CHAPTER 2

BUSINESS AND THE CONSTITUTION

ANSWER TO CRITICAL THINKING QUESTION IN THE FEATURE

INSIGHT INTO E-COMMERCE—LEGAL CRITICAL THINKING—INSIGHT INTO SOCIAL MEDIA (PAGE 35)

Facebook has numerous computers, all programmed by humans, of course. If Facebook's computers make decisions that allow your private information to be shared without your knowledge, should the First Amendment protect Facebook? Why or why not? The issue of protecting privacy has both technological and ethical aspects. From the technological point of view, Facebook and other social media companies have the ability to protect users' private information. From an ethical point of view, some argue that Facebook and other social media companies *must* protect all users' private information. Then there are ethical issues that surround the private information that so many companies now have because of their presence on the Internet. Does a social media user's right to privacy outweigh a social media company's free speech rights with respect to what its computers editorially decide? This is not an easy question to answer.

ANSWERS TO QUESTIONS AT THE ENDS OF THE CASES

CASE 2.1—LEGAL REASONING QUESTIONS (PAGE 32)

1A. ***The court held that the Massachusetts statute discriminated against out-of-state wineries "by design" (intentionally). How can a court determine legislative intent?*** Courts often look to legislative proceedings (transcriptions of meeting minutes, hearings, floor debates, and the like) to determine legislative intent. In this case, for example, the court cited comments during floor debate made by several Massachusetts legislators about the new winery-regulating law. One senator acknowledged that "we are really still giving an inherent advantage indirectly to the local wineries." Another senator urged that apple and other fruit wines not be included in the gallonage cap of 30,000 because otherwise, Massachusetts's then largest winery, which was located in the senator's district, would exceed that cap. Shortly afterward, the draft of the

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law was amended to exempt non-grape fruit wine production from the 30,000 cap. The courts also can make an inference of discriminatory intent, or purpose, based on the effects of the law.

For example, in this case the court noted that Massachusetts's definition of "small" wineries as those producing less than 30,000 gallons of wine per year departed considerably from the wine industry's definition of "small" wineries. The wine industry defined "small" wineries as those producing 120,000 or fewer gallons per year, and no other state had set a gallonage cap as low as Massachusetts's cap for defining "small" wineries. Additionally, observed the court, the industry did not differentiate between wineries that produce fruit as opposed to grape wine. According to the court, these and other effects of the law evinced an intent to discriminate on the part of the Massachusetts legislature.

2A. ***Suppose that most "small" wineries, as defined by the 2006 Massachusetts law, existed out of state. How could the law be discriminatory in that situation?*** This was one of Massachusetts's arguments before the appellate court. Massachusetts claimed that because most "small" wineries were located out of state, the law disproportionately benefited—rather than discriminated against—out-of-state wineries. The court, however, concluded that the much greater disadvantages that the law imposed on out-of-state "large" wineries exceeded the benefits that the out-of-state "small" wineries received.

3A. ***Suppose that the state had only required the out-of-state wineries to obtain a special license that was readily available. Would this have affected the outcome of the case? Explain.*** Possibly, although the effect of this requirement on interstate commerce would have been subject to scrutiny and the result might have depended on its economic impact and other considerations. It seems unlikely that this type of regulation would have as heavily burdened the interstate sale of wine as the requirements at issue in this case, but in some cases, even slight infringements on interstate commerce have been invalidated

4A. When it is difficult to predict how the law might be applied—as in cases arising under the dormant commerce clause—what is the best course of conduct for a business? There are many "gray areas" of the law in which it is difficult to predict how a court will rule in a particular set of circumstances. For example, if a consumer's misuse of a product harms the consumer or someone else, should liability be imposed on the manufacturer or seller? The best course for a business to pursue in areas in which the application of the law is uncertain is to act responsibly and in good faith

CASE 2.2—QUESTIONS (PAGE 37)

THE LEGAL ENVIRONMENT DIMENSION

What is an injunction? What did the plaintiff in this case hope to gain by seeing an injunction? An injunction is a court decree ordering a person to do or refrain from doing a certain act or activity. In this case, the plaintiff Doe asked the court to issue an injunction to block the state's enforcement of a law banning his use of certain Web sites and programs.

