Business Law 210: Unit 2 – Chapter 4: Constitutional Authority to Regulate Business
Law and the Legal Environment of Business
[Professor Scott Bergstedt]

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<thead>
<tr>
<th>Slide #: 1</th>
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</tr>
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<thead>
<tr>
<th>Slide #: 2</th>
<th>Slide Title: Chapter 4: Constitutional Authority to Regulate Business</th>
</tr>
</thead>
<tbody>
<tr>
<td>Audio:</td>
<td>This is Chapter 4 – constitutional law, the authority under the Constitution to regulate business. Now, there is so much that can be said about constitutional law and all we have is this one chapter and a little bit on search and seizure under the criminal section. There’s very little time to cover a whole lot, so I will give you the big picture of constitutional law so you have an idea of how it operates.</td>
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</tbody>
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<table>
<thead>
<tr>
<th>Slide #: 3</th>
<th>Slide Title: § 1: The Constitutional Powers of Government</th>
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<tbody>
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<td>The Constitutional Powers of Government</td>
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<td>• After the Revolutionary War the States created the Articles of Confederation with a weak national government and most power and authority resting in the States.</td>
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<td>Audio:</td>
<td>To start with, there wasn’t a Constitution. We’re going way back, way back, right after the Revolutionary War the states got together and they wanted to create a government. Their first attempt at the government of United States...</td>
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<thead>
<tr>
<th>Slide #: 4</th>
<th>Slide Title: The Constitutional Powers of Government</th>
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<td>The Constitutional Powers of Government</td>
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<td>• Articles of Confederation failed.</td>
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<td>Audio:</td>
<td>...was the Articles of Confederation. The Articles of Confederation basically allowed there to be a federal government. It couldn’t tax, which meant it couldn’t raise money and if it didn’t have money, you know, what could it do? Well, that’s basically it was a very weak national government with most all of the power going to the states. The end result was it</td>
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didn’t work. It was ineffective and that is when the states got together to work on what we have today as the United States Constitution.

Slide #: 5
Slide Title: The Constitutional Powers of Government

The Constitutional Powers of Government
- Federal Form of Government:
  - Shares powers between national and state governments.
  - National government has limited, powers all other powers given to the States.

Audio:
The U.S. Constitution and the government that it established is unique. It had never been done before. It is amazing what had been put together. With our federal form of government, we have three branches. Three branches that are supposed to be coequal branches...

Slide #: 6
Slide Title: The Constitutional Powers of Government

The Constitutional Powers of Government
- Division of Power
  - 10th Amendment.
  - Reserves all powers not specifically delegated to the Federal Government to the States.

Audio:
...that have checks and balances, one to another. What has been created here is amazing. Now, there were different factions in those that were working on the U.S. Constitution. There were those that were very strong in favor of states’ rights and those that were very strong in favor of a strong central government, very contradictory approaches. In the end, the Tenth Amendment was established to help clarify the position. The Tenth Amendment says that all powers are granted to the states and the people except what has been specifically delineated, reserved out for the federal government, making it clear that the intent was that federal government was limited in what it could do, limited in its authority to only what was specifically enumerated and this was something that the states’ rights people tried hard to get enacted and did so as the Tenth Amendment. Now we will talk about the relationship between states.

Slide #: 7
Slide Title: Relations Among States

- Privileges and Immunities Clause.
  - Art. IV §2 of the U.S. Constitution.
  - Prevents state from imposing unreasonable burdens on citizens – particularly with regard to basic and essential activities.
One state to another. What happens when one state gives greater privileges to its own citizens than citizens of another state? Say, Washington state decides that if you’re a Washington state citizen, I mean Washington state resident, you don’t have to pay property taxes. But if you are a resident of another state and you own property in Washington, then you have to pay property taxes. Well, the Privileges and Immunities Clause, Article 4 Section 2 of the U.S. Constitution, specifically deals with this. It prevents states from imposing unreasonable burdens on its citizens and particularly citizens of another state. It is an important aspect of the Constitution and of the rights that we have as citizens of states and of the federal government.

