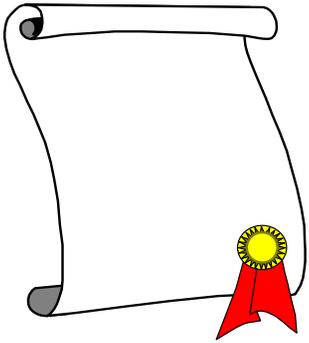


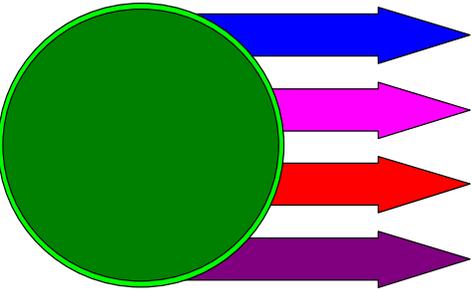
# **The Constitution: Focus on Application to Business**

## **Chapter 5**



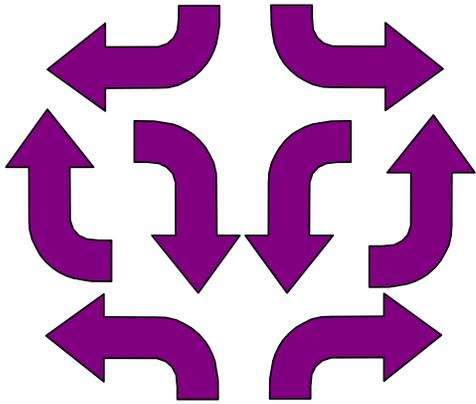
# The Constitution of the United States

- **“We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”**
- ***See Appendix C***



# Articles of the Constitution

- **I. Composition and powers of Congress**
- **II. Selection and powers of the president**
- **III. Creation and powers of the federal judiciary**
- **IV. Role of the states in the federal system**
- **V. Methods of Amending the Constitution**
- **VI. Declaring the Constitution to be supreme law of the land**
- **VII. Method for ratifying the Constitution**



# The Constitutional Amendments

- The constitutional amendments began almost immediately after it was ratified.
- In 1791 the first 10 amendments were ratified by the States. These are called the **Bill of Rights**.
- A proposed amendment must be passed by  $2/3$  vote in the House and Senate
- Then ratified by  $3/4$  of state legislatures **OR**
- May be proposed by  $2/3$  of state legislatures by calling for a constitutional convention
  - This in turn must be ratified by  $3/4$  of state legislatures

- Constitution applies only to governmental (state) action, not private action.

# COMMERCE CLAUSE

## Art. I, Section 8



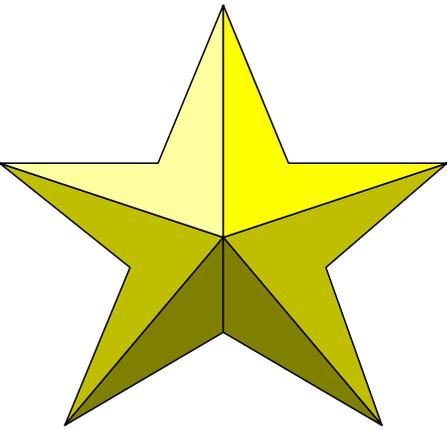
- Congress has power: “Regulate Commerce w/foreign Nations & among the several States, and w/the Indian Tribes”
- Deals with “*interstate commerce*”
- More power in State or Federal Government?



# **Necessary and Proper Clause**

**(clause 18, Article I, Section 8)**

- **Constitution enumerates list of Congressional powers - AND**
- **power “to make all Laws which shall be necessary and proper for carrying into Execution the forgoing Powers...”**
- **This power with the Commerce Clause provides BROAD Congressional control of commerce.**
- **Almost everything is necessary and proper!**



# Federal Supremacy:

## *The Supremacy Clause*

### Article VI, Paragraph 2

- *“The Constitution, and the Laws of the United States . . . Shall be the supreme Law of the Land; and the judges in every State shall be bound thereby. . . .”*
- In *McCulloch v. Maryland* another key point is that when federal government has power to act under the Constitution, its actions are supreme
- In such a case, federal government actions take precedence over actions of other governments.

# Congressional Power in Interstate Commerce

- Congress may regulate both:
  - Interstate Commerce - commerce among the states; and
  - Intrastate Commerce, commerce within a state, that affects interstate commerce.
  - See Wheat case and Restaurant cases.
- States can regulate commerce as long as it does not “burden” interstate commerce.

