survive when you consider the world powers of the day. Obviously, we ticked off Britain because we had a war with them, but that doesn't necessarily mean that other European powers weren't interested in influencing or controlling or perhaps just conquering the nascent United States. So, I think there was a pretty good reason for us to try and cohere together and form a new government, a new federal government, and that's where our Constitution comes from, of course.

One of the things that's going on here is it's still a limited government. We didn't abolish the state governments in 1789; we decided that we'd have a federalist system. And what I mean by that is there's sort of shared governance of the country, where you have a federal government that's supposed to do certain things, and then you have the state governments that really still are going to do the things they used to do. But there was some compromise as to the things they weren't going to do anymore, right? Or maybe they were shared responsibilities, but there might be the supremacy of the Federal Constitution in particular areas. So, when you look at Article I, Section 8, there's a laundry list of stuff that Congress could do, like managing the postal service, dealing with defense, and taxing the citizens. Clause 3, though, is addressed to the regulation of commerce. What it says is Congress shall have the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes.

Now, the first one doesn't seem to be all that controversial. When we're dealing with importing goods or exporting goods to another nation, having one government in charge of that rather than many is probably just efficient, right? We'll have one relationship with France; we'll import their wine at a certain rate, and we'll agree to export goods from the nation to some other place on whatever the terms are. And so today, you know, that's still a power of Congress. You still have a president that negotiates treaties with world powers on things like commerce, and just organizationally, that's got to be better than trying to get 13 different states or, you know, today, 50 states independently to all agree to any treaty. That just would be impractical.

So, there is a sense that giving this power to Congress as a centralized body that represents the nation makes sense. Now, when we talk about the Indian tribes—because today, you would say the Native Americans—again, there's a long, complicated history with Native Americans in the United States, but the nation treated them as essentially a foreign government or a set of foreign governments. When you go to tribal lands today, you really are somewhere else; it's not a state, even though it's within Oklahoma or it's within a reservation in another state like South Dakota, for example. But that really has its own jurisdiction, as if the Native American peoples are really a separate country. And again, it makes sense that the federal government will be in charge of this rather than all the individual states having to figure this stuff out.

So, there's an efficiency issue there. But the thing in the middle is the one that I'm focused on, which is within the United States, there's commercial activity, and the Commerce Clause says that Congress has the power to regulate that too. Why do we need that? Well, when you look through the literature and the reading, the states didn't like each other very much; they competed with each other. They would be protectionist of their own goods that

were grown or created in that particular state, and they would tax out-of-state goods so that they wouldn't be competitive, so people would buy local because it was cheaper. This didn't make us a national economy; it made us 13 different little state economies, and that just doesn't work. It still really wouldn't work if we did that today, even though we're a much larger economy. Even California by itself is a very large economy, but we're better off as a cohesive whole so that we should not be competing with each other, but instead should present a national market. So, there is a sense that Congress has to do this because the states can't.

The people that represent the legislatures and the executive of states are elected only by the people of that state; they're only really accountable to those people. So, if a Delaware citizen was mad at Maryland for taxing their Delaware tobacco at a higher rate than Maryland's, well, what are you going to do? You can't change the Maryland legislature; you don't have a vote, and they don't have to listen to you. But it changes when the federal government does it because we all have a say in that. We all elect representatives from the various states to each of the branches of Congress and also the presidency. So, the thought here was this would be a neutral place where the nation would compromise and not let states continue to compete and regulate against each other within our country. And again, that probably historically makes sense that the Commerce Clause would do that.

When we talk about the Supremacy Clause, there is another kind of constitutional issue that's created when you have a federal government and state governments. There's the possibility for conflict between them when they both can issue rules. They really are still independent of each other, so the constitutional system was set up such that the Supremacy Clause requires federal law and the Federal Constitution to trump contradictory state law. You can't have a contradictory state constitutional provision or whatever. And if you're a state court interpreting the Constitution, you have to be bound to the interpretation of that Constitution so that there is a consistent interpretation of it and application of it. Otherwise, you have an end run around the Constitution, potentially, such that, let's say the federal government interprets the Constitution to mean one thing—like the Commerce Clause, for example—but I don't like that because I'm in Maryland, so I just go to a Maryland state court and get them to say the Constitution means something different, right? Then we end up with 50 different interpretations of the Federal Constitution, and we're back to square one; we don't have a centralized government that means anything because you can just go to your local government and get around it, right? We didn't want that to be the case. So, where the Federal Constitution applies and federal law is properly implemented, that has to take precedence over contradictory state rules, constitutions, statutes, or court opinions.

