

# The Constitution and Contracts

This essay argues various aspects of constitutional and contract law. This discussion continues in four sections. The first section explains the nature of constitutional law including its originations, by what rights are laws made, and who interprets the laws. A discussion of seminal constitutional and contract law litigation and the resulting effect on modern business in the United States is included in the second section. The third and fourth sections examine the importance of contracts in business today and when to involve attorneys in the management or defense of a contact.

## The Nature of Constitutional Law in the United States

As the name implies, constitutional law originated with the Constitution, which created the foundation for all laws in the United States (Miller, 2017, p. 6). Given that Article VI of Constitution established that the document set forth the supreme law in this country, neither the Congress nor individual states can enact a law that is in conflict with the document, laws, or treaties. All laws are made based on the rights established in the Constitution and its amendments (Miller, 2017, pp. 30-35). However, it is important to realize that the rights established the amendments are not unconditional (Miller, 2017, p. 37). As an example, although the Second Amendment provides for the rights of individual citizens to own firearms, in *Small v. United States*, the Supreme Court reaffirmed the constitutionality of prohibiting anyone convicted of a crime and serving more than one year in confinement from owning a firearm. The rationale for restricting the individual's Second Amendment rights is based on the need to protect society from an individual whose criminal history suggests that they represent a risk (Sloan, 2016).

Additionally, the Constitution provided for three branches of government, which includes the executive, legislative, and judicial branches. While the legislative branch passes laws, the judicial branch is charged with interpreting the laws (Miller, 2017, p. 31).

## Seminal Constitutional and Contractual Law and its Influence

The section reviews several seminal and contractual cases and the associated business implications. The section is divided into two subsections with constitutional and contractual issues being addressed separately.

### Seminal Constitutional Law and its Influence

The seminal constitutional law cases selected for review include *Gonzales v. Raich* and *Citizens United v. Federal Election Commission*. *Gonzales v. Raich* (2005) influenced business by expanding the commerce clause within the Constitution (Mello, 2013; Miller, 2017, p. 34). Whereas, *Citizens United v. Federal Election Commission* (2010a, 2010b) overturned existing campaign financing laws thus extending the First Amendment rights of corporations (Boedecker, 2014; Miller, 2017, p. 39-40).

*Gonzales v. Raich*.

In 1996, California became the first of many states to legalize the use of medical marijuana (Mello, 2013). However, although medical marijuana was legal in California, it remained illegal based on its classification as a Schedule 1 drug under federal Controlled Substances Act (CSA; Mello, 2013; Miller, 2017, p. 34). As the result, two Californians using marijuana for medical purposes were arrested and later filed a lawsuit, which became the basis for *Gonzales v. Raich* (2010).

The Supreme Court upheld the federal CSA. The court ruled that the federal CSA could to override state laws and in doing so, the court expanded the Commerce Clause to enable Congress to make the intrastate use of marijuana illegal (LaCroix, 2014; Miller, 2017, p. 34). The effect of *Gonzales v. Raich* (2005) on business was made clear by Scalia's assertion that it may be necessary in some cases to regulate intrastate commerce to ensure proper interstate commerce.

In 2008, *Citizens United*, a not-for-profit corporation began advertising its movie that was critical of Clinton, a Democratic hopeful in the party's 2008 presidential primary (Boedecker, 2014; Miller, 2017, p. 39-40). However, for-profit businesses had donated funds directly to the plaintiff. Fearing that this would create a violation of § 203 of the Bipartisan Campaign Reform Act (BCRA), the organization sued the Federal Election Commission contesting the constitutionality of the law (Boedecker, 2014; *Citizens United v. Federal Election Commission*, 2010b).

The Supreme Court ruled in favor of the plaintiff in a narrow 5-4 decision. According to Scalia, the issue simply boiled down to the word "speech, not speakers" therefore he reasoned that it was unconstitutional to restrict the free speech of for-profit corporations (*Citizens United v. Federal Election Commission*, 2010a, p. 8). In doing so, the court permitted for-profit corporations to contribute directly to political campaigns and thus extended the First Amendment rights of corporations. The effect of the ruling on business is that it is now possible for for-profit corporations, even those controlled by foreign nationals, to contribute directly to national and local elections to further their agenda (*Citizens United v. Federal Election Commission*, 2010b).

## Seminal Contractual Law and its Influence

Seminal contractual and its influence are explored in this section. The cases selected for review include *Basis Technology Corp. v. Amazon.com, Inc.* and *Brown & Brown, Inc. v. Johnson*.

*Basis Technology Corp. v. Amazon.com, Inc.*

While in the middle of a lawsuit in March 2005, the attorneys for Basis Technology Corporation (BTC) and Amazon had reached an agreement in a contract dispute with the understanding that the settlement would be formally memorialized later. The attorney for BTC sent an email to Amazon's attorney, which outlined the terms of the settlement and requested that Amazon's attorney confirm. The Amazon attorney responded with "correct." Unfortunately, subsequent negotiations broke down. When BTC moved to enforce the settlement agreement, Amazon objected. The case was resolved in favor of BTC as the judge ruled that the email had sufficiently outlined the settlement agreement and the Amazon had agreed. The significance of this case in modern business is that it established that clear and complete email settlement agreements are lawful and binding (*Basis Technology Corp. v. Amazon.com, Inc.*, 2008, Miller, 2017, pp. 270-271).

