7 Things You Need to Know About: Constitutional Law

Corey A Ciocchetti, University of Denver

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Professor Corey Ciocchetti
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Wisdom begins in wonder

-- Socrates
Constitutional Law

#1. Constitutional History
In Congress, July 4, 1776.

The unanimous Declaration of the thirteen United States of America.

In Congress, July 4, 1776, the Representatives of the United States of America, in General Congress, Assembled, 

Pursuant to the Resolution of 4th July last:

In the Declaration of Rights, made in the Year 1689, by the Parliament of Great Britain, the Project of abolishing Slavery was early introduced as a matter of immediate importance; and was carried into execution by the several Provinces of the British Empire. In the same Declaration, it was also provided, that the right of property shall be inviolable, and sacred. It is therefore evident, that the Colonies, being independent States, are entitled to all the Rights and Privileges of Free Governments, and, as such, are entitled to the protection of the United States; and that the Declaration of Independence, is an act of the most solemn and binding obligation.
U.S. Constitution

The Preamble

We the People of the United States, in Order to form a more perfect Union, establish Justice, INSURE domestic Tranquility, PROVIDE for the common defence, promote the GENERAL Welfare, & SECURE & Blessings of Liberty to ourselves and our POSTERITY, DO ordain & establish this Constitution for the UNITED STATES & AMERICA.
# U.S. Constitution

## The Articles

<table>
<thead>
<tr>
<th>Article I</th>
<th>The Legislative Branch</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article II</td>
<td>The Executive Branch</td>
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<tr>
<td>Article III</td>
<td>The Judicial Branch</td>
</tr>
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<td>Article IV</td>
<td>State v. Federal Relationship</td>
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<td>Article V</td>
<td>Amending the Constitution</td>
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<td>Article VI</td>
<td>Debt, Supremacy &amp; Oaths</td>
</tr>
<tr>
<td>Article VII</td>
<td>Ratifying the Constitution</td>
</tr>
</tbody>
</table>
The Bill of Rights
Ratified December 15, 1791

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Article III
No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Article IV
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Article V
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article VI
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor; and to have the Assistance of Counsel for his defence.

Article VII
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Article VIII
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Article IX
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Article X
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.
CONSTITUTIONAL LAW

#2. Basic Principles:
Federalism, Supremacy/Preemption, Separation of Powers & Checks & Balances
## Federalism

**Shared Sovereignty**

<table>
<thead>
<tr>
<th>Federal Constitution</th>
<th>State Constitutions</th>
</tr>
</thead>
<tbody>
<tr>
<td>7 articles</td>
<td>27 Amendments</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Federal Statutes</th>
<th>State Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICWA</td>
<td>ACA</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Federal Administrative Law</th>
<th>State Administrative Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rules &amp; regulations for the ACA, etc.</td>
<td></td>
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</table>

<table>
<thead>
<tr>
<th>Common Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Precedent</td>
</tr>
</tbody>
</table>
This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.
TYPES OF PREEMPTION

- Congress says state laws preempted | Express preemption
- Federal & State laws conflict | Conflict preemption
- Congress occupied field | Field preemption
- Congress doesn’t desire to displace state law

- State law preempted
- State law preempted
- State law preempted
- State law constitutional
Preemption

The Supremacy clause, Preemption & Marijuana

The Controlled Substances Act

Schedule I

Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Schedule I drugs are the most dangerous drugs of all the drug schedules with potentially severe psychological or physical dependence. Some examples of Schedule I drugs are:

