

Topic 2: The United States Constitution

Overview

The U.S. Constitution (Constitution) is the supreme law of the United States (US). It provides the framework for our federal government and is a model for state governments. This chapter will review the major provisions of the constitution that establish the framework for the legal system.

1. What is included in the U.S. Constitution?

Many people who are able to visit the National Archives Building in Washington, DC are surprised as to how short the Constitution is. The constitution is divided into seven Articles. Article I, II, III establish the governance structure of United States. Article I establishes the executive branch, which is lead by the President. Article II establishes two legislative bodies, the House of Representative and the Senate, to make the laws to govern the nation. Article III establishes the Judicial branch of government. Since its passage, there have been 27 amendments to the document.

- *Note:* The first ten amendments to the US Constitution make up the Bill of Rights, which was passed in 1791. The 14th Amendment, arguably the most important amendment expanding the authority of the Federal government, was passed in 1868. The 14th Amendment greatly extended the protections afforded individuals under the Constitution by applying those provisions to state (as well as federal) governments. Notably, the 14th Amendment introduced the Due Process and Equal Protection Clauses.
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/structure-constitution/>

2. What is the Separation of Powers?

The Constitution divides the U.S. Government into the following three separate-but-equal branches.

- Executive Branch (Article I) – President
 - Legislative Branch (Article II) – House and Senate (Congress)
 - Judicial Branch (Article III) - US Supreme Court
- *Resource Video:* <http://thebusinessprofessor.com/separation-powers/>

Checks and Balances - The system is designed as a checks-and-balance system where each branch independently checks the authority of the other branches. This allows for a system where

no branch becomes too powerful and is able to erode the rights of citizens. Below is brief description of the authority of each branch used to check the authority of the other branches.

- *Resource Video:* <http://thebusinessprofessor.com/checks-balances-us-system/>
- *Legislative Branch* - This branch of government may pass laws that guide the executive branch in the execution of the law. Congress must approve the executive branch's budget and certain high-level administrative positions appointed by the President. The U.S. House of Representatives retains the authority to impeach (bring charges against) the President for misconduct committed while in office. Further, the U.S. Senate has the authority to determine the merits of the impeachment and render judgment. Congress checks the power of the judiciary as laws passed by Congress supersede or replace the existing common law developed by the judiciary. Lastly, Congress must approve the President's nomination of an individual for appointment to federal judicial positions, including the U.S. Supreme Court.
 - *Resource Video:* <http://thebusinessprofessor.com/legislative-branch-law/>
- *Executive Branch* - The Executive branch is controlled by the President of the United States. This branch checks Congress's authority through the power to veto (strike down) legislation. When Congress presents the President with an approved bill to sign into law, the President can either sign it, not sign it, or veto it. Signing it or failing to sign it will result in the bill becoming law. Vetoing the law strikes it down. The President can veto Congress can only override a veto with a 2/3 majority vote of both the House and Senate. Further, the executive may selectively enforce laws that are within the Executive branch's regulatory authority. Selective enforcement has the effect of reducing the impact of a law on the people. Lastly, the Executive checks the Judicial branch by nominating members to the Federal judiciary and through the power to pardon those convicted under certain criminal statutes.
 - *Resource Video:* <http://thebusinessprofessor.com/executive-branch-law/>
- *Judicial Branch* - The judicial branch checks Congress by reviewing laws passed by the legislature for constitutionality. Any law is subject to challenge on the grounds that it violates rights ensured under the US Constitution. Appellate courts are primarily charged with reviewing the Constitutionality of a law as applied in a given case. The Judicial branch also checks all executive orders or actions for constitutionality. In either case, it has the ability to overturn unconstitutional laws and executive orders or actions. Further, the court can limit the scope of a law by narrowly or broadly interpreting it in a manner that does not infringe on constitutional rights.
 - *Resource Video:* <http://thebusinessprofessor.com/judicial-branch-law/>

- *Discussion:* How many Bills last year were presented by Congress to the President to sign into law? How many times did the President exercise his veto authority? Can you provide an example of a Federal law that was overturned by the US Supreme Court? An Executive action overturned by the US Supreme Court? Can you give an example of a law that was narrowly or broadly interpreted to either limit or expand the breadth of the law?
- *Practice Question:*

3. What is Federalism?

Federalism regards a separation between a central government and independent governmental sub-unit. In the U.S. System, federalism is a separation between the federal and state government. The Constitution under the 10th Amendment specifically reserves power of self-governance to the states. For the federal government to pass a law it must be based on a specific power or authority granted under the Constitution. States pass laws pursuant to their police power. Police power is a state's authority to legislate for the general welfare of its citizens.

