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Chapter 2: Business and the Constitution

CHAPTER OVERVIEW

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

Teaching tip: Capturing the Vast Universe of Con Law

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

KEY LEARNING OUTCOMES

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

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TEACHING OUTLINE

A. Structure and Nature of the Constitution: Federal Powers [P.41]

Points to emphasize:

- The U.S. uses a **federal system** in which a national government, having limited regulatory powers granted by the Constitution, **coexists** with the government of each state.
- The Constitution functions to (1) establish a **structure** for the federal government and rules for amending the Constitution; (2) grant **specific powers** for the different branches of government; and (3) provide **procedural protections** for U.S. citizens from wrongful government actions.
- ***Structure of the Constitution:*** Composed of a preamble, seven articles and 27 amendments.
    - The preamble states the Constitution's broad objectives and the articles then set out structure, power, and procedures **(Reference to Table 2.1: Overview of Articles in the U.S. Constitution [P.42]).**

TABLE 2.1 Overview of Articles in the U.S. Constitution

Article I	Establishes the legislative branch (a Congress composed of the House of Representatives and the Senate); sets qualifications for members; grants congressional powers (lawmaking).
Article II	Establishes the executive branch (president); sets qualifications for the presidency; grants executive powers (enforcement of laws).
Article III	Establishes the judicial branch with a federal system of courts, including a Supreme Court; grants certain judicial powers.
Article IV	Establishes the relationship between the states and the federal government; describes how to admit new states to the Union.
Article V	Describes the process for amending the Constitution.
Article VI	Establishes the Constitution and federal law as the supreme law of the United States over any conflicting state law; authorizes the national debt (Congress may borrow money); public officials must take an oath to support the Constitution.
Article VII	Lists the requirements for ratification of the Constitution.

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

B. Overview of Federal Powers [P.43]

Points to emphasize:

- Federal legislation or regulation must be authorized by a specific, **enumerated** power in the Constitution and theses powers are limited in scope.
- ***Separation of Powers:*** The system of checks and balances whereby the three branches have unique powers that allow them to resolve conflicts among themselves, thus ensuring no one branch exceeds its constitutional authority.
- **Reference to Table 2.2: Example of Constitutional Checks and Balances [P.45]**

TABLE 2.2 Example of Constitutional Checks and Balances

Branch	Power	Power Checked
Executive	Veto	Congress's lawmaking authority
Legislative	Override veto with supermajority	President's veto authority
Legislative	Impeachment and removal	President and federal judiciary's general powers
Judicial	Invalidate a law as unconstitutional	Congress's authority to make laws; the president's authority to enforce laws

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

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Case 2.1: U.S. v. Alvarez [P. 44]

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

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

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

Case Questions

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

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

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

- ***Applying the Constitution: Standards of Review:*** When reviewing a government action for constitutional soundness, the Court classifies the action into one of three categories of **scrutiny**: (1) the rational basis category, or (2) intermediate-level scrutiny, or (3) Strict scrutiny.

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- ***Rationale Basis:*** The government need only show that their action advanced a legitimate government objective and the action was minimally related to the government's objective.
- ***Intermediate-Level Scrutiny:*** The government must prove that their action advanced an important government objective and that the action is substantially related to the government's objective.
- ***Strict Scrutiny:*** (1) The government's objective must be compelling, (2) the means chosen by the government to advance that objective is necessary to achieve that compelling end, and (3) no less-restrictive alternatives existed.

Case 2.2: Brown v. Entertainment Merchants [P. 46].

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

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

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

Case Questions:

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

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

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

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

C. Commerce Powers [P.48]

Points to emphasize:

- Congress's **broadest power** is derived from the Commerce Clause whereby Congress is given the power to "regulate Commerce among the several states."
- ***Application of Commerce Powers:*** The direct and broad power to regulate all persons and products related to the flow of intrastate commerce is the fundamental source of its authority.
  - ***Interstate versus Intrastate Commercial Activity:*** Congress has the authority to regulate (1) channels of interstate commerce, (2) the instrumentalities of interstate commerce, (3) the articles moving in interstate commerce, and (4) intrastate commerce when it has a substantial economic effect on interstate commerce.
    - The Supreme Court has even deferred to congressional regulation of a product that is cultivated for noncommercial purposes solely in one state as **sufficiently related** to interstate commerce, citing *Gonzalez v. Raich.*
  - ***Civil Rights Legislation:*** In the 1964 Civil Rights Act, Congress used its commerce power to **ban discrimination** in places of public accommodation such as restaurants (*Katzenbach v. McClung)* and hotels (*Heart of Atlanta Motel v. U.S.)*

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- ***Noncommercial Activity:*** Some limits on Congress's commerce power still exist, such as in cases where the activity is purely noncommercial, the activity Congress seeks to regulate must have a sufficient nexus to some **legitimate economic interest** (*U.S. v. Lopez; U.S. v. Morrison).*

- ***Constitutional Restrictions on State Regulation of Commerce:*** States are free to regulate commerce that crosses into their state borders so long as (1) it does not impose a **discriminatory** law, and (2) the state law is a **legitimate effort to regulate** health, safety, and welfare.

Case 2.3 Gonzalez v. Raich, [P. 49]

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

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

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

Case Questions:

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

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

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

Legal/Ethical Reflection and Discussion: *Gonzalez v. Raich* **[P. 51]**

D. Tax and Spend Power [P.51]

Points to emphasize:

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

Self-Check: What is the constitutional source of authority for each of the following laws? [P.53]

Concept Summary: Structure and Nature of the Constitution: Federal Powers [P.53]

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E. Constitutional Protections [P.54]

Points to emphasize:

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

Teaching Tip: The First Amendment as a Cultural Icon

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

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

Teaching Tip: Famous Holmes Quote

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

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

Case 2.4 R.J. Reynolds v. FDA [P. 55]

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

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

Ruling: U.S. Court of Appeals for the District of Columbia upheld the trial court's decision in favor of RJR. The court applied the *Central Hudson* test and ruled that the FDA had failed to supply any evidence that the rule which restricted the

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commercial speech directly advances a substantial government interest. The court ruled that the labels were not purely factual because they did not convey any warning information or offer any information about the impact of smoking. Rather, the images were intended to generate emotional responses. Therefore, the FDA could not meet their burden under the *Central Hudson* test with respect to how the graphic warnings directly advance the government's interest.

Case Questions:

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

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

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

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

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

- ***Political Speech by Corporations:*** Typically, **political speech** by corporations is fully protected by the First Amendment.