Brown & Brown, Inc. v. Johnson.

Many companies have a practice of requiring "restrictive covenants" with employees that typically include agreements addressing topics such as those requiring protection of confidential information, not competing against the company for a period of time after the relationship has ended, and the non-solicitation of customers and employees. Typically, legal disputes involve enforceability and only applicable to the degree necessary to safeguard reasonable business interests (Schmidt, 2017).

Johnson was hired by a Florida corporation, Brown & Brown, Inc.'s New York subsidiary. The plaintiff signed a restrictive covenant agreement, which dictated Florida law and contained a non-solicitation clause, on the first day of employment. However, the court found that a choice of law provision was unenforceable in a restrictive covenants agreement. Additionally, the court deemed the agreement was overly broad in that it allowed for modification after the fact if certain provisions were deemed unenforceable (Brown & Brown, Inc. v. Johnson, 2015). As the result, the court determined that the company had acted in bad faith by imposing an overly severe restrictive covenant agreement. The impact to business is that restrictive covenant agreements are unenforceable if it is restrictive beyond what is necessary to protect genuine business interests (Davis, Reicin, & Warren, 2015; Miller, 2017, p. 312).

## The Importance of Contracts in American Business

The importance of contracts in American business cannot be overstated as they memorialize a legally enforceable agreement. A contract must contain four basic requirements to be legally enforceable: an agreement, consideration, contractual capacity, and be for legal purposes. Simply put, a contract establishes the relationship between and expectations of both parties, in order to minimize uncertainties, and provides for legal remedies should one party or the other fail to provide the agreed to legal consideration (Hadfield & Bozovic, 2016; Martimort, Semenov, & Stole, 2017; Miller, 2017, pp. 255). Once signed, the contract often becomes a tool for managing disputes between the parties (Hadfield & Bozovic, 2016). Contracts are often used to resolve disputes including but not limited to the legality of the contract including mistakes, fraudulent misrepresentation, intent to deceive, and undue influence (Miller, 2017, pp. 323-333).

Luong and Stevens (2015) observed that many corporations contracting for complex services would include a termination clause in the agreement in order to safeguard against unsatisfactory performance. Additionally, these types of outsourcing contract are often supplemented with a service level agreement that furthers clarifies the expectations. The scholars also note that when both parties understand the expectations of themselves and the other party better business relationship develops as the result of a minimization of misunderstandings, defects, and mismatched focus.

In many respects, a contract serves as the enforcement tool that provides the foundation for the business relationship (Hadfield & Bozovic, 2016; Martimort, Semenov, & Stole, 2017). Further, unambiguous contracts serve to further the business relationship by clearly establishing the expectations (Martimort, Semenov, & Stole, 2017). Although, a recent study concluded that businesses seldom refer to the contract when working through a contractual disagreement and

prefer not sue or warn of the potential for legal action, some argue that threatening to end the agreement can be useful (Hadfield & Bozovic, 2016; Martimort, Semenov, & Stole, 2017).

Given the cost of managing the contract resolution process through the traditional legal system, many corporations opt for alternative dispute resolution processes (ADRP; Baker & Choi, 2015). Typical ADRLs include arbitration, mediation, and dispute resolution boards (Blankley, 2017; Kamprat, 2014). Miller (2017) transnational contracts regularly contain arbitration clauses (p. 417). Additionally, many contracts rely on a termination or penalty clauses. In particular, in larger contracts, specified legal sanctions will frequently provide proper incentives to correct the dispute without costly litigation (Baker & Choi, 2015). Simply the put, the goal of dispute management is create win-win resolutions, which enable retention of the business relationship, if possible, while protecting revenues, productivity, and minimizing costs (Najar, 2014).

When to Engage Counsel in the Administration or Defense of a Contract 20%

When engaging legal counsel in the administration or defense of a contract it is important to note that the corporation should engaging a business partner and someone to simply state the law (Najar, 2014). Businesses should obviously hire legal counsel when they need litigation support, businesses may also require the assistance of a legal professional negotiating and resolving disputes with contracts (American Bar Association, 2016).

Legal counsel may need to be engaged in the management of a contractual dispute. The counsel's primary objective would be to resolve the dispute to the corporation's satisfaction in the cost effective manner. While the dispute management resolution may be a simple as amending a clause or price, it may involve mediation, arbitration, a customized approach, or a dispute resolution board if the corporation is involved in construction (American Bar Association, 2016; Kramparth, 2014).

Negotiations are often a part of the dispute resolution process. A corporation would wise to engage counsel at this stage in order to help define the issue(s), establish facts, and craft a fallback plan. Additionally, the counsel would need to advise the corporation on the risks of litigation should the dispute actually go to trial. Depending on the size of the financial risk, the corporation may opt to have counsel involved in the actual negotiations. In which case, counsel could assist the preparations and be actively engaged in the talks. At the conclusion, the counsel must ensure that the corporation fully understands the results (American Bar Association, 2016).