THE SOCIAL DIMENSION

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Could a state effectively enforce a law that banned all communication between minors and sex offenders through social media sites? Why or why not? The requirement of narrow tailoring may be satisfied so long as the state's interest would be achieved less effectively without the statute. In other words, the Constitution tolerates some over-inclusiveness if it furthers the state's ability to administer the regulation and combat an evil. And a law that banned all communication between minors and sex offenders through social media would almost certainly enhance the safety of minors, and burden less speech than the statute at issue in the *Doe* case. But such a statute would nevertheless create problems. It would free most expression from regulation but still prohibit a substantial amount of harmless speech—for example, it would prohibit conversations between a parent and child if the parent is a sex offender.

CASE 2.3—QUESTIONS (PAGE 39)

WHAT IF THE FACTS WERE DIFFERENT?

If Bad Frog had sought to use the offensive label to market toys instead of beer, would the court's ruling likely have been the same? Why or why not? Probably not. The reasoning underlying the court's decision in the case was, in part, that "the State's prohibition of the labels . . . does not materially advance its asserted interests in insulating children from vulgarity . . . and is not narrowly tailored to the interest concerning children." The court's reasoning was supported in part by the fact that children cannot buy beer. If the labels advertised toys, however, the court's reasoning might have been different.

THE LEGAL ENVIRONMENT DIMENSION

Whose interests are advanced by the banning of certain types of advertising? The government's interests are advanced when certain ads are banned. For example, in the *Bad Frog* case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of "vulgar and profane" advertising from children's sight arguably advanced the state's interest in protecting children from those ads.

ANSWERS TO QUESTIONS IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

1A. ***Equal protection***

When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

2A. ***Levels***

The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are strict scrutiny (if fundamental rights are at stake), intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and the rational basis test (in

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matters of economic or social welfare).

3A. *Standard*
The court would likely apply the rational basis test. Similar to seat-belt laws and speed limits, a statute requiring motorcyclists to wear helmets involves the state's attempt to protect the welfare of its citizens. Thus, the court would consider the statute a matter a social welfare and require that it be rationally related to a legitimate government objective.

4A. *Application*
The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

ANSWER TO DEBATE THIS QUESTION IN THE REVIEWING FEATURE AT THE END OF THE CHAPTER

Legislation aimed at "protecting people from themselves" concerns the individual as well as the public in general. Protective helmet laws are just one example of such legislation. Should individuals be allowed to engage in unsafe activities if they choose to do so? Certainly, many will argue in favor of individual rights. If certain people wish to engage in risky activities such as riding motorcycles without a helmet, so be it. That should be their choice. No one is going to argue that motorcycle riders believe that there is zero danger when riding a motorcycle without a helmet. In other words, individuals should be free to make their own decisions and consequently, their own mistakes.

In contrast, there is a public policy issue involved. If a motorcyclist injures him- or herself in an accident because he or she was not wearing a protective helmet, society ends up paying in the form of increased medical care expenses, lost productivity, and even welfare for other family members. Thus, the state has an interest in protecting the public in general by limiting some individual rights.

ANSWERS TO ISSUE SPOTTERS IN THE EXAMPREP FEATURE AT THE END OF THE CHAPTER

1A. ***Can a state, in the interest of energy conservation, ban all advertising by power utilities if conservation could be accomplished by less restrictive means? Why or why not?*** No. Even if commercial speech is not related to illegal activities nor misleading, it may be restricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this case, the interest in energy conservation is substantial, but it could be achieved by less restrictive means. That would be the utilities' defense against the enforcement of this state law.

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2A. *Suppose that a state imposes a higher tax on out-of-state companies doing business in the state than it imposes on in-state companies. Is this a violation of equal protection if the only reason for the tax is to protect the local firms from out-of-state competition? Explain.* Yes. The tax would limit the liberty of some persons (out of state businesses), so it is subject to a review under the equal protection clause. Protecting local businesses from out-of-state competition is not a legitimate government objective. Thus, such a tax would violate the equal protection clause.