- ***Political Spending and Corporations:*** In *Citizens United v. Federal Election Commission,* the Supreme Court ruled that the government may not ban all political spending by corporations in candidate elections. **See Case 2.5: Citizens United v. FEC**

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Case 2.5 Citizens United v. FEC [P. 58]

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

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

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

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

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

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

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F. THE FOURTH AMENDMENT [P. 59]

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

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

Exceptions:
-Exigent circumstances
-Consensual searches
-incident to arrest
-plain view
-*Terry* stops

2. Expectation of Privacy

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

3. Reasonableness Requirement

- Totality of circumstances test

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

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

CASE 2.6 U.S. v. Jones [P. 62]

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

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Issue: Was the use of a GPS tracker attached to Jones's vehicle a "search" within the meaning of the Fourth Amendment that requires a warrant?

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

Case questions:

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

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

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

G. Due Process Protections [P.63]

Points to emphasize:

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

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Concept Summary: Constitutional Protections [P.64]

H. Privacy [P.65]

Points to emphasize:

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

CHAPTER REVIEW QUESTIONS [P. 67]

Answers and Explanations [P. 73]

END OF CHAPTER PROBLEMS, QUESTIONS AND CASES

Theory to Practice [P. 68]

1. Congress is using the Commerce Clause as their authority for passing the law. Quick will likely challenge the law as an unconstitutional exercise of

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congressional power because the activity being regulated is purely local and no enumerated power exists. [Ties to "Overview of Federal Powers" and "Commerce Powers"]

2. In this case, Congress is using its Spending Power to implement policy. This changes the analysis because Congress has greater latitude to set policy via conditions on spending. [Ties to "Tax and Spend Power"]
3. Holmestown's actions amount to a discriminatory tax because it impermissibly impacts interstate commerce. Therefore, the law is likely to be ruled unconstitutional. [Ties to "Constitutional Restrictions on State Regulation of Commerce"]
4. The Due Process Clause requires the government to provide a hearing and/or procedure whenever the government has taken some action to deprive. [Ties to "Due Process Protections"]
5. The Fourth Amendment is at issue. If the search is related to a criminal investigation, the government must have probable cause. If the search is related to an administrative investigation, the standard for the government to obtain a warrant is lower. [Ties to Fourth Amendment]

STRATEGY 101 [P. 68]

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

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

Manager's Challenge [P.70]

A sample answer to all Manager's Challenge questions is provided in the student and instructor versions of this textbook's Web site.

Case Summary 2.1: Preemption: Cipollone v. Liggett Group, Inc., [P.71]

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

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Case Summary 2.2: Commercial Speech: State v. DeAngelo [P.70]

1. Is the ordinance constitutionally sound?

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

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

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

Case Summary 2.3: Commerce Clause: U.S. v. Alderman [P.71]

1. I s the law constitutionally sound?

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

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

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

Case Summary 2.4: Necessary and Proper Clause: United States v. American Library Association [P.71]

1. Is the plan constitutional?

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

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

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

Case Summary 2.6 Pagan v. Fruchey and Village of Glendale [P.72]

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

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

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

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

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Business Law Simulation Exercise for Managers #2: Employment Discrimination

Note to the Instructor:

This material is featured in the Instructor's Manual and in online content for instructors.

Students do not have access to this material.

Instructor's Overview

Since at least 1970, instructors in a variety of business disciplines have been using simulations (sometimes called simulation gaming) in their courses. Business law instructors use a wide variety of simulations each with the objective of having students engage in a sequential decision-making exercise involving a legal issue that is typically covered in Legal Environment of Business/Business Law courses[1]. Several journals, notably the **Journal of Legal Studies Education**, regularly feature models for use in the classroom in the form of mock hearings, moot court exercises, and negotiation exercises. However, these simulations can also be impractical for three reasons. First, the exercises are necessarily of the one-size-fits-all genre and cannot be used in settings where large numbers of students are involved. Second, the exercises sometimes tend to be too cut towards education of law students instead of business students. Finally, the simulations are sometimes taught in a vacuum because they are not tied closely enough to the textbook.

The simulations in this text are specifically crafted to be: 1) flexible enough to use in a variety of classroom settings; 2) geared towards business students who are working towards a tenable solution to a legal problem as an alternative to relying on a judicial forum to resolve the dispute; 3) directly related to one or more topics covered in the textbook. Each simulation contains three parts. **Part 1** provides an **overview** of the simulation process, offers learning objectives for the student and gives a hypothetical **fact pattern** describing events leading up to a legal dispute. **Part 2** is a **statutory excerpt** and two hypothetical **case summaries** that give students brief facts, legal points, and short excerpts from the opinion. While these cases are hypothetical, they are based on actual cases from appellate courts in various circuits and represent a majority view. **Part 3 is an assignment sheet that is featured only in the Instructor's Manual**. It contains templates for a wide selection of exercises, including **teaching notes** and alternative formats for using the simulation in a broad range of classroom settings. The assignment sheets are also located on the textbook's Web site in Word format. The website may be used to generate assignment sheets (in hard copy or electronically) for students. The templates are designed to be used 'as is' or may be modified by the instructor to tailor to the particular needs of the course.

[1] For an in depth discussion of the topic of simulations, see Professor Robert Bird's excellent article on the topic: *Integrating Simulation Games into Business Law Teaching,* 10 **J. Legal Stud. Educ**. 203 (2001*)*

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John Falstaff v. Revere Furniture Company
Business Law Simulation Exercise for Managers: Employment Discrimination

INSTRUCTOR RESOURCES

Table of Alternative Options for Assignments

Class Characteristic	Suggested Alternative Option Format
Mid-sized (25-35)	Format A: Arbitration Simulation Format B: Mediation Format C: Short Writing Exercise- Issue spotting Format D: Longer Writing Exercise- Advocate Memorandum Format E: Discussion Questions
Small or seminar (20)	Format A: Arbitration Simulation Format B: Mediation Format C: Short Writing Exercise- Issue spotting Format D: Longer Writing Exercise- Advocate Memorandum Format E: Discussion Questions Format F: Comparative Research Grid
Fourth Credit Hour[2]	Format A: Arbitration Simulation Format B: Mediation
Large lecture section	Format C: Short Writing Exercise- Issue spotting Format E: Discussion Questions
Graduate	Format A: Arbitration Simulation Format B: Mediation Format D: Longer Writing Exercise- Advocate Memorandum Format E: Discussion Questions Format F: Comparative Research Grid

Instructor's Overview: Alternative Assignment Formats

Below is a short description for each alternative assignment format listed in the Alternatives Table (above). Assignment sheet templates for each of these formats are located on the textbook's website in Word format and are fully capable of being distributed electronically, in hard copy format as written, or they may be revised by the instructor to modify for individual course needs.