Relations Among States
- Full Faith and Credit Clause (Art. IV §1).
  - Applies only to civil matters.
  - Ensures that any judicial decision with respect to such property rights will be honored and enforced in all states.

Next we have the Full Faith and Credit Clause. This is also important since as I mentioned earlier, states, in terms of their laws, in terms of the judiciary, are the same as foreign countries. A judicial decision in Washington state has no or relatively no precedential impact in any other state. Concerning civil cases, the Full Faith and Credit Clause, Section 1 of Article 4, specifically requires that one state will recognize the judicial decisions of another state. If someone from Idaho owes me some money and I sue them in Washington and I get a judgment against them. Because of the Full Faith and Credit Clause, I can take that judgment over to Idaho, I can file it in the Idaho court and they are required to recognize what the state of Washington has done and then I could act on trying to collect that debt. Now, I mentioned the three branches of government.

Separation of the National Government’s Powers
- National government provides checks and balances among three branches: executive, legislative and judicial.
  - Legislative (Congress): Creates laws.
  - Executive (President/Agencies): Enforce laws.

The separations of power. So you have the legislative, the executive and the judicial. The legislative creates the laws; the executive signs them into, at least the president does, signs
them into law and then provides the agencies that enforce the laws; and the judiciary interprets the laws. Each branch has a separate function, but even more than that, what is incredible is all the checks and balances between the branches. For example, say you have a position open in the Supreme Court and Congress wants to have someone appointed to that position. Congress has absolutely no authority to appoint someone to that position. Does the president have authority to appoint someone to that position? Yes, he has authority sort of. He has authority to recommend someone be appointed to Congress. Only that person who is recommended can Congress then approve—actually it’s the Senate—can approve to be on the U.S. Supreme Court. So, it requires the Senate and the president to work together to reach an agreement to get someone on the Supreme Court and then once you get someone on the Supreme Court, which by the way, they are appointed for life, they can interpret the Constitution, interpret the laws of United States, of Congress, and require that the president and Congress uphold the Constitution in the laws that they create.

Audio:
So, that brings us to the Commerce Clause of the U.S. Constitution. Now, as I said, there was interaction between the states’ rights folks and the strong central government folks and Interstate Commerce Clause has been at the center of that to some extent. Initially 1824, Gibbons vs. Ogden, the court said that the Interstate Commerce Clause says that the federal government can regulate anything that “substantially affects interstate commerce” and that was the test. If it didn’t “substantially effect interstate commerce,” then they had no authority to regulate it. So, that was the approach and the test beginning in 1824.

Audio:
In 1942, in an interesting case a farmer was growing wheat to be used on his own farm. Well, the Congress has put specific requirements on who could grow wheat under what situation and he was not following their rules. So, he was sued in court and he claimed Congress could not regulate whether or not he was growing wheat because they don’t have
authority under the Interstate Commerce Clause. In *Wickard vs. Fillburn*, the U.S. Supreme Court ruled that Congress had the authority to regulate the production of wheat on a farm when it was only going to be used by that farm because it effected interstate commerce since he would not be buying that wheat on the open market and that would have some impact on interstate commerce. Well this, as you can imagine, was a substantial increase in the authority Congress had to do whatever they wanted under the Interstate Commerce Clause and this went on for about sixty years until *U.S. vs. Lopez*.

**Slide #: 12**

**Slide Title: The Commerce Clause**

The Commerce Clause

- What about medical marijuana and the commerce clause?

