

**CONSTITUTIONAL LAW**

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**CONSTITUTIONAL LAW**

recall separation of powers

CONSTITUTIONS

STATES: limits on State power imposed by  
People's action and by States' grants  
to federal in Constitution  
\* assume States have the power to act

FEDERAL: grant of power from States  
\* assume the federal government has  
NO power to act

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**MAJOR POWERS**

STATES:

POLICE POWER

TAX

FEDERAL:

NO federal domestic police power  
but general welfare: Art. I, Sec. 8, cl. 1

COMMERCE CLAUSE: Art. I, Sec. 8, cl. 3.

TAX

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**EXCLUSIVELY(?) FEDERAL POWERS:**

Art. I, §8 + Art. I, § 10  
coin money; bankruptcy; foreign affairs

Note the combined effects of  
Art. I, § 8, § 9, § 10  
Art. VI, ¶2  
Amd. IX  
Amd. X

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**CONSTITUTIONAL LAW, continued**

**FEDERALISM**

the essence of federalism is a  
SEPARATION OF POWERS.  
this separation of powers occurs along  
several power centers

**INDIVIDUALS**

knowing + voluntary = responsible

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**"BILL of RIGHTS" AMENDMENTS**

- 1 religion, speech, assembly, petition
- 2 State regulation of Militia's arms
- 3 quartering soldiers
- 4 search and seizure
- 5 self incrimination; double jeopardy;  
due process; taking with compensation
- 6 speedy, public trial; right to attorney
- 7 jury trial
- 8 bail; no cruel & unusual punishment
- 9 enumeration not disparaged rights  
retained by People
- 10 residual powers of States and the People

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NOTE: sections on Militia: Art. I, Sec. 8, cl. 15 & 16  
Art. II, Sec. 2, ¶ 1  
Art. IV, Sec. 4  
Amd. 2

NOTE: Amd XI and Amd. XXVII were part of the original Bill of Rights

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**CONSTITUTIONAL LAW, continued**  
**FEDERALISM, continued**

*between power centers:*  
**PRESUME CONCURRENT POWERS**

**FEDERAL GOVERNMENT**

- only has those powers granted to it by the States
- must be in the U.S.A. Constitution  
note especially  
NO federal domestic police power  
COMMERCE CLAUSE

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**STATE GOVERNMENTS**

**States start with all governmental powers.**

**note especially the POLICE POWER**

power of the State to **regulate** to protect the People's

- health
- safety
- morals
- general welfare

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State governments LACK THOSE POWERS

given to the federal government by the States

but note: 2nd: Right to bear arms  
 but note: 10th: RESIDUAL POWERS  
 but note: States *not* covered by 9th  
 but note: Amd. XXI

OR

taken away from the State by its People.

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**FEDERAL GOVERNMENT**

**COMMERCE CLAUSE:**  
**commerce among the several States**

pre - 1937 direct EFFECT (result)  
 transportation, but not manufacturing

post- 1937 *close and substantial AFFECT (cause)*  
 transportation AND manufacturing

core powers	tree	transportation
penumbras	shadow	manufacturing
emanations	breeze	retail

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**SUPREMACY CLAUSE**, Art. VI, ¶ 2:  
 preemption doctrine  
 (This section of the Constitution also is the source of  
 Judicial Review. Can you find it?)

Preemption is NOT favored,  
 but MAY be allowed IF:

- 1) clear intent (silence?) of Congress AND  
 national interests outweigh State interests;

OR

- 2) express intent of Congress AND  
 need for uniformity.

**CONCURRENT POWERS UNLES DIRECT CONFLICT**

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**FREE SPEECH**  
**POLITICAL** free speech  
*right of speaker*  
time, place, manner  
reasonable regulations

**no content regulation:** never, no how, no way

**COMMERCIAL** free speech  
*right of listener*  
time, place, manner  
reasonable regulations

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**CONTENT REGULATION OF COMMERCIAL FREE SPEECH IF**  
substantial government interest, e.g.,  
1) deceptive, or  
2) illegal

**BUT ONLY IF REGULATION**  
1) directly advances substantial government interest  
2) proportional to substantial government interest, and  
3) LEAST (i.e., narrowly tailored) restrictive alternative means of satisfying substantial government interest

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Note difference in treatment of political free speech with a commercial impact under the antitrust law versus the RICO Act.

Narrow Congressional intent and narrow statutory language in the antitrust law lead the Court to hold the political aspect dominant; but under the most expansive RICO Act the political aspect is subservient.

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**PRIVACY**

reasonable expectation of privacy

The word "privacy" never appears in the USA Constitution.

- \* The first use of the concept in USA legal literature was in 1890.
- \* The constitutional right of privacy is found via Amendments IX and X, and is a part of "liberty."
- \* 4th Amendment home and papers  
WARRANT requires probable cause  
criminal v. regulatory probate cause
- \* 5th Amendment criminal testimony  
BUT public records; and corporations (versus custodian)

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**Government, the People; and information**

**FREEDOM OF INFORMATION ACT:**

information about the Government  
DISCLOSE, unless exempt

**PRIVACY ACT:**

information about citizens  
do not gather  
allow access and correction  
do not disclose

**SUNSHINE LAW:**

open meetings

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14th Amendment applies to the States

Due Process Clause

Incorporation Doctrine or Absorption Doctrine  
due process = Bill of Rights' fundamental rights,  
not verbatim

"life, liberty, and property"  
liberty includes privacy

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**14th Amendment** applies to the States  
Equal Protection Clause  
Rational Basis Test  
social and economic regulation  
presumed valid legitimate State interest  
Heightened Judicial Review Test  
no sensible basis for different treatment  
e.g., gender  
substantial relationship to  
important government interest  
Strict Scrutiny Test  
seldom relevant to achievement of  
least drastic means of achieving  
compelling State interest  
i.e., race, alienage, national origin

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**"PERSON"**  
person is a legal concept that has continually evolved  
with respect to

- who is a person
- what rights and obligations exist
- means of enforcement

U.S. Constitution  
person  
not dependent upon citizenship  
Bill of Rights

only within the U.S. for non-citizens  
Customs Service is contact before the border

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citizen

- how become: 14th Amendment
- born in U.S.
- naturalized
- rights and obligations
- civic: vote, hold office, jury
- military: service; Amendment #3: quarter soldiers
- dual citizenship
- with the States
- with Indian Tribes
- 14th Amendment
- privileges and immunities
- with foreign nations not recognized

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due process  
"life, liberty, or property"

incorporation doctrine:  
fundamental rights in Bill of Rights

current flash point: abortion

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