ANSWERS TO BUSINESS SCENARIOS AND BUSINESS CASE PROBLEMS AT THE END OF THE CHAPTER

2–1A. *Commerce clause*

(Chapter 2—Page 30)

A Georgia statute that requires the use of contoured rear-fender mudguards on trucks and trailers operating within its state lines, when thirty-five other states make it legal to use straight mudguards and Florida explicitly mandates the use of straight mudguards, would violate the commerce clause. This hypothetical question is based on *Bibb v. Navajo Freight Lines, Inc.* [359 U.S. 520, 79 S.Ct. 962, 3 L.Ed.2d 1003 (1959)], in which the United States Supreme Court concluded that a similar statute placed an unconstitutional burden upon interstate commerce. In *Bibb,* the Court acknowledged the fact that a state that insists upon a particular regulation may sometimes place a substantial burden of delay and inconvenience on interstate commerce. As in *Bibb,* the burden placed on interstate commerce by this Georgia statute would outweigh Georgia's interest in regulating its highways. According to the facts in this hypothetical, the contoured mudguard is not clearly superior in safety to the straight mudguard.

2–2A. *Freedom of religion*

(Chapter 2—Page 40)

As the text points out, Thomas has a constitutionally protected right to his religion and the free exercise of it. In denying his unemployment benefits, the state violated these rights. Employers are obligated to make reasonable accommodations for their employees' beliefs, right or wrong, that are openly and sincerely held. Thomas's beliefs were openly and sincerely held. By placing him in a department that made military goods, his employer effectively put him in a position of having to choose between his job and his religious principles. This unilateral decision on the part of the employer was the reason Thomas left his job and why the company was required to compensate Thomas for his resulting unemployment.

2–3A. *Equal protection*

(Chapter 2—Page 43)

According to the standards applied to determine compliance with the equal protection clause, this ordinance's classification—a gender-based distinction—is subject to intermediate scrutiny. Under this standard, the court could dismiss the plaintiffs' complaint. Gender-based distinctions are acceptable in circumstances in which the two genders are not similarly situated. The city's objectives of preventing crime, maintaining property values, and preserving the quality of urban

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life, are legitimate and important. Regulation of female, but not male, topless dancing, in the context of the overall regulation of sexually explicit commercial establishments, could reasonably be interpreted as substantially related to achieving these objectives. The court might point out, for example, that males are often topless on beaches, in sporting events, during performances at the ballet, and in magazine photos without sexual suggestiveness. Female breasts are rarely exposed in public venues without sexual overtones, however. This arguably makes it permissible for the law to regard female toplessness differently from male toplessness.

2–4A. SPOTLIGHT ON PLAGIARISM—*Due process*

To adequately claim a due process violation, a plaintiff must allege that he was deprived of "life, liberty, or property" without due process of law. A faculty member's academic reputation is a protected interest. The question is what process is due to deprive a faculty member of this interest and in this case whether Gunasekera was provided it. When an employer inflicts a public stigma on an employee, the only way that an employee can clear his or her name is through publicity. Gunasekera's alleged injury was his public association with the plagiarism scandal. Here, the court reasoned that "a name-clearing hearing with no public component would not address this harm because it would not alert members of the public who read the first report that Gunasekera challenged the allegations. Similarly, if Gunasekera's name was cleared at an unpublicized hearing, members of the public who had seen only the stories accusing him would not know that this stigma was undeserved." Thus the court held that Gunasekera was entitled to a public name-clearing hearing.

2–5A. *Commerce clause*

(Chapter 2—Page 30)

Under the commerce clause, the national government has the power to regulate every commercial enterprise in the United States. The commerce clause may not justify national regulation of noneconomic conduct. Interstate travel involves the use of the channels of interstate commerce, however, and is properly subject to congressional regulation under the commerce clause. Thus, SORNA—which makes it a crime for a sex offender to fail to re-register as an offender when he or she travels in interstate commerce—is a legitimate exercise of congressional authority under the commerce clause.