**Audio:**

In 1995, when the Supreme Court stepped in and said, “Congress, you went too far.” So, what happened in the Lopez case? A twelfth grader had carried a concealed weapon, a handgun, to his high school and he was charged under federal law that says, “This is a gun-free school zone and you cannot bring guns to school.” He was found guilty and this ended up being appealed to the U.S. Supreme Court and the argument presented was whether or not Congress has authority under the Commerce Clause to regulate whether or not a student brings a hand-gun to high school? Does that affect interstate commerce? Well, the Supreme Court went through and listed – there’s three broad categories of activity congress may regulate under its commerce power. Those three – first, Congress may regulate the use of channels of interstate commerce, whether you’re talking about the roads or canals, rivers, etc. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, meaning the trucks, the cars and so on, so that they are safe and so on. And finally, Congress’ commerce authority includes the power to regulate those activities that have any substantial relation to interstate commerce and it’s that test that’s applied to this case. What is the law? The law is Section 922 (q) of the U.S. Code. The court says, if it is to be sustained, it must be under the third category. The criminal statute, by its own terms has nothing to do with commerce or business. Additionally, it has no jurisdictional element that says it could be applied only if it affects interstate commerce. So the government argues that in fact it should be accepted as affecting interstate commerce because a firearm in a school zone may result in violent crime and the violent crime can be expected to affect the functioning of a national economy in two ways. First, the costs of violent crime are substantial and through the mechanism of insurance those costs are spread throughout the population. And second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. The government also argues that the presence of guns in school presents a substantial threat to the educational process by threatening the learning environment. A handicapped educational process in turn will result in a less productive citizenry. The court evaluated the arguments of the government and had this to
say: “We pause to consider the implications of the government’s arguments. The government admits under its cost of crime reasoning that Congress could regulate not only all violent crime, but all activities that might lead to violent crime regardless of how tenuously they relate to interstate commerce. Under the government’s national productivity reasoning, Congress could regulate any activity that it found was related to economic productivity of individual citizen. In fact, they could regulate family law, for instance, marriage, divorce, child custody under the theories that the government presents in support of its law it is difficult to perceive any limitation on federal power even in areas such as criminal law enforcement, education where states historically have been sovereign.” They go on to say, “The possession of a gun in a local school zone is no sense an economic activity that might through repetition elsewhere substantially affect any sort of interstate commerce. To uphold the government’s contention here, we would have to pile inference upon inference in a matter that would bid fair to convert Congressional authority under the Commerce Clause to a general police power of the sort retained to the states. To do so would require us to conclude that the Constitution’s enumeration of powers does not presuppose something not enumerated and there never will be a distinction between what is truly national and what is truly local.” After six years of unfettered regulation by Congress, the court steps in and says, “Congress, you’ve gone too far. The Commerce Clause does not give you authority to do anything you want.” Now, interestingly enough, Congress has other methods to get to regulations. When they pass a regulation requiring a state to fulfill certain requirements that they know they don’t have authority to regulate, they say, “You do this or we are going to withhold your traffic or interstate highway funds,” which are substantial and Congress gets its additional authority that way. Now, the book makes note of medical marijuana. I had an interesting discussion with the federal prosecutor in Spokane and his position is clearly, “The federal government has the right to control the use and possession of marijuana by Washington state citizens and it will do so.” He did indicate that as far as the federal government is concerned, they are much more interested in the major dealers of drugs rather than the individual users and they are not likely to prosecute individual users. Medical marijuana in Washington state allows someone to be able to possess and use a small amount, well, not even that small amount of marijuana for their personal use and it allows someone else to be the custodian of that marijuana. So, various marijuana stores, custodians, have popped up throughout the state. Recently in the city of Spokane, there were quite a few of them. I say “were”, past tense, because the federal government stepped in and said, “We can regulate the use and possession of marijuana and you are going to be prosecuted if you continue to possess and distribute marijuana as a marijuana store.” There were those that closed shop and those that didn’t. Those that didn’t were arrested and are currently being prosecuted in Spokane.

**Slide #**: 13

**Slide Title**: The Supremacy Clause and Federal Preemption

The Supremacy Clause and Federal Preemption

- Article IV of the Constitution provides that the Constitution, laws, and treaties of the United States are the “Supreme Law of the Land.”
• In case of direct conflict between state and federal law, state law is invalid.

Audio:
Next, we cover the Supremacy Clause and federal preemption. How do we know that the Constitution is the supreme law of the land? Well, we know it because it says it is and that’s how we know it. It is the supreme law of the land. If there’s any law that conflicts with the U.S. Constitution, it must be struck down. As I said earlier, there’s a number of exceptions to the practice of law and there is a number of exceptions to how this works as well. For example, in Washington state, the search and seizure law in Washington state is more restrictive than the federal Constitution and the Supreme Court has said that states can be more restrictive on the federal government or the state government at police actions and that’s okay. They just can’t be less restrictive. So, there can be differences between the U.S. Constitution and the constitutions of the state of Washington and other states.