[2] An increasing number of colleges and universities are moving to a four credit system by adopting a "fourth credit hour" where classes meet together for 3 hours per week and 1 hour per week is spent by students to work independently, in teams or under the supervision of an instructor, on long-term assignments, projects, research or exercises (such as a simulation) related to the coursework.

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Format A: Arbitration Simulation
In this format, students are assigned to review Chapter 13 of the text, study the stipulated facts, statutory excerpt and cases, and then participate in a mock arbitration. Students are informed that the cases should be read with an eye towards understanding the differences and similarities between the court cases and the stipulated facts in the **Falstaff v. Revere Furniture Company** case. Each student (or groups of students depending on class size) is assigned the role of **Howe** manager of Revere or as **Falstaff**. The parties then prepare to participate in a private arbitration narrowed down to whether Falstaff's condition is protected by the ADA and ADAAA). The instructor (or teaching assistant) acts as the arbitrator that runs the simulation by asking the parties questions about their theories of the case and testing their knowledge of the application of statutory and case law and the ability to cite specific points of law and excerpts in explaining how the cases support their arguments or are distinguishable from their case's facts. Students are evaluated on: a) grasp of the legal issues; b) ability to articulate an argument and respond to questions in arbitration; c) engagement in the simulation; d) ability to work as a team (if applicable). The time of arbitration is set at a maximum of 20 minutes total.

Format B: Mediation
In this format, students are assigned to review Chapter 13, study the Stipulated Facts, statutory excerpt and the case law, and then participate in a mock mediation. Students are informed that the cases should be read with an eye towards understanding the differences and similarities between the court cases and the stipulated facts in the **Falstaff v. Revere Furniture Company** case. Each student (or groups of students depending on class size) is assigned the role of **Howe** as manager of Revere or as **Falstaff**, or as a **mediator** assigned to the case. The instructor assumes the role of Chief Mediator and serves as a resource for the parties. The parties then prepare to participate in a private mediation narrowed down to whether Falstaff's condition is protected by the ADA and ADAAA). Mediators negotiate a variety of alternatives that will help the parties work towards a non-judicial solution. Initially, students work outside of the classroom to begin working on proposals. They are then assigned a final attempt session at mediation where the Chief Mediator is privy to the negotiations and final resolution or deadlock.

Format C: Short Writing Exercise – Issue Spotting
Students are assigned first to review Chapter 13, study the Stipulated Facts, statutory excerpt and the case law. Based on their knowledge of employment discrimination law as a whole, they are then assigned to compose 3-4 page **neutral** memorandum that outlines each legal issue present with a short explanation of the applicable legal rules or doctrine. The sources of law for this memorandum are the textbook's chapter on employment discrimination (Chap 13) as well as the statutory excerpt and the case law in the simulation materials. In this version of the simulation, students are not functioning as an advocate. Rather, they are being as objective as possible in spotting any and all potential issues that could arise in the case and give the analysis as to the likelihood of success on each point.

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Format D: Longer Writing Exercise: Advocate Memorandum
Students are assigned first to review Chapter 13 and then to study the Stipulated Facts, statutory excerpt and the case law in the simulation materials. They are assigned to compose 5-7 page memorandum that advocates a particular party's view (as assigned by instructor) on the issue of the Revere's potential liability under the ADA and ADAAA. Students outline each legal issue applicable to a discrimination claim and support their arguments using citations to legal points and excerpts of the statutory excerpt and the case law. Students are assigned to conclude the document by suggesting any potential non-judicial solution that may mutually benefit the parties.

Format E: Discussion Questions
Students are assigned to review Chapter 13, then study the Stipulated Facts and the case law and to prepare for a Q & A discussion of the issues presented. Students may be assigned to either advocate one side or the other, or to provide a neutral analysis. Discussion questions include theories of liability, defenses, pretext and the regarded as standard under the ADA and ADAAA and any potential non-judicial, tenable solution that may mutually benefit the parties.

Format F: Comparative Research Grid
Students are assigned to review Chapter 13, then read the facts and cases in the simulation. After the instructor has given students are given a brief orientation on the use of various databases for looking up statutes and cases. Ideally, the academic universe version of Lexis and/or Westlaw should be used, but free legal research Web site services will suffice. **NOTE: A listing of high-quality Web sites that provide free access to legal research and guidelines for research on the web may be found in Appendix A of the textbook: A Business Student's Guide to Understanding Cases and Finding the Law**. Students prepare a grid that compares the federal anti-discrimination statutes with the state anti-discrimination laws in their own (or pre-selected by the instructor) state. For more advanced or internationally focused programs, the instructor may also assign a comparative analysis of a foreign country's law regarding disability protection in the workplace.

*****Important Note to Instructors**:

The following Assignment Sheet templates are included for your purposes only. The Assignments are not featured in the student's textbook. Typically, the student text's *Business Law Simulation Exercise* would end after Part 2. Teaching tips, sample answers, sample grading guidelines and other helpful features are also included in the Instructor's Manual only.

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Business Law Simulation Exercise for Managers: Employment Discrimination

Assignment Sheet (Format A)

Arbitration Simulation

Introduction:

In this simulation, students take on the role of advocates in a mock arbitration. Each individual student will be assigned to [a team of two that will] assume the role of one of the parties in the case.

Additional Facts:

In addition to the ***Stipulated Facts*** in Part 1, assume that Falstaff and Revere agreed that they would submit to a private arbitration. Assume further that the parties have agreed to narrow the dispute to one single issue: *Is Falstqff's condition considered a disability under the ADA?* They further agreed upon the arbitrator (your instructor) and to limit the total time of the arbitration hearing to 20 minutes.

Assignment:

Using the statutory and case law featured in Part 2 as the reference to analyze this question, each party [team] should gain a full understanding of the ***Stipulated Facts***, research the case law and statutes provided and prepare for an arbitration hearing. Students are strongly encouraged to use note cards or other mediums to prepare their arguments and must be prepared to cite specific points of law and/or excerpts from the cases to support arguments or defenses. Each student must be sufficiently familiar with the facts and cases during the arbitration such that each student is able to answer any questions the arbitrator will have and to justify their positions on the basis of case law and/or statutes.

Criteria for grading:

Students are evaluated on:

- Grasp of the stipulated facts, legal issues and case law;
- Ability to articulate an argument and respond to questions in arbitration;
- Engagement in the simulation [and ability to work as a team].

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Teaching Tips:

⇒ The **Stipulated Facts** are designed to have some facts that favor Falstaff's position and some that cut towards Revere's position. It is often a good idea to inform students that they should not only articulate their own arguments, but also to anticipate alternative arguments and questions from the arbitrator.