- heroin
- lysergic acid diethylamide (LSD)
- marijuana (cannabis)
- 3,4-methylenedioxymethamphetamine (ecstasy)
- methaqualone
- peyote
<table>
<thead>
<tr>
<th>Offense</th>
<th>Penalty</th>
<th>Incarceration</th>
<th>Max. Fine</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Possession</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Any amount (first offense)</td>
<td>misdemeanor</td>
<td>1 year</td>
<td>$1,000</td>
</tr>
<tr>
<td>Any amount (second offense)</td>
<td>misdemeanor</td>
<td>15 days*</td>
<td>$2,500</td>
</tr>
<tr>
<td>Any amount (subsequent offense)</td>
<td>misdemeanor or felony</td>
<td>90 days* - 3 years</td>
<td>$5,000</td>
</tr>
<tr>
<td>* Mandatory minimum sentence</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Sale</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 50 kg</td>
<td>felony</td>
<td>5 years</td>
<td>$250,000</td>
</tr>
<tr>
<td>50 - 99 kg</td>
<td>felony</td>
<td>20 years</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>100 - 999 kg</td>
<td>felony</td>
<td>5 - 40 years</td>
<td>$500,000</td>
</tr>
<tr>
<td>1000 kg or more</td>
<td>felony</td>
<td>10 years - life</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>To a minor or within 1000 ft of a school, or other specified areas carries a double penalty.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Gift of small amount -- see Possession</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Cultivation</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Less than 50 plants</td>
<td>felony</td>
<td>5 years</td>
<td>$250,000</td>
</tr>
<tr>
<td>50 - 99 plants</td>
<td>felony</td>
<td>20 years</td>
<td>$1,000,000</td>
</tr>
<tr>
<td>100 - 999 plants</td>
<td>felony</td>
<td>5 - 40 years</td>
<td>$500,000</td>
</tr>
<tr>
<td>1000 plants or more</td>
<td>felony</td>
<td>10 years - life</td>
<td>$1,000,000</td>
</tr>
<tr>
<td><strong>Paraphernalia</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sale of paraphernalia</td>
<td>felony</td>
<td>3 years</td>
<td>N/A</td>
</tr>
</tbody>
</table>
(1) Purpose and findings.

(a) In the interest of the efficient use of law enforcement resources, enhancing revenue for public purposes, and individual freedom, the people of the state of Colorado find and declare that the use of marijuana should be legal for persons twenty-one years of age or older and taxed in a manner similar to alcohol.

(b) In the interest of the health and public safety of our citizenry, the people of the state of Colorado further find and declare that marijuana should be regulated in a manner similar to alcohol so that:
(3) Personal use of marijuana. Notwithstanding any other provision of law, the following acts are not unlawful and shall not be an offense under Colorado law or the law of any locality within Colorado or be a basis for seizure or forfeiture of assets under Colorado law for persons twenty-one years of age or older:

(a) Possessing, using, displaying, purchasing, or transporting marijuana accessories or one ounce or less of marijuana.

(b) Possessing, growing, processing, or transporting no more than six marijuana plants, with three or fewer being mature, flowering plants, and possession of the marijuana produced by the plants on the premises where the plants were grown, provided that the growing takes place in an enclosed, locked space, is not conducted openly or publicly, and is not made available for sale.

(c) Transfer of one ounce or less of marijuana without remuneration to a person who is twenty-one years of age or older.
As the Department noted in its previous guidance, Congress has determined that marijuana is a dangerous drug and that the illegal distribution and sale of marijuana is a serious crime that provides a significant source of revenue to large-scale criminal enterprises, gangs, and cartels. The Department of Justice is committed to enforcement of the CSA consistent with those determinations. The Department is also committed to using its limited investigative and prosecutorial resources to address the most significant threats in the most effective, consistent, and rational way. In furtherance of those objectives, as several states enacted laws relating to the use of marijuana for medical purposes, the Department in recent years has focused its efforts on certain enforcement priorities that are particularly important to the federal government:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs, and cartels;
- Preventing the diversion of marijuana from states where it is legal under state law in some form to other states;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
As with the Department’s previous statements on this subject, this memorandum is intended solely as a guide to the exercise of investigative and prosecutorial discretion. This memorandum does not alter in any way the Department’s authority to enforce federal law, including federal laws relating to marijuana, regardless of state law. Neither the guidance herein nor any state or local law provides a legal defense to a violation of federal law, including any civil or criminal violation of the CSA. Even in jurisdictions with strong and effective regulatory systems, evidence that particular conduct threatens federal priorities will subject that person or entity to federal enforcement action, based on the circumstances. This memorandum is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. It applies prospectively to the exercise of prosecutorial discretion in future cases and does not provide defendants or subjects of enforcement action with a basis for reconsideration of any pending civil action or criminal prosecution. Finally, nothing herein precludes investigation or prosecution, even in the absence of any one of the factors listed above, in particular circumstances where investigation and prosecution otherwise serves an important federal interest.
PREEMPTION