Slide #: 14
Slide Title: The Supremacy Clause and Federal Preemption

The Supremacy Clause and Federal Preemption

- A valid federal statute or regulation will take precedence over a conflicting state or local statute.
- Preemption occurs when Congress chooses to act exclusive when national and state governments have concurrent powers

Audio:
Next we have what’s called federal preemption. Federal preemption means that there is an area of law that the federal government has stepped in and said, “We’re going to regulate this.” If federal government preempts that area of law, then no state laws can be enacted. Well, for example, Federal Communications Commission regulates who can have what radio frequencies, whether it’s your cell phone, radio, TV, who can have what radio frequencies. They preempted that whole area of law. There is no authority for the states to regulate what frequencies can be used where.

Slide #: 15
Slide Title: Taxing and Spending Powers

Taxing and Spending Powers

- Article 1, Section 8: Congress has the “Power to lay and collect Taxes, Duties, Imposts, and Excises” which shall be “uniform” among the states.
- Expansion of commerce clause gives taxing power as well.

Audio:
And that would be an example of preemption. Preemption works in a whole lot of other areas as well. The Constitution has given Congress the power to tax and pose duties and so on. If it wasn’t for their taxing authority, then the federal government would have no
money and they would be ineffective as a federal government.

Slide #: 16
Slide Title: § 2: Business and the Bill of Rights

§ 2: Business and the Bill of Rights
• First Ten Amendments to the United States Constitution are called the Bill of Rights.

Audio:
The first Ten Amendments to the U.S. Constitution, otherwise known as the Bill of Rights, are significant to each and every one of us. They provide us with delineation of rights. When I say “us” I mean the people of United States, with significant rights and protections.

Slide #: 17
Slide Title: The Bill of Rights

The Bill of Rights
First Amendment: Guarantees the freedoms of religion, speech, and the press and the rights to assemble peaceable and to petition the government.
Second Amendment: States that the right of the people to keep and bear arms shall not be infringed.
Third Amendment: Prohibits, in peacetime, the lodging of soldiers in any house without the owner’s consent.
Fourth Amendment: Prohibits unreasonable searches and seizures of persons or property.
Fifth Amendment: Guarantees the rights to indictment by grand jury, to due process of law, and to fair payment when private property is taken for public use; prohibits compulsory self-incrimination and double jeopardy (being tried again for an alleged crime for which one has already stood trial).
Sixth Amendment: Guarantees the accused in a criminal case the right to a speedy and public trial by an impartial jury and with counsel. The accused has the right to cross-examine witnesses against him or her and to solicit testimony from witnesses in his or her favor.
Seventh Amendment: Guarantees the right to a trial by jury in a civil case involving at least twenty dollars.
Eighth Amendment: Prohibits excessive bail and fines, as well as cruel and unusual punishment.
Ninth Amendment: Establishes that the people have rights in addition to those specified in the Constitution.
Tenth Amendment: Establishes that those powers neither delegated to the federal government nor denied to the states are reserved to the states and to the people.

Audio:
And it is something you will need to know for this class. I’ll cover a few of them. The First Amendment, we have freedom of religion, speech, freedom of press. We’ll cover a little bit more of that later. Second Amendment, the right to bear arms, we
won’t cover that at all really. Third Amendment, we don’t have to house soldiers. You might ask yourself what is the Third Amendment about. Third Amendment is about the fact that the British government used to require individuals to house, provide food, and so on to soldiers of the British government at the time, before the Revolutionary War and so they enacted the Third Amendment to say the government cannot require, in peace time, you to lodge soldiers. Fourth Amendment prohibits unreasonable search or seizure. Fifth Amendment guarantees the right to a jury, due process of law, prohibits self-incrimination and double jeopardy. All of those are significant and critical rights. Sixth Amendment guarantees a right to a speedy and public trial, cross-examine witnesses, solicit testimony from witnesses and so on. Seventh Amendment guarantees a right of trial by jury. Eighth Amendment prohibits excessive bail, cruel and unusual punishment. And the Tenth Amendment establishes those powers neither delegated to the federal government nor denied to the states are reserved to the states and to the people. As I mentioned, the Tenth Amendment was the states’ rights folks’ provision that limits federal authority. At least that was its goal.