## Regulation of Intrastate Commerce by Congress :

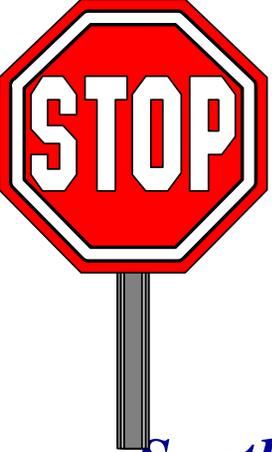
### Wickard v. Filburn (1942)

- **Federal controls on production of wheat**
- **Small farm in Ohio produces 239 bushels more than the farmer, Filburn, was allowed by U.S.D.A.**
- **He is fined \$117 and ordered not to plant more**
- **Filburn argues that production used to feed his chickens and cows and for making bread--all for consumption on farm (all intrastate)**
- **HELD: Although this appears “intrastate” & “trivial”**
- **STILL, all small farmers together would impact “interstate” commerce and “market conditions”**
- **Congress may regulate production**
- *Note: Almost all commerce is defined as “interstate”*

## *Congressional Power to Regulate Intrastate*

### *Commerce: Katzenbach v. McClung (1964)*

- **Ollie's Bar-B-Q**
- **Family-owned restaurant in Birmingham, AL**
- **220 seats for white customers only**
- **Title II of 1964 Civil Rights Act prohibits racial segregation in public accommodations if serving interstate travelers or if food moved in **interstate commerce****
- **Does Title II apply?**
- **HELD: Yes, activity may “exert a substantial economic effect on interstate commerce.” What impact on blacks traveling to Florida?**



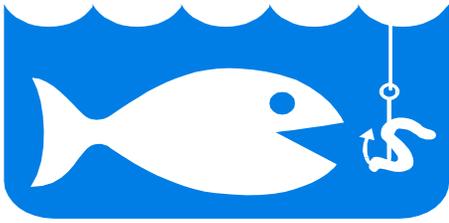
# When State law impedes Interstate Commerce

## Some Supreme Court Cases:

- *Southern Railway Co v. Arizona*-- Ct. struck down Arizona law which required trains to be shortened for safety reasons
- *Chemical Waste Management v. Hunt*-- Violates Commerce clause to charge more for out of state generated hazardous waste than for in state waste
- *Morales v. Transworld Airlines*-- State can't sue under consumer protection statutes because Feds have exclusive authority to regulate airlines
- *Wyoming v. Oklahoma*-- OK law requiring coal-burning power plants to burn at least 10% OK-mined coal was discriminatory & interfered w/ interstate commerce

# More Examples of State Regulation of Commerce.

- Different truck mud flaps: curved vs. straight.
- Iowa shorter trucks case.
  
- California Emissions laws on cars.



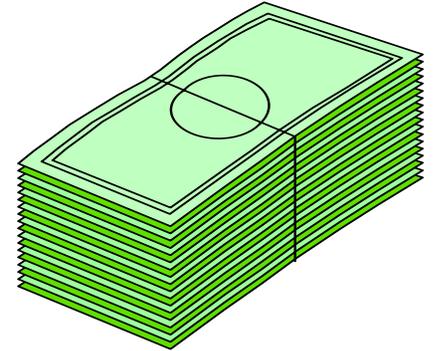
# Hughes v. Oklahoma

- **Oklahoma prohibits shipping or selling minnows out of state to protect OK minnows.**
- **Hughes bought minnows in OK and took them to Texas.**
- **OK Supreme Court upheld statute as constitutional to protect OK natural resources**
- **Key Issues:**
  - **1) Does statute regulate evenhandedly with only “incidental” effects on interstate commerce?**
  - **2) Does statute serve a legitimate local purpose, and if so**
  - **3) Could alternative means promote this local purpose as well without discriminating against interstate commerce?**
- **Alright to protect wildlife, but could be done in less discriminatory way by the state: Reversed in favor of Hughes.**

# Taxing Power

## Art. I, Section 8, Clause 1

- “lay & collect taxes”
- Taxes used to raise revenue and /or deter/punish/encourage certain behavior
- Supreme Court: Upheld taxes on illegal gambling, narcotics & marijuana (illegal business activities)
- If reported: evidence of illegal activity
- If don't, violate tax laws