Again, there's a lot of conflict between the federal and state governments. That's a modern problem. It happens today where there's state regulation that's challenged under the Federal Constitution or federal law, and it requires this system where the federal government has to win and for its law to be enforced rather than the state law. But the other side of this is, and what's sort of stated in the Tenth Amendment, is that whatever we didn't say was in the Federal Constitution or within the ambit of Congress or the President has to be reserved to the states or the people, respectively. It's not a general government created

by the Federal Constitution; it's only in specific areas that this Supremacy Clause is applicable.

Now, we'll get into the court system next week. One of the things in the Constitution is Article III, which creates the federal judiciary. It actually just creates the U.S. Supreme Court and leaves it up to Congress to fund and establish lower inferior courts, which they did. If you look at Title 28 of the U.S. Code today, there are lots of inferior courts that have been created for specialty reasons. But even back in the original Judiciary Act, districts and circuit courts were created throughout the country at the time, so there were lower courts that Congress funded. But the Constitution is talking about the overall Article III courts, the overall federal court system. Like other parts of the Constitution, the judiciary is also limited as to what kinds of cases it can decide and can hear and decide. Article III, Section 2 gives you the laundry list, which includes lots of stuff that arises under the U.S. Constitution or federal law, treaties that are made by the United States government, things that affect ambassadors, public ministers, or consuls—again, people that work at the federal government—admiralty and maritime jurisdiction when you have ships that sink or that run into each other out in the waterways of the United States; maritime jurisdiction is federal.

Cases that involve the United States as a party, or the United States suing or being sued, when two states sue each other, they could go to federal court, when a state is sued by a citizen of a different state, when citizens of different states sue each other, and then there's this issue about foreign citizens and land grants across different states, and so forth. It's a long list, Professor Faith, but actually in practice, this is a relatively short jurisdictional limit. There really aren't that many cases, probably less than one percent of all the cases filed in the U.S. in any given year, that go to the federal court system. That's by design. What we're really saying is most cases are still decided by state court judiciaries. They weren't replaced, and they are really the workhorses of the U.S. court system, which is really at the state level, not at the federal level. It goes back to this idea that the Constitution is creating a limited federal government that's only supposed to do certain things. The judiciary is only supposed to do certain things, as is Congress and the President; they have specific kinds of authority that they're supposed to enforce or enact under the constitutional plan.

Okay, so now the Constitution was enacted; it had the plan of government; it has the various articles about amendment and the Supremacy Clause and so on. After that, Congress decided to enact the Bill of Rights, sort of an afterthought, I guess. You know, we had this constitutional plan, and some people thought, "Well, we don't really need to say what rights we have; we have rights; everybody knows that, right? We don't need to get into it." But I think the wisdom was that we really should maybe list it out. We should have a written document that talks about this, and so early on in the history of the country, the first ten amendments were adopted and then ratified by the states to amend the U.S. Constitution. The first, fourth, fifth, sixth, eighth, and tenth—I skipped the second and third amendments because the business law class is not a guns class, and quartering of troops is sort of a non-issue today. It doesn't even apply to states; there's no Third Amendment right. I don't think the federal government has ever come to someone's house and knocked on the door and said, "Hey, we're taking over your house and moving in," right? The Third

Amendment really is prohibiting that because that's what Britain used to do in the colonies. That doesn't come up very often in a business law class. But nonetheless, some of these other amendments are applicable to business law issues. This week, we're really focused on the First Amendment and some reading about that. When we get into criminal law a few weeks from now, Fourth, Fifth, Sixth, and Eighth Amendment issues are applicable—they're constitutional criminal procedure—and I have a unit to talk about that with you. But these are all early on in the Constitution; they were added to it in the 1790s by the legislature and by the states ratifying it.

The First Amendment in particular—this is the language of it—which says that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of the people to peaceably assemble and to petition their government for a redress of their grievances. So, it's a list, if you will, a conglomeration of rights, some having to do with religion, some with probably political speech originally, and the right of the press to be free from regulation by the federal government, and then this idea that the government is of the people, and so therefore the people have a right to assemble. They also have a right to protest, if you will, and to redress the government for grievances that are unresolved with the government.