Slide #: 18
Slide Title: Business and the Bill of Rights

Business and the Bill of Rights

- Originally the Bill of Rights was a limit on the national government’s powers. Starting in 1925, Bill of Rights was applied to States via the “due process” clause of the 14th Amendment.
- These rights are not absolute.

Audio:
How does the Bill of Rights affect each one of us and business? Starting 1925, the Due Process Clause of the Fourteenth Amendment was then applied to all of the states. You see the first Ten Amendments of the U.S. Constitution did not originally apply to the states. As an example of that was the Freedom of Religion Clause saying that there’s no establishment of a religion. Well many states, up until the application of the Fourteenth Amendment to the states, had state religions. Some states were Protestants, some states were Catholic and so on and they supported that religion. Well, once the Supreme Court said through the Fourteenth Amendment the first Ten Amendments apply to the states, then it was no longer acceptable for states to have their own religions and we’ll cover more of that under freedom of religion.

Slide #: 19
Slide Title: Freedom of Speech

Freedom of Speech
- Afforded highest protection by courts.
- Symbolic Speech.
One of the first ones, First Amendment, freedom of speech. Freedom of speech is one of the more significant and important rights that each one of us has. It is protected by the highest level of protection regarding fundamental constitutional rights and we’ll go through – well, I will want you to know the two tests, there’s actually more than two, but we are going to talk about just two tests of whether or not something is constitutional. We’ll get into that later.

### Slide #20
**Slide Title:** Freedom of Speech

**Freedom of Speech**
- **Reasonable Restrictions.**
  - Balance must be struck between a government’s obligation to protect its citizens versus a citizen’s rights to speech.
  - If restriction is content neutral, restrictions must target some societal problem – not to primarily suppress the message.

**Audio:**
Freedom of speech. What is speech? Speech can be not only things you say. It can be demonstrative, things you do, something you do to illustrate what you are thinking or what you wish to say and that’s in the *Texas v. Johnson* case in 1989, the flag burning case in which the court said, “Flag burning was trying to convey an idea, a concept and consequently it could not be regulated by the states or punishable under the criminal statutes except if it met the highest level of test or protection afforded freedom of speech.” On the other hand, the court said, “There are reasonable restrictions on speech that a government can make.” For example, the government can make it unlawful for you to stand up in the middle of a theater and yell, “Fire!” when in fact, there is no fire. That is unprotected speech and one can be prosecuted criminally for having done so. The court will allow restrictions on speech when it is content neutral and it specifically deals with an issue in society and it’s not meant to suppress a concept or the message itself.

### Slide #21
**Slide Title:** Corporate Political Speech

**Corporate Political Speech**
- Political speech by corporations is protected by the First Amendment.
- In *Citizens United v. Federal Election Commission* (2010) the Supreme Court ruled that corporations can spend freely to support or oppose candidates for President and Congress.

**Audio:**
Then we cover corporate political speech. That is also protected by the First Amendment.

**Slide #: 22**
**Slide Title:** Commercial Speech

**Commercial Speech**
- Courts give substantial protection to commercial speech (advertising).
- Restrictions must: Implement substantial government interest; directly advance that interest; and go no further than necessary.

**Audio:**
Commercial speech and advertising, for instance, in the case of *Rubin vs. Coors* in 1995. The federal government had a regulation that said beer providers could not list on the label what percent alcohol was in the beer. Now, the intent of this law was to keep the beer providers from having strength wars and seeing who could provide the beer with the highest alcohol content. So that was the purpose of the law. Well, Coors wanted to be able to indicate what the alcohol level was and so they went to court over this and the court had to decide if in fact that was a valid regulation on speech – advertising is speech – and a corporation is treated as a citizen, for the most part, when it deals with speech. The government had additional laboring regulations that said you couldn't use the words “full strength” or “extra strength” or “high proof” and so on.