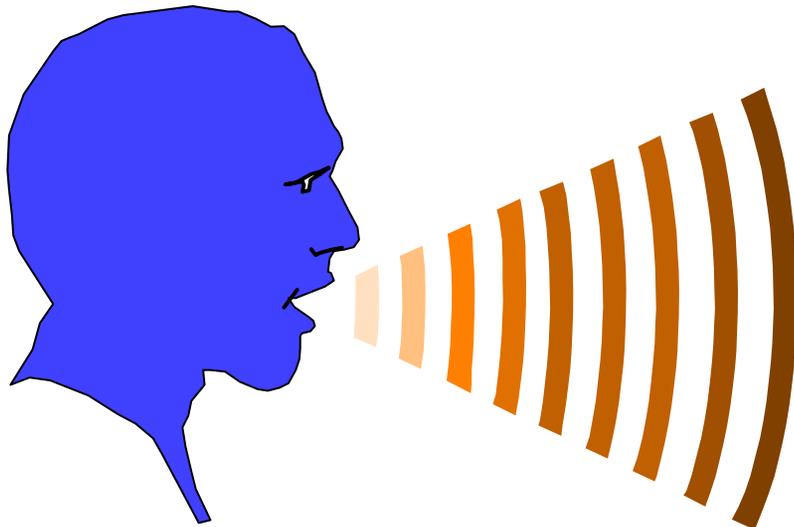
State taxes can't impede interstate or international commerce

# Incorporation

- The U.S. Supreme Court has held that most of the Bill of Rights applies to the states, through the “due process” clause of the 14<sup>th</sup> Amendment.
- This doctrine is called “incorporation.”
- 2<sup>nd</sup> Amendment has not been incorporated .

- . The Bill of Rights provides that the federal Congress shall make no laws abridging certain fundamental freedoms. Which of the following best describes the relationship between the states and the Bill of Rights?
- A. The Bill of Rights DOES NOT APPLY to the state governments; it was intended to limit the Federal government only.
- B. Some, but not all, of the Bill of Rights has been held to APPLY to the state.
- C. All of the Bill of Rights guarantees HAVE BEEN APPLIED to the states via the Fourteenth Amendment.
- D. All of the state constitutions contain similar guarantees, so it DOES NOT MATTER if the federal Constitution applies to them.

# “Commercial” Free Speech



- Usually allowed
- UNLESS “compelling state interest” to prohibit
- (For example: public safety)
- See Consolidated Edison case (business & political speech)
- See also Central Hudson case (business and commercial speech)

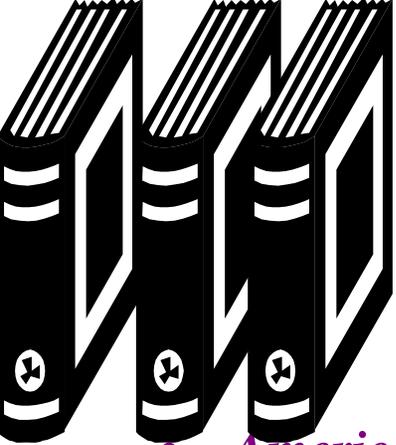
# Commercial Speech is protected

- Unless it is
  - Fraudulent,
  - Deceptive , or
  - Misleading.
  
- Examples: Lawyer advertising, Listerine ads, electric utilities advertising uses of electricity,

# *Consolidated Edison v. Public Service Comm. of NY (1980)*



- **Con Ed mailed statement supporting nuclear power in monthly billing**
- **Public Service Comm. of NY said: Can't do it as customers are captive audience and should not be subjected to Con Ed's views**
- **Key Test: Is the state's restriction: 1) reasonable as to time, place & manner of speech? 2) concern a permissible subject matter? 3) narrowly tailored to serve a "compelling state interest"?**
- **HELD: Supreme Court reversed in favor of Con Ed**
- **This is not a captive audience; customers may choose not to be exposed to material by not reading it or tossing it in the wastebasket.**



# Cyberlaw: “Freedom of Speech on the Net”

- *American Civil Liberties Union of Georgia v. Miller*
  - Georgia passes a statute making it a crime for “any person . . . knowingly to transmit any data through a computer network . . . if such data uses an individual name . . . to falsely identify the person.”
  - Violated the 1st Amendment
  - Statue was too sweeping in it’s coverage.
- *Reno v. American Civil Liberties Union*
  - Supreme Court struck down the Communications Decency Act of 1996
  - Purpose of law was to restrict pornography for children on the Web
  - Law went too far restricting 1st Amendment rights
  - It was like “burning the house to roast the pig.”