In the actual case on which this problem is based, a federal district court dismissed Hall's indictment. On the government's appeal, the U.S Court of Appeals for the Second Circuit reversed the dismissal and remanded the case for further proceedings, based on the reasoning stated above.

2–6A. BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Establishment clause*

The establishment clause prohibits the government from passing laws or taking actions that promote religion or show a preference for one religion over another. In assessing a government action, the courts look at the predominant purpose for the action and ask whether the action has the effect of endorsing religion.

Although here DeWeese claimed to have a nonreligious purpose for displaying the poster of the Ten Commandments in a courtroom, his own statements showed a religious purpose.

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These statements reflected his views about “warring” legal philosophies and his belief that “our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments.” This plainly constitutes a religious purpose that violates the establishment clause because it has the effect of endorsing Judaism or Christianity over other religions. In the case on which this problem is based, the court ruled in favor of the American Civil Liberties Union.

2–7A. *The dormant commerce clause*

(Chapter 2—Page 31)

The court ruled that like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. The law requiring companies that sell cement in Puerto Rico to place certain labels on their products is clearly an attempt to regulate the cement market. The law imposed labeling regulations that affect transactions between the citizens of Puerto Rico and private companies. State laws that on their face discriminate against foreign commerce are almost always invalid, and this Puerto Rican law is such a law. The discriminatory labeling requirement placed sellers of cement manufactured outside Puerto Rico at a competitive disadvantage. This law therefore contravenes the dormant commerce clause.

2–8A. *Freedom of speech*

(Chapter 2—Page 34)

No, Wooden’s conviction was not unconstitutional. Certain speech is not protected under the First Amendment. Speech that violates criminal laws—threatening speech, for example—is not constitutionally protected. Other unprotected speech includes fighting words, or words that are likely to incite others to respond violently. And speech that harms the good reputation of another, or defamatory speech, is not protected under the First Amendment.

In his e-mail and audio notes to the alderwoman, Wooden discussed using a sawed-off shotgun, domestic terrorism, and the assassination and murder of politicians. He compared the alderwoman to the biblical character Jezebel, referring to her as a “bitch in the Sixth Ward.” These references caused the alderwoman to feel threatened. The First Amendment does not protect such threats, which in this case violated a state criminal statute. There was nothing unconstitutional about punishing Wooden for this unprotected speech.

In the actual case on which this problem is based, Wooden appealed his conviction, arguing that it violated his right to freedom of speech. Under the principles set out above, the Missouri Supreme Court affirmed the conviction.

2–9A. A QUESTION OF ETHICS—*Defamation*

(a) The answers to these questions begin with the protection of the freedom of speech under the First Amendment. The freedom to express an opinion is a fundamental aspect of liberty. But this right and its protection are not absolute. Some statements are not protected because, as explained in the *Balboa* decision, “they are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Defamatory statements are among those that are not protected.

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Arguments in favor of protecting such statements include the perception of the right to freedom of speech as necessary to liberty and a free society. Arguments opposed to such protection include "the social interest in order and morality." In between these positions might fall a balancing of both their concerns. Under any interpretation the degree to which statements can be barred before they are made is a significant question.

In the *Balboa* case, the court issued an injunction against Lemen, ordering her to, among other things, stop making defamatory statements about the Inn. On appeal, a state intermediate appellate court invalidated this part of the injunction, ruling that it violated Lemen's right to freedom of speech under the Constitution because it was a "prior restraint"—an attempt to restrain Lemen's speech before she spoke. On further appeal, the California Supreme Court phrased "the precise question before us [to be] whether an injunction prohibiting the repetition of statements found at trial to be defamatory violates the First Amendment." The court held it could enjoin the *repetition* of such statements without infringing Lemen's right to free speech. Quoting from a different case, the court reasoned, "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment. An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint." The court added that the injunction could not prevent Lemen from complaining to the authorities, however.