**Slide #: 23**
**Slide Title:** Commercial Speech

**Commercial Speech**
- **CASE 4.2:** *Bad Frog Brewery, Inc. v. New York State Liquor Authority* (2003). Did the State unconstitutionally restrict commercial speech when it prohibited a certain gesture (illustration) on beer labels?

**Audio:**
The court applied First Amendment scrutiny test. It said, “For commercial speech to come within the First Amendment, it at least must concern lawful activity and not be misleading. Next we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted and whether it is not more expansive than is necessary to serve that interest.” The court evaluated the restrictions. They said, “We conclude the law cannot directly and maturely advance its asserted interest because of the overall irrationality of the governmental regulatory scheme.” They say, “Failure to provide the disclosure of alcohol content in advertising, which would seem to constitute a more influential weapon in any strength war than labels, makes no rational sense if the government’s true aim is to suppress strength wars.” They say, “The statute bans disclosure of alcohol content on beer labels, but it allows the exact opposite in the case of wine and spirits.” They conclude, “To be sure, the government’s interest in combating strength wars remains a valid goal, but the irrationality of this unique and puzzling regulatory
framework insures the labeling ban will fail to achieve that end. There is little chance the statute can directly and maturely advance its aim while other provisions of the same act directly undermine and counteract its effect.” And thus, they applied a constitutional test to commercial advertising in determining whether or not the government could restrict the labeling of alcohol content in beer and determined that the government’s plan, its government’s regulation, was unconstitutional and it was struck down.

Slide #: 24
Slide Title: Unprotected Speech

Unprotected Speech

- Certain types of speech are *not protected* by the First Amendment:
  - Slander.
  - Obscenity (see *Miller v. California*).
  - Fighting Words.
- Online Obscenity:
  - CDA, COPA, Children’s Internet Protection Act, Children’s Internet Protection Act (2000).

Audio:
Certain types of speech are not protected under the U.S. Constitution. The First Amendment does not protect slander, obscenity or fighting words. For instance, dealing with obscenity has been a challenge for the Supreme Court in determining what exactly is obscenity and how it can be regulated. The Children’s Internet Protection Act of 2000 was an attempt to regulate obscenity that is made available to children under 18. The court struck down much of this statute because it effectively regulated obscenity or pornography or lewd and lascivious activity that is presented on the internet to more than just children. It is yet to be modified in such a way that it can be upheld under the statute.

Slide #: 25
Slide Title: Strict Scrutiny Test

Strict Scrutiny Test

- Laws that affect fundamental rights of similarly situate individuals differently are subject to the “strict scrutiny” test.
- Any “suspect class” (race, national origin) must serve a “compelling state interest” which includes remedying past discrimination.

Audio:
What is the test used to determine if in fact something is valid under the Constitution? Well you have to determine first of all whether the regulatory action of the government affects a fundamental right. If it is a federal, constitutional, fundamental right then the test that is applied is a compelling state interest. There must be a compelling state interest in order for that statute to regulate someone’s fundamental rights. So first and foremost, what you need to understand is
that the government can regulate your fundamental rights. The fundamental right you have as given in the U.S. Constitution can be regulated by the state and federal government if they can show a compelling state interest and that’s the first test. The second test you need to know is the rational basis test. If the matter that’s being regulated may be constitutional, but is simply an economic interest...

**Slide #:** 26  
**Slide Title:** Rational Basis Test

Rational Basis Test
- Applied to matters of economic or social welfare.
- Laws will be constitutional if there is a rational basis relating to legitimate government interest.

**Audio:**
...then the test applied is there must be a rational basis relating to legitimate governmental interest. If in fact the government can show that, which is a much lesser standard, then the court will uphold that statutory scheme.

**Slide #:** 27  
**Slide Title:** Freedom of Religion

Freedom of Religion
- First Amendment may not “establish” a religion or prohibit the “free exercise” of religion.
- The Establishment Clause:
  - Prohibits government from establishing a state-sponsored religion, or passing laws that favor one over the other.