THE CHALLENGE
**Separation of Powers**

**Checks & Balances**

- **Congress**
  - Passes legislation
  - Overrides vetoes (2/3 vote)
  - Confirms nominees & controls budget
  - Impeaches Presidents & Judges
  - Revises legislation to overcome precedent
  - Approves treaties & ambassadors
  - Creates lower courts & set jurisdiction

- **The President**
  - Commander in Chief
  - Proposes legislation & vetoes legislation
  - Nominates Judges
  - May call special sessions of Congress
  - VP is President of the Senate
  - Pardon power

- **The Judiciary**
  - Invalidates legislation (judicial review)
  - Invalidates Exec./Administrative orders
  - Lifetime tenure
  - C.J. sits as V.P. of Senate during impeachments of a President

It’s good to avoid tyranny.
Constitutional Law

#4. Standards of Review
**How Judges Judge Laws**

**Rational Basis Test**
- Used for vast majority of laws
- Most laws pass

**Intermediate Scrutiny**
- Use for laws based on sex & commercial speech
- Few laws pass

**Strict Scrutiny**
- Used for laws based on protected speech, fundamental rights, race & national origin
- Even fewer laws pass

Law must be rationally related to a legitimate gov’t interest

Law must be substantially related to an important gov’t interest

Law must be narrowly tailored to serve a compelling gov’t interest
CONSTITUTIONAL LAW

#4. GOVERNMENTAL POWERS
# What May the Federal Government Do?

## The Enumerated Powers

<table>
<thead>
<tr>
<th>Levy &amp; Collect Taxes</th>
<th>Punish Crimes @ Sea</th>
</tr>
</thead>
<tbody>
<tr>
<td>Borrow Money</td>
<td>Declare War</td>
</tr>
<tr>
<td>Regulate Commerce</td>
<td>Maintain an Army &amp; Navy</td>
</tr>
<tr>
<td>Regulate Naturalization</td>
<td>Regulate the Military</td>
</tr>
<tr>
<td>Regulate Bankruptcy</td>
<td>Allow Pres. to Use Militia</td>
</tr>
<tr>
<td>Coin $$ &amp; Regulate Its Value</td>
<td>Maintain State Militias</td>
</tr>
<tr>
<td>Punish Counterfeiting</td>
<td>Govern the Capitol</td>
</tr>
<tr>
<td>Establish Post Offices</td>
<td>Govern U.S. Possessions</td>
</tr>
<tr>
<td>Promote Copyrights &amp; Patents</td>
<td>Make Laws That Are Necessary &amp; Proper to Do the Above</td>
</tr>
<tr>
<td>Establish a Court System</td>
<td></td>
</tr>
</tbody>
</table>
"The Congress shall have Power To...regulate Commerce...among the several States...."

ARTICLE 1, SECTION 8, CLAUSE 3

**KEY WORDS:**
- Congress
- To Regulate
- Shall have
- Commerce
- Power
- Among the several States
“The Congress shall have Power To...regulate Commerce...among the several States....”

**ARTICLE 1, SECTION 8, CLAUSE 3**

**Congress may regulate:**
1. **Channels of Interstate commerce**
2. **Persons or Things in Interstate Commerce**
3. **Activities that substantially affect Interstate commerce**

**This is a broad power**

**Wickard v. Filburn**

**But can Congress compel someone to enter commerce?**

**Guaranteed Issue**

**Community Rating**

**Does failure to purchase insurance substantially affect Interstate Commerce?**

**Otherwise it’s a tax**

**Premiums rise when uninsured seek care**

**Hospitals must treat them**

**Pass costs to insurers**

**Insurers pass costs to consumers | Cost-shifting**
What Happens when the Government Exceeds its Enumerated Powers?

**NAT’L FEDERATION OF IND. BUSINESSES V. SEBELIUS (U.S. 2012)**

**The Majority Opinion**

**Congress has power to “regulate commerce”**

**This presupposes that commercial “activity” already exists**

**Granting Congress the power to force someone into commerce extends its power past Commerce Clause boundaries**

**Congress could then order everyone to buy vegetables as unhealthy diets involve similar cost shifting**
CONSTITUTIONAL LAW

#5. LIMITS ON GOVERNMENT & AMENDING THE CONSTITUTION
Many founders thought the enumerated powers would constrain the Federal Government . . .

but many citizens disagreed.