(b) To answer this question requires a standard to apply to the facts. A different chapter in the text sets out two fundamental approaches to ethical reasoning: one involves duty-based standards, which are often derived from religious precepts, and the other focuses on the consequences of an action and whether these are the "greatest good for the greatest number."

Under the former approach, a pre-established set of moral values founded on religious beliefs can be taken as absolute with regard to behavior. Thus, if these values proscribed Lemen's name-calling as wrong, it would be construed as wrong, regardless of the truth of what she said or any effect that it had. Similarly, if the values prescribed Lemen's conduct as correct, it might be unethical not to engage in it. A different duty-based approach grounded on philosophical, rather than religious, principles would weigh the consequences of the conduct in light of what might follow if everyone engaged in the same behavior. If we all engaged in name-calling, hostility and other undesirable consequences would likely flourish. A third duty-based approach, referred to as the principle of rights theory, posits that every ethical precept has a rights-based corollary (for example, "thou shalt not kill" recognizes everyone's right to live). These rights collectively reflect a dignity to which we are each entitled. Under this approach, Lemen's name-calling would likely be seen as unethical for failing to respect her victims' dignity.

Finally, an outcome-based approach focuses on the consequences of an act, requiring a determination as to whom it affects and assessments of its costs and benefits, as well as those of alternatives. The goal is to seek the maximum societal utility. Here, Lemen's behavior appears to have had little positive effect on herself or the objects of her criticism (the Inn, its employees, its patrons, and its business). The Inn's business seems to have been affected in a substantial way, which in Lemen's eyes may be a "benefit," but in the lives of its owners, employees, and customers, would more likely be seen as a "cost."

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2–10A. LEGAL REASONING GROUP ACTIVITY—*Free speech and equal protection*

(**a**) The rules in this problem regulate the content of expression. Such rules must serve a compelling governmental interest and must be narrowly written to achieve that interest. In other words, for the rules to be valid, a compelling governmental interest must be furthered only by those rules. To make this determination, the government's interest is balanced against the individual's constitutional right to be free of the rules. For example, a city has a legitimate interest in banning the littering of its public areas with paper, but that does not justify a prohibition against the public distribution of handbills, even if the recipients often just toss them into the street. In this problem, the prohibition against young adults' possession of spray paint and markers in public places imposes a substantial burden on innocent expression because it applies even when the individuals have a legitimate purpose for the supplies. The contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti also undercuts any claim that the interest in eliminating illegal graffiti could not be achieved as effectively by other means.

(**b**) The rules in this problem do not regulate the content of expression—they are not aimed at suppressing the expressive conduct of young adults but only of that conduct being fostered on unsuspecting and unwilling audiences. The restrictions are instead aimed at combating the societal problem of criminal graffiti. In other words, the rules are content neutral. Even if they were not entirely content neutral, expression is always subject to reasonable restrictions. Of course, a balance must be struck between the government's obligation to protect its citizens and those citizens' exercise of their right. But the rules at the center of this problem meet that standard. Young adults have other creative outlets and other means of artistic expression available.

(**c**) Under the equal protection clause of the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." This clause requires a review of the substance of the rules. If they limit the liberty of some person but not others, they may violate the equal protection clause. Here, the rules apply only to persons under the age of twenty-one. To succeed on an equal protection claim, opponents should argue that the rules should be subject to strict scrutiny—that the age restriction is similar to restrictions based on race, national origin, or citizenship.

Under this standard, the rules must be necessary to promote a compelling governmental interest. The argument would be that they are not necessary—there are other means that could accomplish this objective more effectively. Alternatively, opponents could argue that the rules should be subject to intermediate scrutiny—that the age restriction is similar to restrictions based on gender or legitimacy. Under this level of scrutiny, the restrictions must be substantially related to an important government objective. In this problem, the contrast between the numbers of those cited for violating the rules and those arrested for actually making illegal graffiti undermines any claim that the restrictions are substantially related to the interest in eliminating illegal graffiti. If neither of these arguments is successful, opponents could cite these same numbers to argue that the rules are not valid because there is no rational basis on which their restrictions on certain persons relate to a legitimate government interest.

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