**Audio:**
Next, we move into freedom of religion. Now, as I mentioned earlier, many states at one point had their own religion. Obviously that’s not the case today. The First Amendment says the government may not “establish” a religion or prohibit the “free exercise” thereof.

**Slide #:** 28  
**Slide Title:** Freedom of Religion

Freedom of Religion
- Establishment Clause.
  - In *Van Orden*, the Court upheld, by a 5-4 vote, the legality of a Ten Commandments display at the Texas state capital due to the “secular Purpose”

**Audio:**
The Establishment Clause prohibits government from establishing a federal
sponsored religion or passing laws that favor one religion over another. In the Van Orden case, the U.S. Supreme Court was presented with the issue of the display of the Ten Commandments in the Texas state capital as part of a larger display. In a vote of five to four, the U.S. Supreme Court said that display of the Ten Commandments had a “secular purpose” and thus was not the establishment of religion and it was ok.

**Slide #: 29**
**Slide Title:** Freedom of Religion

Freedom of Religion

- Establishment Clause.
  - In McCreary County, the court ruled that the displays of the Ten Commandments were illegal because they were not clearly part of a secular display.

**Audio:**
On the other hand, in the case in McCreary County, the court ruled that the display of the Ten Commandments there was improper since it was not part of a secular display.

**Slide #: 30**
**Slide Title:** Freedom of Religion

Freedom of Religion

- Free Exercise Clause: Firs Amendment guarantees the “free exercise” of religion.
  - Employers must reasonably accommodate beliefs as long as employee has sincerely held beliefs.

**Audio:**
The Free Exercise Clause guarantees that we have the free exercise of religion. Now, there are limitations to that. One has the right to believe whatever religion you wish, but practicing that religion, if it contravenes any state regulations, may be a problem.

For instance, in an Oregon case, Indians as part of their practice of their religion would smoke peyote. Peyote is a scheduled drug, which is regulated by the federal government. When prosecuted for doing so, they claimed that they had their First Amendment right to exercise their right to practice their religion. The court ruled that they sure enough have a First Amendment right to practice their religion, but not to the extent that they can smoke illegal drugs and denied their authority to practice their religion to the extent it contravened the federal drug laws. Now the same thing can be applied to zoning. Does a church have a right to locate itself wherever it wishes or does the government have the right to tell a church, “You can only locate here” or “You can only locate there?” And the test that the U.S. Supreme Court has used is the compelling state interest test. That is, the government can regulate zoning of a church to the extent it has a compelling state interest to do so.

**Slide #: 31**
**Slide Title:** Slide 31
Audio:
And if it does, then it can regulate where that church can be established. The court has held employers must reasonably accommodate beliefs of their employees as long as an employee has a sincerely held religious belief. To that extent, there is a recent case in which Costco had a policy that did not allow various piercings for their employees and one employee that refused to take out an eyebrow ring was fired and so she sued Costco saying that it was violating her right to religion under the Constitution. She said she belonged to the Church of the Body Modification that in 1999 had over a thousand members. Costco indicated this should not be considered a “sincerely held religious belief” and ultimately the court agreed with them and Costco was allowed to require someone not to wear eyebrow rings or other piercings.

Slide #: 32
Slide Title: Searches and Seizures

Searches and Seizures
- The Fourth Amendment requires Police must have a search warrant based on “probable cause.”
  - General searches through personal belongings are illegal.
  - Search warrants must be specific.

Audio:
Next we cover searches and seizures. We’ll only cover it briefly here because I’ll cover it much more extensively in criminal law. The Fourth Amendment requires police to have a search warrant and that search warrant must be based on “probable cause” in order to search someone or someone’s apartment, someone’s car, etc., etc. So that is the rule. Now, there’s all sorts of exceptions. For example, plain view exception. If a police officer sees illegal activity or illegal contraband in plain view meaning he sees it where he rightfully has the right to be, then he can act on that and seize and search the property that he sees it on.

Slide #: 33
Slide Title: Self-Incrimination

Self-Incrimination
- Fifth-Amendment guarantees no person can be compelled to testify against himself in a criminal proceeding.
- Does not apply to corporations or partnerships.