Okay, yes, I had to chat—not ChatGPT, I had DALL-E, which is another OpenAI product—I had it make this goofy little drawing to move us on to the next thing about some of the details here. Okay, so Commerce Clause today—21st-century issues. One part of this is that the Commerce Clause gives Congress the power to regulate things that cross state lines. For example, if you're growing apples in Maryland and you want to sell your apples in Pennsylvania, that transaction, the transport of them across state lines, Congress can set rules about that. If you use the highways to travel across state lines, Congress has the authority under the Commerce Clause to regulate the instrumentalities of interstate commerce, and that's broad because if you think about every power line, every internet connection, every phone line, everything today in our interconnected economy, there are lots of instrumentalities that Congress has the power to regulate. And it is under the Commerce Clause power that they can do that.

Now, things that substantially impact interstate commerce, however, was added later. The Wickard case, which is talked about in the textbook, is, I think, really the big case about this issue. Wickard was a farmer who was growing wheat, and he wanted to grow some extra wheat beyond the federal allotment for his own use on his farm, and I think it was another 100 acres out of 1,000 he was going to grow, so it wasn't a small amount of wheat; it was a substantial amount. And when you do that, if you grow more than your allotment, the federal government will tax you for the excess. So, he challenged the tax. It's real; it's a tax case, actually, the Wickard case. His claim was, "Look, that extra wheat you're taxing me for—you can't. It's not interstate commerce; I'm not going to sell it to anybody; I'm going to use it here at my own farm." And it's interesting only—it's a state matter; they're the ones that have to regulate this; you can't do that.

And the U.S. government defended the tax, and ultimately the Supreme Court sided with the government when it said that, well, when you grow extra wheat and you don't

participate in purchasing wheat that you need from somebody else, you have an impact on the supply and potentially the demand, which, as you know, in modern economics, that means that you have an impact on the price. And of course, the whole purpose of Congress regulating this area is to control the price of wheat. It's the 1940s, the middle of World War II; we don't need wheat prices to dramatically change while we're trying to fight the Germans, and the same with milk and with other staples. The government was regulating that during wartime to keep the economy stable so that we could effectively fight a world war—a major conflict with other world powers in Europe and in Asia. So, what the Supreme Court said at that time was that when an activity substantially impacts interstate commerce, and what they said really by extension is, “What if every farmer did what you did?” Suddenly, there'd be 10 percent more wheat that was grown across the country; that's a 10 percent potential change in the price of a commodity. You know, you're talking about a large economy, large impacts. Congress can regulate that too.

Now, that's an interpretation by the Supreme Court of what the Constitution says, and the idea that for this power to work correctly, Congress has to have plenary power; they have to have exclusive power to regulate in this area. And it's more than just that it has to cross state lines; it has to also potentially substantially impact things across state lines. Growing extra wheat can have an impact on the national economy, so there's a change really in the '40s of the interpretation of this to expand the power of Congress. Okay, so far so good; that's sort of the law today. There are conflicts about this. You could read about the Gonzalez case and regulating Schedule I narcotics and some of the other things that have been challenged, like federal laws that criminalize the possession of guns at schools. That's too far; you can't regulate that; there's no connection to interstate commerce with that, with mere possession of a gun. And it wasn't workable to say, “Well, if you bought the gun in interstate commerce, we can criminalize it.” That didn't make sense. How would you ever know? You want to keep guns away from schools; the Supreme Court ultimately said that doesn't work, right? You can't make that a federal law; states have to regulate that.

But what's confusing is there's the other part of the Commerce Clause; it's not even in there. It's what's called the “sleeping” or the “dormant” Commerce Clause, which acts as a limit on states and how states may regulate commerce, at least interstate commerce. Now, states, if it's all activity within their state, starts and finishes within the state, there are no real federal limits on that under the Commerce Clause. But as I said earlier, there are a lot of things that impact interstate commerce, right? You know, “substantially impact,” whatever that means. You know, that's very unlikely that a state is only going to regulate activity that happens within the state through a regulation. So, the Supreme Court over time has said there are limits on states, on what states may regulate as to interstate commerce, because if it were otherwise, then all the states could regulate, and they could supplant federal law, and we would be back to where we were. So, we don't want them to do that; we want to prevent them from doing that.

So, there are certain rules that have been created by the Court in interpreting what the framers meant under the Commerce Clause power of Congress in the first place. One of them is that it's almost per se unconstitutional—almost—if a regulation benefits people in the state but burdens everybody else that's outside of that state. That goes back to the

earlier conversation about why we have the Commerce Clause power. Why don't we do this as a matter for the federal United States Congress to regulate as opposed to the states? Because the states can't do it. They just can't have consistent regulations. They have their own interest locally that they have to represent, and it just doesn't work. You can't have a system regulating that kind of activity. It's the argument that the railroads made in the 19th century when each state would say, "You've got to have all these practices and procedures to keep our citizens safe in the state when you're traveling through," and then the next state has different regulations. How can we ever have a national railroad that goes across even just 10 or 15 states, but the safety standards are all different? That doesn't make sense; you can't do that, right? That violates Commerce Clause power for states to regulate in that area.