⇒ Instructors may wish to take special care to help students understand that this arbitration is focused **Falstaff's claim that his impairment qualifies for protection under the ADA** and **not** on the issues in the fact pattern that could arise regarding issues that are unrelated such as pretext.

⇒ Instructors in certain classroom settings may wish to consider combining this format with one of the writing formats over a period of several weeks.

⇒ In preparing for arbitrations, students sometimes are confused how to use points and facts in their arguments. Students should be encouraged to come prepared to cite to specific points of law and excerpts and to have these points prepared on note cards for the actual arbitration. Students should also be encouraged to **factually distinguish** any cases that do not support their arguments. That is, tell the arbitrator why one case or the other can't be applied because it is factually different from the **Falstaff v. Revere Furniture Company** case.

⇒ Students benefit greatly from a separate sheet or e-mail that lists the arbitration dates, times, locations and names of who represents which party.

⇒ If students assume a fact that is not stipulated, they should be presented with the question: Where is that in the stipulated facts?

⇒ The suggested format of the arbitration is to begin with a question to Falstaff: What is the legal dispute that we are arbitrating today? Arbitrators may then ask questions that are designed to promote a step-by-step process giving equal time to each party.

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Issue	Sample questions
Disparate treatment under the McDonnell Douglass standard	To Falstaff: o What theory of discrimination are you alleging under the ADA? o What is the applicable test used in this circuit for an ADA disparate treatment case? o Prong 1: Why is Revere covered by the ADA? o Prong 2: Is Falstaff's condition a qualified disability? (See below) o Prong 3: Assuming that Falstaff meets prong 2, in what way could Revere have performed the job (what accommodations could Revere have possibly made? o Prong 4: Isn't there a record of poor performance that led to the discharge? Isn't that the actual reason why he was terminated? To Revere: o Assuming that the McDonnell Douglass prongs are met. What is your legitimate and non-discriminatory reason for the termination? o Could you have accommodated Falstaff by providing breaks and having another employee designated to lift heavy items?
Qualified disability	To Falstaff: o The 14th circuit court has specifically held that obesity is not a qualified disability. Why is this case different? o In what way does the **Adams** case support your position? o In what way does the impairment substantially limit a major life activity? To Revere: o Doesn't the ADAAA cover Falstaff's disability because his obesity interferes with the life activity described in the Act? o How does the fact that Falstaff's obesity may be related to an actual injury (lower back sprain) impact Revere's liability under the ADA?
Regarded as test	To Falstaff: o If it is determined that you are not covered as disabled under the Act, do you have an alternative theory for coverage? To Revere: o Isn't there some indication in the Stipulated Facts that Revere supervisors believed that Falstaff could not perform his job tasks even with accommodation?

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Business Law Simulation Exercise for Managers: Employment Discrimination

Assignment Sheet (Format B)

Mediation Simulation

Introduction: In this simulation, students analyze the ***Stipulated Facts***, case law and statutes, then work towards mediating a tenable solution to the dispute using a mock mediation process.

Assignment:

- In addition to the ***Stipulated Facts*** in Part 1, assume that Falstaff and Revere agreed that they would submit to a private mediation. Assume further that the parties have agreed to avoid any pretext issues and narrowed the dispute to the issue of Falstaff's claim that his impairment qualifies for protection under the ADA and that Revere failed to accommodate him.
- Review the *Concept Summaries* and your notes from chapter 13 in the textbook.
- Study the ***Stipulated Facts***, case law and statutes in the *Simulation Exercise* materials.
- The facts and cases should be read with the goal of understanding the differences and similarities between the court cases and the stipulated facts in the ***Falstaff v. Revere Furniture Company*** case so that groups can work towards a resolution that achieves the primary objectives of both parties.
- Each student *(or groups of students depending on class size)* is assigned the role of **Howe,** as a manager of Revere, or as **Falstaff**, or as a **mediator** assigned to the case. The instructor is the **Chief Mediator** and will serve as a resource for the parties during the mediation process.
- Participants then prepare to participate in a process designed to settle issues related to **Falstaff's claim that his impairment qualifies for protection under the ADA** and that requires accommodation. Note that no other legal issues are in dispute.
- Initially, participants work outside of the classroom to begin working on proposals. The mediator initiates meetings with each party separately (no more than two 30-minute meetings with each side) and then prepares a variety of alternative tenable solutions crafted to help the parties work towards a mutually agreeable solution.
- After meeting separately, students will be assigned a 20-minute time slot for a "final attempt" session at mediation where all parties and the instructor are present. The Chief Mediator is present to facilitate a solution and to evaluate your negotiations and progress. A deadlock, in and of itself, does *not* affect your grade, so long as the parties used reasonable efforts to compromise.
- The parties should attempt to draft a detailed agreement that achieves, as best as possible, the objectives of each party: For Revere compliance with the ADA and a productive employee; for Falstaff, his former position as a floor manager with reasonable accommodations.
- The mediator should provide a copy of the alternative proposals for a more detailed resolution for each of the parties just prior to the final attempt session.

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The parties may amend the proposal by hand at the session and turn in the final product (whether agreed to by the parties or deadlock) to the instructor.

Criteria for grading:

Students are evaluated on their final mediation session. Specifically:

- Grasp of the stipulated facts and case law;
- Legal issues and ability to articulate their position in the context of achieving mutually agreeable objectives;
- Negotiation skills, engagement in the simulation, and ability to work as a team.

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Teaching Tips:

⇒ The **Stipulated Facts** are designed to have some facts that favor Revere's position and some that cut towards Falstaff's position. It is often a good idea to inform students that neither side has a distinct advantage and thus a deadlock would result in a significant risk of legal liability for the business and expense of litigation.

⇒ Instructors may wish to take special care to help students understand that this arbitration is focused **only on** Falstaff's claim that his impairment qualifies for protection under the ADA and that Revere failed to accommodate him and **not** on the issues in the fact pattern that could arise regarding pretext.

⇒ Instructors in certain classroom settings may wish to consider combining this format with one of the writing formats over a period of several weeks.

⇒ Instructors may wish to emphasize that a deadlock is not necessarily equated to poor performance in the simulation so long as there is evidence that the mediation took place in good faith and at arms length. On the other extreme, students should be cautioned that if the parties have concluded a one-sided deal quickly, that would have a negative impact on their grade as it indicates that no arms-length transaction took place.

⇒ Students benefit greatly from a separate sheet or e-mail that lists the mediation dates, times, locations and names of who represents what role.