“The Constitution is itself, in every rational sense, and to every useful purpose, a Bill of Rights.”
-- Alexander Hamilton

“The Bill of Rights is what the People are entitled to against every government, and no Just Government should refuse, or rest on inference.”
-- Thomas Jefferson
The Bill of Rights
Ratified December 15, 1791

Article I
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

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Article X
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LIMITS ON GOVERNMENT

CONSTITUTIONAL AMENDMENTS

Amendments tell the Federal (and sometimes state) government what it must & can’t do.

- For example . . . the Gov’t can’t:
  - ABRIDGE THE FREEDOM OF SPEECH
  - INFRINGE THE RIGHT TO BEAR ARMS
  - ESTABLISH A RELIGION
  - PROHIBIT THE FREE EXERCISE OF RELIGION
  - SEARCH WITHOUT A WARRANT
- FORCE PEOPLE TO SELF-INCRIMINATE
- DENY A SPEEDY TRIAL OR COUNSEL IN CRIMINAL CASES
- DENY DS A JURY IN MOST CASES
- VIOlate due process
- Conduct cruel & unusual punishment

"When governments fear the people, there is liberty.
When the people fear the government, there is tyranny."

-- Thomas Jefferson
Article V: Amending the Constitution

Option #1

2/3 of Congress propose an amendment

3/4 of State Legislatures/Conventions ratify (Congress decides)

Option #2

2/3 of State Legislatures call a National Constitutional Convention

3/4 of State Legislatures/Conventions ratify (Congress decides)
**Article V: Amending the Constitution**

- **Overturn Citizens United**
- **D.C. Statehood**
- **Balanced Budget Amendment**
- **Term Limits Expired**
- **Electoral College Changes**
CONSTITUTIONAL LAW

#6. State Police Powers
Amendment 10

The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.
**State Police Power**

States allowed to interfere w/ individual autonomy, liberty, privacy & property

Inherent powers as sovereign | can be delegated to local governments

**States can make laws to protect:**

1. Health
2. Safety
3. Morals (i.e., prohibiting public fornication/nuddity in parks)
   (But . . . what about private morals?)
4. General Welfare

Of their inhabitants | can't go outside of these limits

U.S. Constitution is silent on state police powers but, of course, it is not the source of their power.
The Police Power

Typical police powers

- State Taxes
- Licensing of Professionals
- Traffic, Motor Vehicle & Parking Regulations
- Fire/Building Codes, Sanitation & Zoning
- Rent Control & Nuisance Regulations
- Gambling & Liquor Laws
- Schooling
- Voting
#7. Business Speech
THE 1st AMENDMENT

-- Speech, Religion, Press, Assembly & Petition --

THE FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.

Businesses speak all the time
Free Speech Refresher

Hierarchy of First Amendment Protection

Protected Non-Commercial Speech

Commercial Speech

Unprotected Speech

Political Speech | Offensive Speech
Strict Scrutiny

Speech related to economic interests of speaker
Less valuable than political speech
Central Hudson Test

Obscenity | Child Pornography
Fighting Words | Incitement
Most Defamation | Plagiarism
Perjury | Blackmail
"We return to the principle . . . that the Government may not suppress political speech on the basis of the speaker’s corporate identity. No sufficient governmental interest justifies limits on the political speech of non-profit or for-profit corporations."

-- Justice Kennedy
# Commercial Speech

**Central Hudson Test**

| Prong #1 | **Does the speech concern a lawful activity?**  
| **Is the speech misleading?**  
| This brings the speech w/in the 1st Amendment |
| Prong #2 | **Is the asserted gov’t interest substantial?** |
| Prong #3 | **Does the regulation directly advance the asserted gov’t interest?** |
| Prong #4 | **Is the regulation narrowly tailored?**  
| Gov’t doesn’t need to use the least restrictive means possible here |
“Presidents come and go, but the Supreme Court goes on forever.”

-- William Howard Taft
“The Constitution only gives people the right to pursue happiness. You have to catch it yourself.”

--Benjamin Franklin
Wisdom begins in wonder
-- Socrates

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facebook.com/profc