# *Central Hudson Gas & Elec. v. Public Service Comm. (1980)*

- **The NY PSC ordered the end of ads that promoted the use of electricity as contrary to public policy**
- **U.S. Supreme Court HELD: Although commercial speech accords lesser protection than other guaranteed expressions. To be protected speech must be lawful and not misleading.**
- **Government must have a substantial interest to be able to regulate speech and the regulation must advance that interest. The regulation must be no more extensive than necessary to achieve the objective. The regulation here does not meet this standard.**





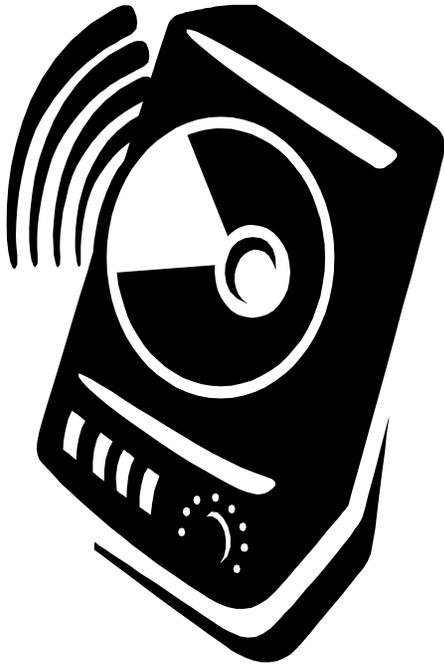
# **“Freedom of Commercial and Political Speech Abroad”**

**(Most nations more restrictive than U.S.)**

- **French court ordered Yahoo! to block French Internet users from accessing auctions selling Nazi artifacts. Yahoo! Removed items.**
- **This is equivalent to the U.S. government prohibiting sale of Osama bin Laden artifacts in U.S.**
- **German courts upheld prison sentence for an Australian who posted information on Australian web site that denied the Holocaust occurred; hate speech in Germany.**
- **This is equivalent to U.S. courts upholding a conviction of an Iranian citizen who posted material on an Iranian web site claiming that the World Trade Center terrorist attacks never occurred.**

# Freedom To Criticize

## Freedom of speech vs. disparagement



- *Bose Corp. v. Consumers Union*
  - Product disparagement or truthful reporting?
  - To show defamation must show actual malice in publishing a knowing and reckless falsehood
  - Supreme Court HELD: Okay since no MALICE

# Question

- 17. Which of the following best describes the "free speech" protection given
- to commercial speech?
- 
- A. Commercial speech is not given any protection.
- B. Commercial speech may be regulated by the states, since it is not protected by the 1st Amend.
- C. Generally, any legal product may be advertised in a non-fraudulent, non-deceptive manner.
- D. Commercial speech may NOT be regulated by the states because it has complete 1st Amendment protection.

# Question

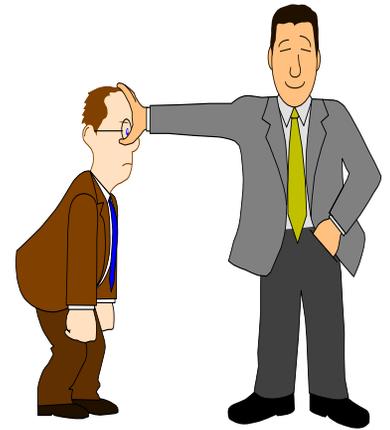
- 22. ABC Manufacturing develops a new feminine hygiene product, which it wants to advertise. The State passes a law prohibiting the advertising of such products. There is nothing wrong with the product, and the advertising is not fraudulent or deceptive, but the citizens of the State just do not want to see this type of product advertised. ABC claims this law violates its First Amendment right to free speech, and sues. What result?