⇒ At the instructor's discretion, the mediator may be presented with the following issue/question list for use in the initial separate meeting in order to facilitate the mediation.

Issue	**Sample questions**
Disparate treatment under the McDonnell Douglass standard	To Falstaff: o What theory of discrimination are you alleging under the ADA?

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	○ What is the applicable test used in this circuit for an ADA disparate treatment case? ○ Prong 1: Why is Revere covered by the ADA? ○ Prong 2: Is Falstaff's condition a qualified disability? (See below) ○ Prong 3: Assuming that Falstaff meets prong 2, in what way could Revere have performed the job (what accommodations could Revere have possibly made? ○ Prong 4: Isn't there a record of poor performance that led to the discharge? Isn't that the actual reason why he was terminated? To Revere: ○ Assuming that the McDonnell Douglass prongs are met. What is your legitimate and non-discriminatory reason for the termination? ○ Could you have accommodated Falstaff by providing breaks and having another employee designated to lift heavy items?
Qualified disability	To Falstaff: ○ The 14th circuit court has specifically held that obesity is not a qualified disability. Why is this case different? ○ In what way does the **Adams** case support your position? ○ In what way does the impairment substantially limit a major life activity? To Revere ○ Doesn't the ADAAA cover Falstaff's disability because his obesity interferes with the life activity described in the Act? ○ How does the fact that Falstaff's obesity may be related to an actual injury (lower back sprain) impact Revere's liability under the ADA?
Regarded as test	To Falstaff ○ If it is determined that you are not covered as disabled under the Act, do you have an alternative theory for coverage? To Revere ○ Isn't there some indication in the Stipulated Facts that Revere supervisors believed that Falstaff could not perform his job tasks even with accommodation?

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Business Law Simulation Exercise for Managers: Employment Discrimination

Assignment Sheet (Format C)

Short Writing Exercise- Issue Spotting

Introduction: In this simulation, students analyze the ***Stipulated Facts*** and Longville case law and spot as many legal issues as possible. The analysis is articulated in a 3-4 page neutral (i.e., not advocating a particular side) memorandum.

Assignment:

- Review the *Concept Summaries* and your notes from chapter 13 in the textbook.
- Study the ***Stipulated Facts***, statutory excerpt and the case law featured in Section 2 of the Simulation Exercise.
- Compose 3-4 page **neutral** memorandum that outlines each legal issue present with a short explanation of the applicable legal rules or doctrine. The sources of law for this memorandum are the textbook's chapter 13 as well as the case law and statutory excerpt
- Note that you should not write as an advocate on one side or the other. Rather, you should be as objective as possible in spotting any and all potential issues that could arise in the case and give the analysis as to the likelihood of success of all theories.

Criteria for grading:

- Clarity of writing, grammar, document appearance;
- Articulation of all potential issues presented;
- Quality and depth of analysis.

Due Date: *[Instructor]*

Policy on Late Work: *[Instructor]*

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Teaching Tip:

Students should identify and give a brief explanation of the following issues:

Issue	Stipulated Fact Reference (Paragraph #)
Revere's as a covered employer under the ADA	1,
Falstaff's condition as a permanent disability	7,8,9
Treatment of obesity as covered under the ADA and case law	10,11,13
Impact of ADAAA	11,15
Regarded as standard	13,13,14
Pretext	15
Reasonable accommodation	8
Remedies available	N/A

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Business Law Simulation Exercise for Managers: Employment Discrimination

Assignment Sheet (Format D)

(Longer) Writing Exercise: Advocate Memorandum

Introduction: In this simulation, students are asked to analyze the ***Stipulated Facts***, a statutory excerpt and case law, then spot as many employment discrimination issues as possible, and then write a 5-7-page memorandum that advocates a particular side of the dispute.

Assignment:

- Review the *Concept Summaries* and your notes from chapter 13 in the textbook.
- Study the ***Stipulated Facts,*** the statutory excerpt and the case law included in Section 2 of the Simulation Exercise.
- Your instructor will assign you to advocate for either Falstaff or Revere.
- Compose a 5-7-page memorandum that focuses on issue of Revere's potential liability under the ADA and ADAAA. Your memorandum should contain: 1) a brief summary of relevant facts of the dispute; 2) an explanation of each legal issue in the analysis with an application of legal rules or doctrines governing the dispute; 3) a list of all remedies that your side is entitled to; 4) a tenable solution to resolve the dispute in a non-judicial forum. Your memorandum should articulate arguments that support your side of the case by citing directly from the statute, case points of law and opinion excerpts (use a simple parenthetical citation format with the first name of case and point/excerpt number such as ***Grindle*** *at Point 2*, or ***Adams*** *at Excerpt b1* or *ADAAA Section 2-2*).
- Be sure to explain why you cited a particular point. Start with your strongest argument and give an analysis as to the likelihood of success of each theory.
- In determining a tenable solution, carefully consider the objectives of each party (e.g., For Revere, compliance with the ADA and a productive employee; for Falstaff, his former position as a floor manager with reasonable accommodations).

Grading Criteria: See Memorandum Evaluation form (**Attachment A**) for specific factors used in evaluating your memorandum.

Due Date: *[Instructor]*

Policy on Late Work: *[Instructor]*

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Attachment "A"

Memorandum Evaluation

Student: _____

Possible	Score	
		Facts
5		Relevant summary of facts used throughout analysis
		Analysis
10		Demonstrated understanding of McDonnell Douglass application
5		Demonstrated understanding of Regarded as Test and pretext
5		Demonstrated understanding of the impact of the ADAAA on the dispute
5		Used case law to support points
5		Offered a tenable non-judicial solution
		Writing style
10		Sentences were direct, clear and concise with appropriate syntax and legal expression
5		Paper format and appearance
		Comments:
		Total
50		

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Business Law Simulation Exercise for Managers: Employment Discrimination
Assignment Sheet (Format E)
Discussion Questions

Introduction: In this simulation, students prepare for a question and answer session based on issues presented by the ***Stipulated Facts*** in the ***Falstaff v. Revere*** case.