So, one of the things that the Court has said is that you can't benefit in-state people while burdening out-of-state people when you're dealing with the regulation of commerce as a state. Even if Congress hasn't regulated it, you can't either. And when you see that fact pattern of an in-state business getting an advantage—a tax advantage, a licensing advantage—and an out-of-state business being hindered by that regulation, what courts will do is look at that activity and say to the state, "What really extremely good reason do you have for doing this? Like, overwhelmingly, you had to do it this way; there were no alternatives that were less restrictive." It's that sort of scrutiny—strict scrutiny of that regulation—which is why I say almost all the time, the state loses when they do this, and it gets challenged in court, okay, under this provision of you can't treat in-state and out-of-state people differently.

The other idea is you can't unduly burden interstate commerce. Now, to give you an example, the Quill case was about collecting sales tax. As you know, every state—most every state—has sales tax. And in some states, it's really crazy because they have county taxes and state taxes, and you have to figure out to collect both, and there are different rates—thousands of counties across 50 states, many of which collect sales tax. It's very difficult, potentially, to figure that out. And you know, if you're selling on the internet, you can sell anywhere, right? It's the internet. Brick-and-mortar stores are brick-and-mortar stores; they're physically somewhere. They're generally fulfilling orders within a particular area; their sales tax collection is relatively simple. But if I'm Amazon and I'm selling to 50 states, or I'm Wayfair and I'm selling to people in 50 different states, then it's really cumbersome; it is difficult to figure this out.

So, the Quill case, a long time ago, the Supreme Court said making internet businesses collect sales tax across the country where they might happen to incidentally sell a good or two is unfair. Instead, they should only have to collect the tax where they're physically located. And so, for a long time, the internet was 5 or 6 or 7 or 9 percent cheaper than the same product in the store locally, right? The internet was cheaper because they didn't have to deal with sales tax anywhere but where they were physically located. And you know, it benefited the internet at the expense of brick-and-mortar stores, and to some extent, it also made tax offices within states upset because they were losing out on many hundreds of millions of dollars of tax revenue.

This was challenged again in a more recent case when South Dakota enacted a law that said all internet retailers that sell a certain volume or a certain number of transactions have to remit the sales tax for South Dakota citizens that buy from you. And it was a couple of hundred transactions a year, or I think like \$100,000 of sales or something like that, but the South Dakota tax regulation. Wayfair is, of course, an internet retailer, and they liked it the way it was. And they went to the Supreme Court with this and said, “Look, this is unduly burdensome on us; we have to collect sales tax, and everybody’s going to do this, and then we’re going to be stuck having to do all this accounting.” And you know what? The Supreme Court changed their mind and said, “You know what? Today, when this case was decided in the last few years, you have what’s called software, right? You can build a database, or you can hire a company to create a database and keep it up to date on what sales tax rates there are by zip code or whatever it is from your customers. And by the way, beyond that, you can do math, right? You can have a technology solution to this. You’re a big company; you can figure this out. This doesn’t affect the occasional sales of South Dakota retailers; it’s only bigger retailers that do a substantial amount of business. That’s not unduly burdensome on you. Deal with it.” And they changed the rule because in the 20 years since the last case, everything’s changed, right? I mean, the complexity is no different with sales tax and sales tax collection, but the technology has evolved such that the internet has grown up, and it can deal with stuff like this. So, what this means is that subject to court interpretation, and sometimes they change their minds as to what it means, all of it being kind of written into the Constitution—it’s not literally there, it’s a matter of interpretation of it.

Okay, a couple of just key points about the First Amendment. I’m talking about the right of speech. When you look at the text of the First Amendment, it’s really addressed to Congress; it’s not addressed to anybody else. It’s a limit on what Congress may do. Now, by interpretation, the Supreme Court has said that this applies to all branches of government at the federal level. And then after the 14th Amendment was enacted, the Supreme Court incorporated the rights of the First Amendment against state action through the 14th Amendment. So, a state, and by extension, counties and municipalities and cities, also may not prohibit speech. And there’s a bunch of rules about what I mean by that, but it’s addressed to a government. A state actor may not regulate speech under the First Amendment.