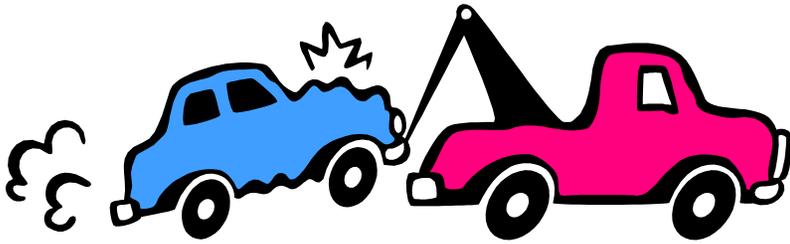
- A. The state law is UNCONSTITUTIONAL because the free speech guarantee prohibits the states from limiting speech in any way.
- B. The state law is CONSTITUTIONAL because this is commercial speech, which has no protection under the First Amendment.
- C. The state law is UNCONSTITUTIONAL, because commercial speech, which is not deceptive or fraudulent, for a lawful product is protected under the First Amendment.
- D. The state law is CONSTITUTIONAL, because the First Amendment applies only to the Congress, not to the states.

# 4th Amendment-- Unreasonable Search & Seizure

“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....”



- **Do government inspectors (i.e. OSHA) need warrants?**
- **Usually yes**
- **Exception: closely regulated businesses**
- **However, business usually agrees to allow inspection**
- **Generally, closed places such as homes and businesses are not subject to random police searches**



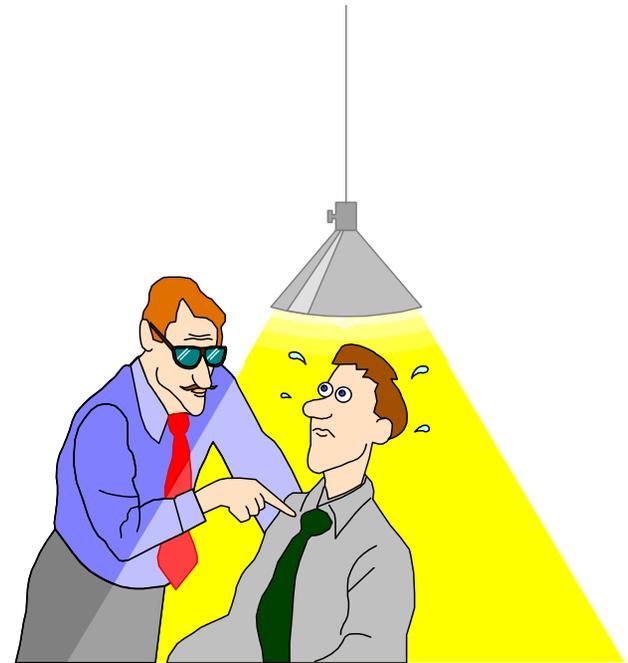
# *New York v. Burger (1987)*

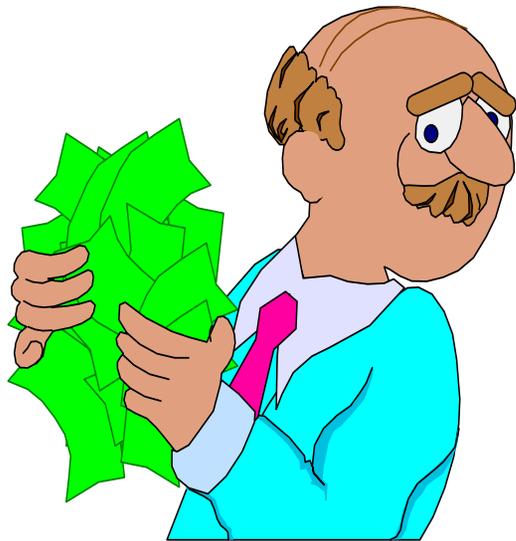
- **Junkyard is searched without warrant; stolen cars & parts are found**
- **Owner tries to keep evidence out of trial as unconstitutional search**
- **Supreme Court holds for a warrantless search:**
  - **must have substantial government interest**
  - **searches must be necessary to further a regulatory scheme**
  - **must have adequate substitute for a warrant (must advise owner of statutory scheme and scope of search)**
- **HELD: Search is constitutional as furthering statutory concerns regarding theft, which overcomes privacy interest**

# 5th Amendment-Right Against Self Incrimination

“No person shall be... compelled in any criminal case to be a witness against himself.”

- **Does self-reporting violate 5th Amendment?**
  - Applies to **PEOPLE**, *not Corporations*
  - *Braswell v. U.S.*: President & sole stockholder must report, even if it incriminates him





# **5th Amendment- Just Compensation or Takings Clause**

**“nor shall private property be taken for public use, without just compensation.” Note that the Constitution does not give this right.**

**Government can take property for public purposes -- utilities, military bases, highways, sidewalks, schools, etc.**

**What is “just” compensation?**

**What if regulations destroy property value?**

**What if government takes for a private party?**

# Eminent Domain

- Both the fed. and state governments have the right to take private property for public use.
- The only restriction is the need for “just compensation”.
  