- *Discussion:* Can you identify some conduct by citizens that is almost entirely regulated under State law? Federal law?
- *Resource Video:* <http://thebusinessprofessor.com/federalism-separation-powers/>
- *Resource Video:* <http://thebusinessprofessor.com/federalism-us-system/>
- *Practice Question:*

4. What is the Supremacy Clause?

Article VI, Section 2 of the US Constitution expressly states that the Constitution is supreme over all laws and that federal law is supreme over a state law. Any state law that prevents or interferes with the accomplishment and execution of the full purposes and objectives of Congress is invalid. Congress can expressly reserve an entire area of law for federal regulation. In such a case, the federal law preempts any state law. If Congress does not expressly reserve the area of law for federal regulation, the state may also regulate that area of law. This is known as concurrent authority. Note, however, that the state law cannot interfere with (conflict with) the federal law. Generally the state law can be more restrictive than the federal law. State or appellate courts reviewing a state law may overturn that law if it determines that the law conflicts with or violates a federal law.

- *Discussion:* Can you think of any recent state laws that were struck down because they

conflicted with Federal Law? Can you think of any areas of law that are regulated by both state and federal law?

- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/supremacy-clause-us-constitution/>

5. What is the Full Faith & Credit Clause?

Article IV, Section 1, states that “Full faith and credit shall be given in each state to the public Acts, Records, and judicial proceedings of every other state.”

This means that each state must recognize the laws of every other state. The only exception to this rule concerns laws that violate the public policy of another state. In such a case, the state may refuse to recognize the legality of the foreign law or legal agreement.

- *Discussion:* Can you think of laws recognized in one state but not another based on public policy? Currently, there is a debate across states regarding each state’s recognition of same-sex marriage. What are the implications of one state recognizing same-sex marriage and others not.
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/full-faith-credit-clause/>

6. What is the Privileges and Immunities Clause?

Article IV, Section 2 states that, “Citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.”

States generally cannot discriminate against members of other states in favor of its residents without a “substantial” justification. Substantial is a floating standard that may be subject to challenge by a court. Try to think about the methods that a state could treat members of another state differently, such as through voting rights, ownership of property, taxation, etc.

- *Discussion:* Can you think of a way in which one state has discriminated against citizens of another state that was held invalid by the court? What about a situation where one state discriminates against the citizens of another state and it is held to be valid? (Hint: If you are in a public university, think about your tuition payments.)
- *Practice Question:*

- *Resource Videos:* <http://thebusinessprofessor.com/privileges-immunities-clause/>

7. What is the Commerce Clause?

Article I, Section 8, specifically grants to the federal government the right to “regulate commerce ... among the several states...”

In summary, the Commerce Clause allows the federal government to regulate any activity that affects interstate commerce. The commerce clause is the most commonly employed justification for the passage of federal law affecting citizens and businesses within the U.S. In reality, almost any sort of business activity affects interstate commerce and thus falls under the regulatory authority of the federal government. The federal government would not, however, have the authority to regulate an activity that is carried out solely within a state’s borders that has no discernible effect on interstate commerce. As previously discussed, unless an area of law is expressly reserved for federal regulation, states have the authority to pass laws based upon their police power. The state law cannot conflict with, intend to regulate, or substantially conflict with interstate commerce. The “substantially conflict with” provision is known as the Dormant Commerce Clause.

- *Discussion:* Can you think of any activities that are regulated under state law that would be outside of the regulatory authority of the Federal Government? Can you think of any historical cases where the federal government has passed a federal law that overturns state law. (Hint: Think about civil rights legislation and state laws discriminating against certain individuals.)
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/commerce-clause/>

8. What is the Taxing and Spending Power?

Article 1, Section 8, expressly grants to the federal government the “Power to lay and collect Taxes, Duties, Imports, and Excises.”