So, the consequence of that is very important because if you’re a private party, the First Amendment doesn’t apply to you. You can suppress other people’s speech all you like. And you know, this has come up on a pretty regular basis in the last several years because you have all these social media platforms that are all owned by—you know, they might be publicly traded companies, or they might be Elon Musk’s private company, but they’re all not government, right? The First Amendment doesn’t apply to those people because they’re not a state actor. It’s really only the government or someone that is providing essentially a government function that can be limited by the First Amendment.

So, what do I mean? You have a right to speech, but it’s not an absolute right, okay? There are certain things you still can’t say even in the United States, but the list of those things is relatively narrow. The other thing is that it is possible to have content-neutral regulation. For

example, commonly, time, place, and manner restrictions on speech. One of the things that you see a lot is if you want to do a march in a public street, which is a traditional public open forum, you have to get a permit. Now, the Supreme Court has said there's purpose, and then there's permits. You know, if the permit is like a hundred million dollars if you want to march, or your speech is a hundred million dollars, but everybody that disagrees with you only has to pay 50 bucks, right? That sort of thing's not content-neutral, okay? And it can't be so burdensome that no one can speak. But there is a reason why you need to get the permit, because if you're going to go marching down the street, the police have to show up to, you know, keep traffic from running you over and to prevent people from getting injured. You know, there's a public order, and so knowing in advance when you're going to do the marching is really for the efficiency of government and to protect the people from unnecessary injury, right? So, there's a reason why there's a permit. It just shouldn't be a very expensive permit or a complicated process in order to obtain one. It shouldn't be a big burden on speech.

Also, commercial speech, when you're talking about advertising, for example, the Supreme Court has said, "Yes, that's a First Amendment activity, but it's a lesser activity than the speech that we're talking about that is political in nature." So, when a business wants to advertise its products or services, it could be subject to further restrictions than if it were just simply political speech. And you see that in federal regulation of false or deceptive advertising practices. You can't lie to people about your product or make claims about it that aren't true or that are misleading about it. That regulation is permissible on commercial speech; it may not be on political speech. Again, you hear all kinds of crazy stuff on the political spectrum; it may or may not be true. There's no false or misleading requirement for that kind of speech. But commercial speech, while protected, is subject to more regulation according to the Supreme Court because it's further from the core activity that was intended by the framers in protecting the First Amendment in the first place.

And then, nobody can defame somebody else. That's not protected speech. Getting people to fight each other, inciting a riot—"Let's go burn down the college!"—you can't say those things; that could be criminalized. True threats, when I call you up and say, "I am definitely going to kill you right now," right? And I have a gun, and it's pointed at your head, and I'm going to shoot you. Those sorts of true threats are not permitted speech; they're not protected speech. They can be criminalized. Or obscenity—there's been a long history of what does that mean exactly. You know, a lot of litigation about whether it's pornography or obscenity. Today, the outer limits of what is obscenity is probably child pornography. That could be criminalized, and there may be certain other sorts of displays that are considered obscene. But all these things are relatively narrow in terms of the kind of speech that's not protected. So again, broad protection—not an absolute—but broad protection for individual speech under the First Amendment.

And then, the last lot here. The other complexity is where are you speaking? The forum determines the level of scrutiny that will be applied, and I guess it changes the chances of your speech being unregulatable. And so, the Court over time has interpreted different places as being either public or open forums where minimal regulation is permitted, to places that are non-public or private forums where a lot more regulation is still permissible.

But what the Court has also said is we will not tolerate viewpoint discrimination. So, if the forum is open to one group that has one position, then you can't shut it to a group that says something else. Viewpoint discrimination is almost always unconstitutional. Why is it? Well, it goes back to why we have the First Amendment. We really ought to be able to hear from all sides on an issue, and we're protecting—usually, it's the minority that's in dissent—that's the one that needs the protection. They still have a right to be heard. You don't like it? You can always change the channel; you don't have to go to the march. But we can't have a regulation that says, "Well, we're just not going to hear from you anymore, right? We don't want to hear from Republicans or Protestants, or we want to cut out people that have a viewpoint from the Middle East." You just can't have that, you know, regardless of the type of forum.

But public forums, traditional forums like streets and sidewalks and public parks, much less regulation is permitted in general of speech. Whereas if you want to go to a military base and protest the war, they could probably kick you out, right? You've got to have a good reason to be on a military base, even though it's a government installation. You know, there are lots of parts of it you can't visit for national security reasons, and that might suppress your speech, but too bad, because that's really a private forum. All right, so hopefully some of these concepts are helpful. And again, if you've read through the textbook and done some of the homework for this week, probably this conversation makes more sense to help clarify some of the issues.