Assignment:

- Review the *Concept Summaries* and your notes from chapter 13 in this textbook.
- Study the ***Stipulated Facts***, statutory excerpt and the case law in Parts 1 and 2 of the Simulation Exercise.
- Be prepared to discuss the following questions:

Questions:

1) **Coverage**: Is Revere within the jurisdiction of the ADA? Why?
2) **Theory of discrimination**: What theory of discrimination under the ADA is Falstaff alleging?
3) **McDonnell-Douglass test**: What is necessary to make out an ADA claim under McDonnell-Douglass? Does Falstaff meet all four prongs of the test?
4) **Qualified disability:** Under the current case law in the 14th circuit, is Falstaff's condition a qualified disability? How does the ***Adams*** case support Falstaff's claims? How is the ***Adams*** case different from Falstaff's? How does the fact that Falstaff's obesity may be related to his lower back injury impact your analysis? In what way does Falstaff's disability interfere with the life activity requirements as described in the ADA?
5) **ADAAA:** How does the passage of the ADAAA impact Revere's liability under the ADA for Falstaff's disability? What parts of the statute are applicable to the *Falstaff v. Revere* matter?
6) **Reasonable accommodations**. Did Revere take steps to accommodate Falstaff? If not, what accommodations would be reasonable?
7) **"Regarded as" test**: Is there some indication in the Stipulated Facts that Revere supervisors believed that Falstaff could not perform his job tasks even with accommodation? How does the ADAAA impact the "regarded as" analysis.
8) **Pretext**: Is there any indication that Revere's reasons for terminating Falstaff were pre-textual? Is Falstaff's misconduct at issue?
9) **Business necessity:** What business necessity defense could Revere articulate for requirements related to Falstaff's position?

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Teaching Tip:

Students sometimes benefit from being assigned to either advocate one side or the other, or to provide a neutral analysis. Depending on time constraints, instructors may wish to assign only questions dealing with the ADA Disparate Treatment factors [3-5].

SAMPLE ANSWERS AND REFERENCES FOR DISCUSSION QUESTIONS (Format E)

Question 1:
Revere, the employer, is covered by the ADA because the Act requires employers with 15 or more employees to make reasonable accommodations for a disabled employee. Revere has 800 employees [Stip. Fact 1].

Question 2:
Falstaff is alleging that he was terminated due to his disability (overt discrimination), so the theory of discrimination is **disparate treatment**. Falstaff could also allege that his termination were a combination of legitimate motives (cutting costs) with illegitimate motives (disability) under a **mixed motives** theory.

Question 3:
According to *Grindle v. Watkins*, courts use the McDonnell Douglas test to analyze an ADA claim. The four prongs are:

- Employer covered by ADA
- Plaintiff is disabled within the meaning of the ADA
- Plaintiff could have performed the job with reasonable accommodations
- Plaintiff was subject to adverse employment action due to the disability

While the first prong is easily met, the second is more problematic. In *Grindle*, the 14th Circuit specifically held that obesity was not a covered disability. However, after the passage of the ADAAA, the Act's focus is not on specific conditions, but rather on whether or not the disability "substantially limits a major life activity."

Questions 4 and 5:
In *Grindle*, the 14th Circuit specifically held that obesity was not a covered disability. However, after the passage of the ADAAA, the Act's focus is not on specific conditions, but rather on whether or not the disability "substantially limits a major life activity." The ADAAA covers certain disabilities that substantially limit one or more major life activities (impairment). The *Adams* case supports Falstaff's claim by expanding the definitional framework of the ADA. The ADAAA specifically adds the several activities that had not been previously recognized [Adams, Point b]. On the other hand, *Adams* involves a diabetes patient that required insulin and meals on a set schedule. No such burden is placed on Falstaff. Falstaff's condition, though, clearly affect his life activities such as sitting or standing for extended periods [Stip. Fact 5 and 6]. Although some may

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point to the "exclusion" in Section 5 of the ADAAA, it is important to realize that this only applies to ADA claims related to the "regarded as" test. There is also a causation issue: Did the back injury cause the obesity or did the obesity cause the back injury? Further, Section 6 makes clear the legislative intent to favor broad coverage of the Act. This favors Falstaff's claim.

Question 6

Falstaff's position would be that they did not reasonably accommodate his disability. In Stip. Fact #13, he makes clear that his management duties could be carried out so long as he is not required to do any heavy lifting. Stip. Fact 7 indicates that Revere did give Falstaff light duty, but this was temporary and they made no further effort to accommodate him (e.g., arranging lighter duties and administrative tasks).

Question 7

The ADA covers an employee even in cases where the employer **regards the employee as disabled** ("Regarded as" test). Stip. Fact 13 indicates that Falstaff's manager, after reviewing Dr. King's report, expressed concern that the employee may "not be able to fully perform the duties required." This is evidence that, even if Falstaff was not classified as "disabled," his employer regarded him as disabled. This fact strengthens Falstaff's position under the "regarded as" theory. According to *Adams*, the regarded as standards were expanded by the ADAAA and the evidence of the employer's actions are similar to the Falstaff/Revere case [Point c].

Question 8

Stip. Fact 9 provides evidence that the employer's reasons were not pre-textual because they began to document his unsatisfactory performance at least 3 months ahead of the termination and that poor performance was a primary motive in terminating Falstaff. However, Falstaff would argue that this poor performance stemmed from his disability and that Revere's failure to accommodate him caused his performance to deteriorate to the point of termination.

The timeline from the stipulated facts is important:

July 2008 to May 2009	June 2009	July 2009	July, Aug. 2009	Sept. 1, 2009	October 2009	December 2009
Favorable reviews	Back injury- six consecutive sick days	Diagnosed with mild sprain and given temporary accommodation of "light duty."	Arriving late for work. Complains of back pain. Unable to arrange	Falstaff give Correction Action letter documenting poor performance.	Second doctor: Obesity is significant factor in Falstaff's health.	Falstaff terminated by Revere citing poor performance and cost cutting.

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			displays etc.			

Question 9

Business necessity is used by an employer as a defense to discrimination on the basis that it is legitimately necessary to the business operations of the company. It is typically used as a defense in a disparate impact claim, but in this context Revere would likely argue that certain physical requirement were a business necessity. The physical requirements of the position were set out in the job posting [Stip. Facts: Exhibit A]. The posting makes clear that long periods of standing and lifting were a requirement for the job.

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Business Law Simulation Exercise for Managers: Employment Discrimination
Assignment Sheet (Format F)
Comparative Research Grid

Introduction: In this simulation, students learn the fundamentals of legal research and then apply those skills to develop a grid/chart that compares the enforceability tests, legal standards and requirements under federal anti-discrimination statutes and case law to the state anti-discrimination protections in a particular jurisdiction.

Assignment:

- Review chapter 13, then read the ***Stipulated Facts***, statutory excerpt, and case law in Parts 1 and 2 in this Simulation Exercise.

- Read Appendix A of your textbook: "A Business Student's Guide to Understanding Cases and Finding the Law." [**alternative**: Your instructor may also provide you with a brief tutorial on the use of various databases such as Lexis/Nexus® or Westlaw® available at your institution] for performing basic legal research.