- *Resource Video:* <http://thebusinessprofessor.com/taxing-spending-power-us-constitution/>

The taxing power allows for funding for federal government operations. The ability to tax is limited by the requirement that all taxes be uniformly applicable to all individuals.

- *Discussion:* Can you think of a recent, landmark Supreme Court decision affecting health care that turned on the Taxing and Spending Power?

Article 1, Section 8 further allows the federal government to “Pay the debts and provide for the common Defense and general Welfare of the US.”

This authority allows the federal government to incur and manage foreign debt. It also allows for the formation and funding of the military defense budget.

- **Practice Question:**
- *Discussion:* Through what process does the United States incur foreign debt? What portion of the total revenue collected from taxes within the United States is allocated to defense spending? How does this compare to other countries in the world?

9. What is the Contract Clause?

Article I, Section 10 states that, “No state shall pass any Law impairing the obligation of contracts.”

The Contract Clause prohibits state governments from specifically legislating to interfere with (or usurp) private contract. It is, however, limited by the ability of state governments to legislate to interfere with those rights under their police power. The state may pass legislation impairing contract if the law is passed to deal with a specific emergency situation. Further, a state government may generally legislate to regulate an industry or commercial activity. Such legislation may have the effect of interfering with existing contracts. Because the legislation is not directly targeted at interfering with an individual’s (or business’s) contract rights, it does not violate the contracts clause. This Contract Clause demonstrated the drafter’s regard for the importance of individual contract rights. Note: The Contract Clause does not limit the power of the federal government to interfere with private contract.

- *Discussion:* Historically, can you think of why the founders felt it necessary to include the Contract Clause into the Constitution?
- **Practice Question:**
- *Resource Video:* <http://thebusinessprofessor.com/contract-clause-us-constitution/>

10. What is the First Amendment?

The first amendment to the Constitution states 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 peaceably to assemble, and to petition the government for a redress of grievances.”

This amendment provides for three fundamental freedoms:

- Freedom of Religion
 - Freedom of Speech
 - Freedom of Press
 - Freedom of Assembly
- Discussion: Why do you believe the Framers decided to group these rights together? What political significance did the Framers hope to achieve through the 1st Amendment?
 - Resource Video: <http://thebusinessprofessor.com/1st-amendment-us-constitution/>

11. What are the Establishment and Free Exercise Clauses?

The freedom of religion portion of the 1st Amendment is made up of the Establishment Clause and the Free Exercise Clause.

- Resource Video: <http://thebusinessprofessor.com/freedom-religion/>

Establishment Clause

1st Amendment states that, “Congress shall make no law respecting an establishment of religion” or “prohibiting the free exercise thereof.” The first provision of this clause is known as the “Establishment Clause”. It stands for the principle that the government should not force any particular religion(s) onto its citizens.

- *Discussion:* Historically, why did the Framers seek to prohibit the Government from establishing a state religion? How has this clause been interpreted with regard to government actions and religious activity?

Free Exercise Clause

The second provision of the above-cited clause is known as the “Free Exercise Clause”. It provides that the government cannot prohibit individuals from practicing any religion. The Free Exercise Clause has been the subject of significant litigation charging the government with discrimination against individuals practicing a particular religion. The common law test for determining whether a government statute runs afoul of the Free Exercise Clause by unduly restricting the free exercise of religion is as follows:

- *Secular Purpose:* Does the statute or government action affecting religion have a secular (non-religious) purpose? If the purpose of the statute or government action is to somehow promote any single or particular group of religions among the citizens, then the statute is

unconstitutional. If the purpose of the statute or government action is not to promote religion, then move onto the next step.

- *Discussion:* Can you think of any examples of government actions that have been challenged as effectively promoting in a particular religious practice? (Hint: Think about religious holidays and governmental events.)
- *Primary Effect:* Is the primary effect of the statute or government action to advance or inhibit religion? Even if the purpose of the statute or action is secular, it may violate the Establishment Clause if the primary effect is to somehow advance or inhibit a religion among the citizens. The word “primary” of particular importance. This leaves room for statutes or actions that only incidentally promote a particular religion. Further, a statute or action that does not promote any religion or religions above others may be acceptable. That is, the government may allow for the general observance of any religion. If the primary effect is something other than advancing or inhibiting religion, move on to the next step.
 - *Discussion:* Can you think of any examples of laws or government actions that have a purpose other than promoting a religion, but do have an incidental effect of promoting a religious practice?
- *Excessive Entanglement:* Does the statute cause excessive government entanglement with religion? Even if the statute only has a secondary effect upon religion, it may still result in too much government involvement with religion practice to comply with the Establishment Clause. This is a floating standard that greatly depends on the law and how it affects religion.
 - *Discussion:* How do you feel about allowing a court this level of autonomy for determining when a statute or government action is simply too closely related to religious activity?