Audio:
Next we cover the Fifth Amendment, self-incrimination. The Fifth Amendment requires,
it guarantees, no person can be compelled to testify against himself in any criminal proceeding. So, any defendant has the right not to testify on his own behalf and often times that’s to his advantage because if he did testify, he would be subject to cross-examination by the prosecutor and would have to either perjure himself or admit things that he doesn’t want to.

Slide #: 34
Slide Title: § 3: Due Process and Equal Protection

§ 3: Due Process and Equal Protection
- Fifth and Fourteenth Amendments provide “no person shall be deprived of life, liberty or property without due process of law.”
- Procedural and Substantive issues.

Audio:
Section 3, due process and equal protection. The Fifth and Fourteenth Amendments provide “no person shall be deprived of life, liberty or property without due process of law.” What is due process of law? Well, the court has divided due process of law into two types of due process: there’s a procedural due process and substantive due process. The nice thing about it is the names actually go along with what they are.

Slide #: 35
Slide Title: Procedural Due Process

Procedural Due Process
- Procedures depriving an individual of her rights must be fair and equitable.
- Constitution requires adequate notice and a fair and impartial hearing before a disinterested magistrate.

Audio:
Procedural due process deals with the procedures involved in court, involved in being taken to court. There must be notice and a fair and impartial hearing. So, the rules themselves requiring you to appear in court have to be fair, they have to be equitable, and that’s procedural due process. Now, on the other hand, substantive due process...

Slide #: 36
Slide Title: Substantive Due Process

Substantive Due Process
- Focuses on the content or substance of legislation.
- Laws limiting fundamental rights (speech, privacy, religion) must have a “compelling state interest.”
- Laws limiting non-fundamental rights require only a “rational basis.”
Audio:
...deals with the substance of the law, the content of the legislation. If the content of the legislation is fair – does not go against any fundamental constitutional right – then it’s okay. If the law limits a fundamental constitutional right such as speech, privacy or religion, then the state or the government must have a “compelling state interest” in order to limit someone’s fundamental rights. If it is a non-fundamental right, then it is back to the other test, the rational basis test.

Slide #: 37
Slide Title: Equal Protection

Equal Protection
- Fourteenth Amendments provide “equal protection under the law.”
- All people must be treated the same.
  - Hunting permits
  - Out of state tuition

Audio:
Under equal protection, the Fourteenth Amendment provides equal protection under law. So, all people similarly situated must be treated the same. So, now I ask you, if a state charges more for an out-of-state resident to hunt in the state than an in-state resident, is that a violation of equal protection? Or how about this one – say the state charges a higher tuition for those that live outside of the state than those that live within the state. Is that a violation of equal protection? Similarly situated people are not treated the same. Well, the test is a compelling state interest. Does the state have a compelling state interest to treat these people differently? Well, the courts said that the state does have sufficient interest to justify charging more for a hunting permit for an out-of-state resident since the residents pay for the fishing game department through their taxes, property insurance or property taxes and so on. Then, the government has the right to charge more of out-of-state individuals since they don’t help pay for the fishing game department and so on. And the same thing goes for paying out-of-state tuition – that the colleges are subsidized by the people of the state and if you’re an out-of-state resident, then you should be charged more to help cover the subsidy that is supplied by the residents of the state.

Slide #: 38
Slide Title: § 4: Privacy Rights

§ 4: Privacy Rights
- Fundamental right not expressly found in the constitution, but derived from First, Fifth and Fourteenth Amendments.
- Laws and policies affecting privacy are subject to the compelling interest test.

Audio:
Privacy rights. If you read through the Constitution, where do you think you are going
to find the right of privacy? If you said you don’t know, that’s because it’s not there. There is no right of privacy in the Constitution, at least specifically enumerated. Instead, the Supreme Court decided that if you read the First, Fifth and the Fourteenth Amendments and you think really hard and you imagine the rights that this might encompass and you are really creative, then there must be a fundamental right of privacy that the U.S. Constitution implies. And it is based on that reasoning that we now have the right of privacy. Laws and policies affecting privacy interests are subject to a “compelling state interest” so a very high standard, it’s a fundamental right, and this concludes our discussion of constitutional law.