- Prepare a grid that compares the federal antidiscrimination laws with the law in your own state. Be sure to name the cases or statutes that you use as a reference to complete the grid.

- The grid should be prepared as follows:

Federal Anti-discrimination Law	***Your State (Name)***	***Similarities***	***Distinctions***
Title VII: Protected classes: Race, Color National Origin, Gender, Religion and Pregnancy)			
Age Discrimination in Employment Act (ADEA)			
American with Disabilities Act (as amended by the ADAAA of 2008)			
Business necessity defense			
BFOQ defense			

Due Date: *[Instructor]*

Policy on late work: *[Instructor]*

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Teaching Tips:

⇒ For Graduate students or courses that have a more international law focus, the assignment may be modified to include a comparative law grid with a foreign country. Germany, Great Britain, Japan, and the United Arab Emirates all have a solid body of law covering discrimination in the workplace and each has a distinct cultural flavor to their rules. Appendix A in Chapter 1 of the textbook: **"A Business Student's Guide to Understanding Cases and Finding the Law"** provides several high-quality, free Web sites for legal research.

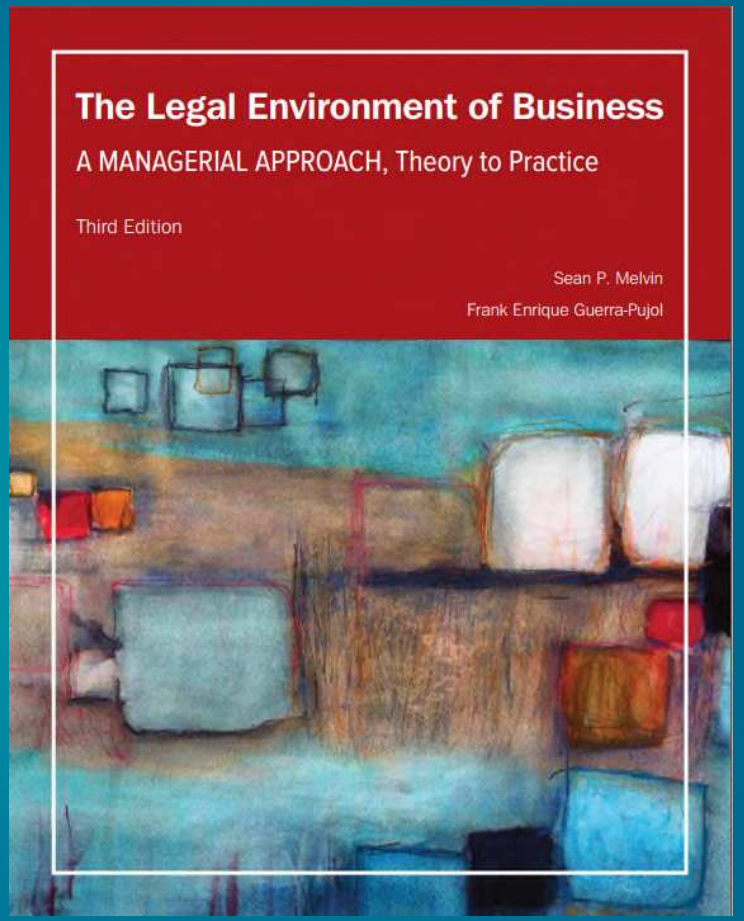
⇒ Instructors in certain classroom settings may wish to consider combining this format with one of the writing formats over a period of several weeks.

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Business and the Constitution

Chapter 2



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Learning Objectives

2-1 Describe the purpose and structure of the Constitution.
2-2 List the major provisions of the first three articles of the Constitution.
2-3 Explain the role of judicial review in interpreting the Constitution.
2-4 Recognize the three standards of constitutional review and their application.
2-5 Understand the scope of Congress's powers under the Commerce Clause.

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Learning Objectives

2-6 Describe constitutional restrictions on state regulation of commerce in the business environment.
2-7 Explain why Congress's tax and spend powers are an independent source of federal power.
2-8 Describe the main protections in the First Amendment and explain how they apply in the business environment.

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Learning Objectives

2-9 Describe the main protections in the Fourth Amendment and how they apply in the business environment.

2-10 Identify limits imposed on government power by virtue of the Due Process and Equal Protection clauses.

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Chapter Overview

- The structure of the U.S. Constitution and its role in the American legal system.
- The specific powers granted to the three branches of the federal government under the Constitution.
- The main constitutional rights and protections afforded to individuals and business entities in the Bill of Rights and the Fourteenth Amendment.

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Functions of the Constitution

- Establishes a *structure* for the federal government; that is, it creates three coequal branches
- Delegates enumerated and limited *powers* to each coequal branch of the federal government.
- Provides *procedural protections* to citizens, persons, and business firms

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Structure of the Constitution

- Preamble
- Seven articles
  - first three articles establish a system of government with three coequal branches: the **legislative branch**, the **executive branch**, and the **judicial branch**.
- 27 amendments
  - Bill of Rights (The first 10 amendments)

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Overview of Articles in the U.S. Constitution

TABLE 2.1 Overview of Articles in the U.S. Constitution

Article I	Establishes the legislative branch (a bicameral Congress composed of the House of Representatives and the Senate); sets qualifications for members of Congress; grants congressional powers (lawmaking).
Article II	Establishes the executive branch (president); sets qualifications for the presidency; grants executive powers (enforcement of laws).
Article III	Establishes the judicial branch, including a Supreme Court; grants certain judicial powers.
Article IV	Establishes the relationship between the states and the federal government; describes the power of Congress over territories and the admission of new states into the Union.
Article V	Describes the process for amending the Constitution in the future.
Article VI	Establishes the Constitution and federal law as the supreme law of the land; authorizes the national debt (Congress may borrow money); requires public officials to take an oath to support the Constitution.
Article VII	Lists the requirements for ratification of the Constitution.

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Article I—Congressional Powers

Among the powers of Congress that generally impact business are

1. the power to *regulate commerce* (**Commerce Clause**);
2. the power to tax and the power to spend government funds (*tax and spend provisions*); and
3. the power to regulate *bankruptcy, patents, and copyrights.*

- Congress has a *general implied power* to make all laws necessary for carrying out its enumerated powers

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Article II—Executive Powers

Presidential powers that affect business include:

1. the power to carry out laws made by Congress;
2. the power to enter into treaties (subject to Senate approval) and carry out foreign policy; and
3. the power to appoint federal officers and judges

- **Executive orders** have the force of law and are typically issued by the president as a method to carry out executive functions of government.

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Article III—Judicial Powers

- The federal judiciary adjudicates (decides) cases and controversies that fall within its authority
- Jurisdiction is the legal authority of a court to decide a specific case.