If the a law or government action violates any one of the above elements, it is an unconstitutional infringement of the 1st Amendment’s grant of freedom of religion.

- *Discussion:* Do you think that the government should pass laws that have an effect on any single religion? Can you think of any examples of a law that has a secular purpose but has an effect of promoting a religion? How would you measure whether an effect on promoting religion is strong enough to be considered a primary effect? At what point do you think government influence on religious practice becomes excessive entanglement?
- *Practice Question:*

- *Resource Video:* <http://thebusinessprofessor.com/what-is-the-establishment-clause/>

12. How does Religious Freedom affect business practice?

Generally, for-profit businesses may not discriminate against employees on the basis of religion. Aside from the prohibitions on employment practices, common law holds that closely-held corporations may have religious protections similar to those of citizens.

- *Discussion:* This issue came to the forefront of consideration in the case, *Burwell v. Hobby Lobby Stores, Inc.*, The Court found that the religious beliefs of owners of the closely-held entity were sufficiently tied to the religious beliefs of the owners to be susceptible to protection under the 1st Amendment. The court's holding exempts closely-held businesses from laws that mandate or prohibit certain conduct conflicting with that belief. What is your view for or against the holding that a business entity can adopt (an enforce) the religious rights of its owners?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/businesses-and-religious-freedom/>

13. What is covered under Freedom of Speech?

Freedom of speech is far more broad in its protections than simply protecting the spoken word. It protects individual's right to any form of expression. Forms of expression may include speech, writings, physical expressions, symbols or symbolic activity, etc.

- *Discussion:* What type of events have you witnessed that are protected under the 1st Amendment's freedom of speech? Does the breadth in types of conduct to which the freedom of speech applies surprise you?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/freedom-speech/>

14. What type of speech is either not protected or receives limited protection?

The Supreme Court has interpreted the 1st Amendment to not protect all forms of speech. That is, some forms of speech or expression may be regulated or fully prohibited by the Government. In determining whether a type of speech or expression is protected, the court will balance the rights of the individual against potential harm to or effect on the rights of others. The Government, therefore, cannot limit free speech without a compelling government interest justifying the

restriction. (Note: the Constitutional standards for determining the validity of government laws or actions limiting an individual's Constitutional rights are discussed further below). Pursuant to this understanding, statutory and common law often prohibit or limit the protections offered to: Obscene Speech, Fighting Words, Commercial Speech, Defamation, and Political Speech.

- *Discussion:* Do you think it is important that the Supreme Court has recognized exceptions to the blanket protection of an individual's freedom of speech?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/speech-partially-protected-1st-amendment/>

A more detailed discussion of each type of non-protected or partially-protected speech is discussed below.

- *Obscenity* - Obscene expressions are those that appeal to the prurient interest. Such expressions are deemed harmful to community interests. There is no standard definition of obscenity; rather, courts determine whether an expression is obscene based upon the beliefs, perceptions or standards of the local population. For example, one community may feel that allowing fully nude dancing in night clubs is obscene; while other communities may not believe it to be obscene. While there is no common definition of obscenity, a state or local law that is too restrictive or broad in its provisions limiting such expression are subject to be overturned by the judiciary as an undue restriction on the freedom of speech.
 - *Discussion:* How do you feel about using a floating standard for determining what is obscene? Can a law, therefore, begin to violate 1st Amendment protections if the beliefs and understandings of the local population change or evolve?
 - *Practice Question:*
 - *Resource Video:* <http://thebusinessprofessor.com/obscene-speech-and-the-1st-amendment/>
- *Fighting Words* - Fighting words are those deemed likely to immediately incite violence by listeners. An important requirement for an expression to constitute fighting words is that the threat of violence be immediate. In this way many public presentations openly calling for violent activity by the crowd are limited or regulated; however, the same form of expression recorded and later distributed to listeners may not constitute fighting words. The difference is the immediacy of the threat of violence created by the presence of a crowd.