- Always an issue whether the property is for public use.
  - Oakland Raiders case.
  - Hawaii land redistribution case.

# *Dolan v. City of Tigard (1994)*

- Dolan seeks building permit to increase size of her store
- Is told yes **IF** she will dedicate 1/6 of her land to city for public pathway
- Ruling: State can't tie permit to dedication—that is a taking



# Issue: “*More Courts Rule Cities Misapply Eminent Domain*”: Creation of business parks.

- Issue: Do Governments abuse eminent domain to benefit favored private parties?
- Local governments compete to attract business
- Use eminent domain, forcing private citizens to sell their land
- Governments then sell the land to businesses
- The “forced sale” of property is sometimes at the current value rather than higher commercial property value
- Is this an abuse of the 5th Amendment?
  - Pennsylvania, Mississippi and California courts as well as a Manhattan judge have blocked gov’t. condemnations that they view as an abuse of eminent domain





# 6th, 7th & 8th Amendments

6<sup>th</sup>

Right to trial by jury in  
criminal cases

7<sup>th</sup>

Right to trial by jury in  
common law cases

8<sup>th</sup>

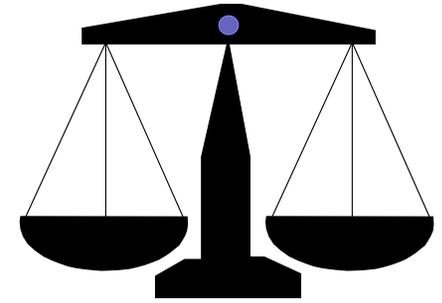
Limits cruel & unusual  
punishments and excessive  
fines

# International: Limits to Constitutional Protections



- **No constitutional protections outside of U.S.**
- **Except: Embassy Property = U.S. Soil**
- **Constitution protects people in U.S. against arbitrary action by government, not aliens outside U.S. territory**

# 14th Amendment--Due Process Clause and Equal Protection Clause



- “No state . . . shall deprive any person of life, liberty or property *without due process of law*;
- “nor deny to any person within its jurisdiction the *equal protection of the laws*.”
- **Due process:** (Substantive due process)
  - is violated when state infringes on fundamental liberty interests without narrowly tailoring to meet the compelling state interest
  - is offended when state action shocks the conscience or offends judicial notions of fairness and human dignity
- **Equal protection:** governments must treat people equally

# Equal Protection clause

- Essence of clause is that if state groups people, there must be a good reason for it.
- **Rational basis test**: Grouping must have a rational/reasonable relationship to the achievement of a valid governmental purpose.
- Out-of-state tuition, hunters, fishermen.

# Equal Protection clause (cont)

- Strict Scrutiny test: Grouping must be necessary to achieve a compelling governmental interest.
  - Fundamental Rights: classification that affect a fundamental right.
    - Vote, procreate, travel interstate, criminal procedures.
  - Suspect Classifications: classifications based on inherent traits.
    - Race, Religion, Color.

# Equal Protection clause (cont)

- Intermediate Scrutiny: grouping must be substantially related to an important state interest.
  - Sex, Illegitimacy, National Origin.
  - Sex – draft laws.
  - Illegitimacy – Illegitimate children may inherit only from mother, but not father, thru intestate succession (without a will). Laws overturned.

# Equal Protection clause (cont)

- Comparison of tests:
- Reasonable relationship to a valid state interest.
- Substantial relationship to an important state interest.
- Necessary to achieve a compelling state interest.

# *Cooper Industries v.*

## *Leatherman Tool Group (2001)* Issue for Supreme Court: Do the high punitive damages violate due process under the 14th Amendment?

- Leatherman makes a famous tool. Cooper makes a competitor called ToolZall. Cooper used photographs of a slightly modified Leatherman tool in its advertising of ToolZall
- Leatherman sues Cooper for violation of Trademark Act
- Jury finds Cooper committed a tort, awards \$50,000 in compensatory damages & \$4.5 million in punitive damages
- **HELD: 14<sup>th</sup> Amendment Due Process makes 8th Amendment prohibitions against excessive fines and cruel and unusual punishment (deprivations of life, liberty and property) that are “grossly excessive” punishments considering the offense applicable to States**
- **Standard: Punishments are “grossly disproportional to gravity of . . . [the] offense”**