- **Judicial review**
  - the notion that federal courts have the right to invalidate state or federal laws that are inconsistent with the U.S. Constitution in some way.

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Separation of Powers

- The Constitution's creation of three coequal branches and its enumeration of government powers are part of an overall framework that is designed to ensure that no one branch exceeds its constitutional authority

- Based on a **separation of powers**, ensuring that no one branch becomes overly dominant over the other branches.

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Example of Constitutional Checks and Balances

TABLE 2.2 Example of Constitutional Checks and Balances

Branch	Power	Power Checked
Executive	Veto	Congress's lawmaking authority
Legislative	Override veto with supermajority	President's veto authority
Legislative	Impeachment and removal	Presidential misconduct and federal judicial power
Judicial	Invalidate a law as unconstitutional	Congress's authority to make laws; the president's authority to enforce laws

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Applying the Constitution: Standards of Judicial Review

The Supreme Court classifies the action into one of three categories of scrutiny:

1. **the rational basis** category
2. **intermediate-level scrutiny**
3. **strict scrutiny**

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Rational Basis Review

The government need only show:

1. that its action advanced a *legitimate* government objective (such as public welfare, health, or safety) and
2. that the action was somehow related to the government's objective.

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Intermediate-Level Scrutiny

Courts will uphold government actions as constitutional so long as the government can prove:

1. that its action advanced an important government objective (a higher level than the "legitimate" criterion used in the rational basis test) and
2. that the action is *substantially related* to the government's objective.

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Strict Scrutiny

Courts will uphold the law only if:

1. the government's objective is *compelling,*
2. the means chosen by the government to advance that objective are necessary to achieve that compelling end, and
3. no *less restrictive alternatives* exist.

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Supremacy Clause and Preemption

- **Supremacy Clause**
  - Article VI of the U.S. Constitution provides that federal laws are always *supreme* to any conflicting state law.
  - invalidates any state law that is in direct conflict with federal law
- **Preemption**
  - The power granted by the supremacy clause to override a state law

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Commerce Powers

- Congress's broadest power is derived from the Commerce Clause whereby Congress is given the power to "regulate Commerce among the several states."

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Application of Commerce Powers

Congress has the express constitutional authority to regulate:

1. channels of interstate commerce such as railways and highways,
2. the instrumentalities of interstate commerce such as vehicles used in shipping,
3. the articles moving in interstate commerce.

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Constitutional Restrictions on State Regulation of Commerce

- The U.S. Supreme Court has ruled that the mere existence of congressional commerce powers restricts the states from *discriminating* against or *unduly burdening* interstate commerce.

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Constitutional Restrictions on State Regulation of Commerce

States are free to regulate commerce so long as:

1. It does not impose a discriminatory law on out-of-state businesses and
2. The state law is a *legitimate* effort to regulate health safety and welfare.

❖ Gonzalez v Raich

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Tax and Spend Power

- Congress has the textual power to impose taxes and to spend federal tax revenues in any way that promotes the common defense and general welfare of the United States.
- It is an independent source of federal authority.

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Necessary and Proper Clause

- Congress may also place *conditions* on the use of federal money in order to achieve some public policy objective.
- Congress generally cites the Necessary and Proper Clause as authorization to set conditions on federal spending.

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Necessary and Proper Clause

Four-part test for evaluating the constitutionality of conditions attached to federal spending programs:

1. the spending power must be exercised in pursuit of the general welfare,
2. grant conditions must be clearly stated,
3. the conditions must be related to a federal interest in the national program or project, and
4. the spending power cannot be used to induce states to do things that would themselves be unconstitutional.

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Constitutional Protections

- The Constitution confers on persons and businesses many constitutional rights.
- Most of these rights are contained in the first 10 amendments to the Constitution (the Bill of Rights).
- Corporations and other business entities do *not* always receive the same level of constitutional protection as individuals

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First Amendment

- The **First Amendment** contains the important introductory phrase “Congress shall make no law” and then articulates several specific protections against government encroachment in the areas of religion, press, speech, assembly, and petition of grievances.
- Demonstrates that the framers intended the Constitution to function as a *limit* on federal government actions.

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Commercial Speech

- ***Part One:*** So long as the commercial speech concerns lawful activities and is not misleading, the speech qualifies for protection under the First Amendment.

- ***Part Two:*** The government must show that it has a *substantial government interest* in regulating the speech.

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Commercial Speech

- ***Part Three:*** The government must demonstrate that the restriction *directly advances* the government's interest.
- ***Part Four:*** The government's restriction must be *not more extensive* than necessary (not too broad) to achieve the government's asserted interest.

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Fourth Amendment

- A search or seizure conducted by the government is illegal without a warrant from a judge or magistrate.
- To obtain a warrant, the government must first demonstrate **probable cause** to a judge or a magistrate that the proposed search or seizure is justified under the law.

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Fourth Amendment

- The government, for example, does not need a warrant if there are “exigent circumstances” and if it is acting with probable cause and obtaining a warrant is impractical.

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Postscript: The USA Patriot Act

- This legislation increases the ability of law enforcement agencies to search e-mail and telephonic communications as well as medical, financial, and library records.
- Under the USA Patriot Act, law enforcement can use National Security Letters to investigate U.S. citizens, even when law enforcement does not think the individual under investigation has committed a crime.

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Due Process

- First, due process imposes certain *procedural* requirements on federal and state governments when they impair life, liberty, or property.
- Secondly, due process limits the *substantive* power of the states to regulate certain areas related to individual liberty

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Equal Protection

- The Equal Protection Clause is part of the Fourteenth Amendment and prohibits state governments from denying their citizens equal protection of the laws.
- Fundamentally, equal protection requires the government to treat people who are similarly situated equally.
- Does not mean that everyone must be treated exactly the same.

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The Right to Privacy

- Although not explicitly mentioned in the Constitution, the right to privacy plays a central role in constitutional law.
- The U.S. Supreme Court formally recognized a *constitutional* right to privacy in 1965 in the landmark case of *Griswold v. Connecticut*

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Federal Statutes

- **Health Insurance Portability and Accountability Act (HIPAA)**
  - regulates health care providers, health plans, and plan administrators in gathering, storing, and disclosing medical information about individuals.
  - requires that specific policies and record-keeping practices be used in order to ensure the privacy of any medical information, such as diagnoses, tests, medications,

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Workplace Privacy

- Most privacy rights afforded by the U.S. Constitution do not extend to the workplace.
- Nonetheless, privacy rights have become increasingly important to business owners and managers as Congress and state legislatures seek to clarify workplace privacy rights by statute.

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