- *Discussion:* Can you think of any activities in history that have been censored under the grounds that it is inciting immediate violence? Can you think of any examples of speech that have incited violence, but have been protected because they incitement was not immediate in the location of the speech?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/fighting-words-and-the-1st-amendment/>
- *Commercial Speech* - There is only a limited right to undertake commercial speech. Such expressions necessarily involve third-parties who take actions based on that speech. As such, the government has an interest in regulating speech that potentially that has a negative affect on the general welfare of society. The limitation upon the regulation of commercial speech is that the government must have a compelling state interest to justify the restriction. (Note: the Constitutional standards for determining the validity of government laws or actions limiting an individual's Constitutional rights are discussed further below.). For example, business practices that knowingly deceive individuals may constitute fraud. Many deceptive advertising practices violate consumer protection laws. The federal and state governments require disclosure of material information about publicly-held companies. All of these examples demonstrate a balance between protecting the public and protecting the freedom of speech afforded individuals. (Note: It is important to note that common law holds that corporations have limited rights to free speech that are very similar to those of individuals.).
 - *Discussion:* Can you think of any types of commercial speech that is prohibited by Federal, State, or Local laws? What is the risk to the public of allowing this type of unregulated speech?
 - *Practice Question:*
 - *Resource Video:* <http://thebusinessprofessor.com/commercial-speech-and-the-1st-amendment/>
- *Defamation* - Defamation is the publication (open communication) of false statements about others that will knowingly subject that person's character to ridicule or disrepute. Slander is verbally defaming someone. Libel is defaming someone through a writing. Disparagement is defaming someone's business prowess or practice. Defamation statutes do not prohibit this type of speech (a prior restraint of the speech); rather, it allows an individual harmed by the speech to recover for damages suffered as a result of the speech. Potential liability for defamation, however, can have the effect of dissuading free speech.

This fact must be balanced against the protections afforded the individual who is the subject of the defamatory expression. For example, to lessen the potential for the suppression of the press, a plaintiff must show intentional conduct or malice by the publisher toward the defamed person. Likewise, a public figure or celebrity must demonstrate this higher standard of intent to hold someone liable for defamatory statements. In any case, the defamed individual must demonstrate an actual harm suffered because of the defamation. Disparagement represents the societal interest of allowing individuals to undertake commercial activity free of the damaging effects of defamatory attacks.

- *Discussion:* How do you feel about the balancing of an individual's freedom of speech rights against the rights of individuals to not be harmed by false speech? Remember, the freedom of speech is expressly stated in the Constitution, while an individual's protection against harm from false statements is not.
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/defamation-and-the-1st-amendment/>
- *Political Speech* - Previously, the common law held that corporations were entitled to only limited protection for political speech. Political speech includes the spending or donation of money to political campaigns or undertaking political activism. This issue came to the forefront in the case *Citizens United v. Federal Election Commission*. In this case, the court held that corporations hold rights similar to those of individuals with regard to political speech. As such, the existing regulations of the amount of funds or activity that a corporation may undertake with regard to political campaigns were held invalid.
 - *Discussion:* How do you feel about a corporation being deemed to have the same freedom of speech protections as individuals? Should the rights of freedom of speech be weighed against the impact of allowing corporations to impact the outcome of political elections?
 - *Practice Question:*
 - *Resource Video:* <http://thebusinessprofessor.com/political-speech-and-the-1st-amendment/>

15. What is Overbreadth or an Overbroad law?

As previously discussed, to pass constitutional muster, the government must have a compelling

government interest in passing a law regulating free speech. The law is deemed overly broad if, in the process of regulating unprotected speech, it negatively impacts protected speech that was not intended. While the law may be constitutional in some applications, the possibility that it could negatively affect the protected free speech means that it is unconstitutional.

- *Discussion:* Do you believe that overly broad statutes could have the effect of causing individuals from refraining from speech or expression that would otherwise be constitutionally protected?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/overbreadth-and-overly-broad-laws/>

16. What is the Freedom of Press granted under the 1st Amendment?

The 1st Amendment states that, “Congress shall make no law ... abridging the freedom of ... the press.” Generally, it prohibits attempts by the government to curtail the freedom of expression through the public dissemination of information. More specifically, it prohibits any restraint prior to the publication of information. In contrast, as discussed below, protections for free press are commonly reduced after the publication of the information. That is, an individual or organization may be held liable subsequent to the publication of information, as the publication may run afoul of laws protecting the public (e.g., defamation).

- *Discussion:* The public disclosure of information is an important activity for publicly-held businesses. For example, the Securities Act of 1934 requires the public dissemination of material information about the business to the public. Further, this freedom can be an important tool in investigating the activities of a business. For example, the major crimes of Bernie Madoff and Alan Sanford first came to light as a result of publication of information by investigative journalists. What justifications can you provide for and against laws establishing extensive disclosure requirements for public companies?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/freedom-press/>

17. Freedom of Assembly

The freedom of assembly, commonly known as the “freedom of association”, protects individuals rights to assemble in groups for the purpose of expressing common beliefs or pursuing common interests. The right of assembly include the right to physically assemble and the right to be a member of an organization. The right of physical assembly is commonly

restricted by “time, place, and manner” restrictions. Further, the government commonly requires permits or licensing for such assembly. These restrictions must meet the highest level of scrutiny when determining whether such restrictions are constitutional.

- *Discussion:* Do you feel that common time, place, and manner restrictions on the freedom of assembly are overly burdensome? Or do you feel that this government authority is sufficiently extensive? Can you think of historical acts of assembly that were challenged based upon time, place, and manner or permit restrictions?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/freedom-of-assembly-or-association/>

18. What is the 5th Amendment?

The 5th Amendment contains a number of protections for U.S. Citizens. Specifically it protects against self-incrimination by individuals. That is, individuals cannot be compelled to testify against oneself. It prohibits subjecting an individual to double jeopardy for alleged criminal conduct. This means that the government subject an individual to multiple prosecutions for the same activity. (Note: This rule does not prevent the federal and state governments from bringing charges against an individual for the same conduct.) The 5th Amendment also provide for the just compensation to individuals for property taken by the government for public use. This concept most frequently arises in cases of eminent domain (discussed in a subsequent chapter). Arguably, the most important protection, however, is the assurance of substantive and procedural rights of citizens in the passage and execution of laws by the federal government. This protection is known as the “Federal Due Process Clause”.

- *Discussion:* Many people are familiar with the 5th Amendment in criminal law cases because of popular comedy skits (see The Dave Chapelle Show) or through popular movies (see Double Jeopardy). The 5th Amendment, however, is one of the most diverse Amendments due to the multiple areas of protection under the statute. In what contexts are you familiar with the use of the 5th Amendment?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/what-is-the-5th-amendment/>

19. What is Due Process of Law?

Due Process rights assures fundamental fairness and decency in any governmental process that may affect the life, liberty, property or other constitutional rights of its citizens. Restated, the government may not act in a manner that is arbitrary, capricious, or unreasonable when

subjecting an individual to the laws of the state. For example, procedural due process requires fair procedures in the carrying out of a criminal trial, such as the the right to notice and the ability to respond to an accuser. Procedural due process further entails the observance of individual rights in the passage of laws and regulations. This may include the right to public vote or comment on a proposed law or regulation. Further, the government establishes certain standards for determining when a law may justifiably infringe upon an individual's constitutional rights. For example, a law that infringes on a fundamental rights must meet a certain standard (discussed further below) to be deemed constitutional. The due process clause applies to both individuals and corporations.

- *Discussion:* Are you familiar with Miranda Rights? How does the does the Miranda Rights doctrine demonstrate principles of due process of law?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/5th-amendment-federal-due-process-clause/>

20. What is the 14th Amendment (Due Process Clause - Incorporation Doctrine and Equal Protection Clauses)?

The 14th Amendment to the Constitution states that, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the US; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within it s jurisdiction the equal protection of the laws.” These provisions are known as the Due Process Clause and the Equal Protection Clause. These two provisions make up two of the most important amendments to the US Constitution. Each of which are discussed further below.

- *Resource Video:* <http://thebusinessprofessor.com/14th-amendment-us-constitution/>

Due Process Clause - Incorporation Doctrine

- The 14th Amendment's Due Process clause is an incorporation doctrine. In addition to requiring that states observe principles of due process in the execution of laws, it makes all of the provisions of the Bill of Rights applicable to state governments. That is, state governments cannot act to infringe upon the constitutionally protected rights of its citizens. As previously stated, the 5th Amendment's Due Process Clause applies strictly to the Federal Government.
 - *Discussion:* What would be the effect if the Bill of Rights did not apply to state government?

- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/incorporation-doctrine/>

Equal Protection Clause

- The Equal Protection Clause of the 14th Amendment embodies the ethical idea that law should not treat people differently without a satisfactory reason. This clause focused on the historical discriminations present from the days of involuntary servitude. It forced upon state governments the Civil Rights Act of 1866.
 - *Discussion:* Can you think of historical incidences where state laws have been held unconstitutional per the Equal Protection Clause? Hint: Think of voting and education rights.
 - *Practice Question:*
 - *Resource Video:* <http://thebusinessprofessor.com/what-is-the-equal-protection-clause-of-the-14th-amendment/>

21. What are the standards by which the government may infringe on individual rights?

The above discussions should demonstrate that many laws, to some extent, infringe upon the rights of citizens. Individuals often challenge the constitutionality of these laws in court. As previously stated, one role of the judiciary is to determine the constitutionality of laws and the execution of those laws. For a law to pass constitutional muster, it must meet a certain standard justifying its existence. The standard that the court applies depends upon the rights infringed upon. Below are explanations of the applicable standards.

- *Resource Video:* <http://thebusinessprofessor.com/standards-constitutionality/>
- *Minimum Rationality* - This standard, also known as the “Rational Basis Standard of Review”, requires that a law have a rational connection to a permissible state end (a legitimate goal of the Government). The classification must have a reasonable basis (not wholly arbitrary), and the courts will assume any statement of facts that can be used to justify the classification. This standard applies to laws that affect a non-fundamental right (i.e., one that is not expressly protected under the constitution). As such, it is the default standard by which the court reviews a law to determine constitutionality. The standard is higher if the law affects a fundamental right, such as due process or equal protection rights.
 - *Discussion:* The court is left to interpret what constitutes a legitimate government

interest. There is no formal test established for this purpose. How do you feel about the level of autonomy left to the court in making this decision? (Note: When the government fails to provide a legitimate interest promoted by its law or action, the duty of the court is to “seek out other conceivable reasons for validating” the law or action.)

- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/minimum-rationality-rational-basis-review-for-constitutionality/>
- *Strict Scrutiny* - This standard requires that a law have a compelling state purpose to be constitutional. Further, the law in question must be “narrowly tailored” to achieve that purpose and must be the “least restrictive means” of achieving that purpose. This means that the government must make certain that the law is not overly broad in the individuals and type of conduct that it affects. Further, there must not be another method of achieving this purpose without infringing upon the affected individual’s rights. Strict scrutiny is used if the classification involves a fundamental right under the Bill of Rights or under the Due Process Clause. It is also applied when a law or government action specifically affects a suspect class. That is the law or action has a discriminatory effect on a protected class of persons - race, gender, religion, national origin.
 - *Discussion:* There is not single standard for determining what is a compelling state purpose. The court must determine whether the law’s purpose is a compelling interest. How do you feel about the court’s autonomy in making this determination? Do you believe that the requirement that the law be narrowly tailored and the least restrictive means of achieving the purpose adequately protects individual’s fundamental or constitutionally protected rights?
 - *Practice Question:*
 - *Resource Video:* <http://thebusinessprofessor.com/strict-scrutiny-standard-of-constitutional-review/>
- *Intermediate Scrutiny* - This standard requires that the law must further an “important government interest”. It must do so in a manner that is substantially related to the objective. When laws only partially affect a suspect class or the rights involved border upon fundamental rights, an intermediate level of scrutiny applies. This standard has been applied in determining the constitutionality of laws sex-based classifications or laws or government action; laws affecting the status of undocumented or illegal immigrants; restrictions on rights to own firearms; and content-neutral restrictions on free speech.

- *Discussion:* Can you think of any recent cases applying intermediate scrutiny to overturn a government law affecting a suspect class or individual rights?
- *Practice Question:*
- *Resource Video:* <http://thebusinessprofessor.com/intermediate-scrutiny-or-quasi-strict-scrutiny/>