

12th Edition

Roger LeRoy Miller

**The Essentials:**  
Text &  
Summarized Cases

# Business Law Today



**BUSINESS LAW TODAY SERIES**



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# **Business Law Today**

**The Essentials**  
Text & Summarized Cases



**BUSINESS LAW TODAY SERIES**

**Roger LeRoy Miller**

Institute for University Studies  
Arlington, Texas



Australia • Brazil • Mexico • Singapore • United Kingdom • United States



**Business Law Today, The Essentials  
Text & Summarized Cases  
12th Edition  
Roger LeRoy Miller**

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# Preface

The study of business law and the legal environment has universal applicability. A student entering any field of business must have at least a passing understanding of business law in order to function in the real world. *Business Law Today, The Essentials*, Twelfth Edition, provides the information in an interesting and contemporary way. The Twelfth Edition continues its established tradition of being the most up-to-date text on the market.

Instructors have come to rely on the coverage, accuracy, and applicability of *Business Law Today, The Essentials*. This best-selling text engages your students, solidifies their understanding of legal concepts, and provides the best teaching tools available. I have spent a great deal of effort making this edition more contemporary, exciting, and visually appealing than ever before. Special pedagogical devices within the text focus on legal, ethical, global, and corporate issues, while addressing core curriculum requirements.

The Twelfth Edition incorporates the latest legal developments and United States Supreme Court decisions. It also includes numerous new features and new cases, as well as new examples, case examples, exhibits, learning objectives, margin definitions, and case problems.

## New and Updated Features

The Twelfth Edition of *Business Law Today, The Essentials*, is filled with exciting new and updated features designed to cover current legal topics of high interest.

1. **Entirely new *Business Web Log*** features underscore the importance of the text material to real-world businesses. Each of these features discusses a major U.S. company that is engaged in a dispute involving a topic covered in the chapter. Some examples include:
  - *Samsung and Forced Arbitration* (Chapter 2)
  - *Amazon Faces Fake Products* (Chapter 5)
  - *Online Retail Competition Causes Yet Another Brick-and-Mortar Retailer to File for Bankruptcy* (Chapter 15)
  - *Facebook and Google in a World of Antitrust Law* (Chapter 21)
2. **Entirely new *Business Law Analysis*** features appear in numerous chapters of the text. These features are useful tools to help students master the legal analysis skills that they will need to answer questions and case problems in the book, on exams, and in business situations. Subjects include:
  - *Licensing Is a Defense to Copyright Infringement* (Chapter 5)
  - *Determining If a Contract with an Unlicensed Party Is Enforceable* (Chapter 9)
  - *When Will a Court Order the Dissolution of an LLC?* (Chapter 18)
3. **Entirely new hypotheticals in many chapter introductions** provide a real-world link that generates student interest and highlights specific legal concepts that will be discussed in the chapter. These hypotheticals—often based on real cases or business situations—help to introduce and illustrate legal issues facing managers, companies, and even industries.
4. **Adapting the Law to the Online Environment** features examine cutting-edge cyberlaw topics, such as:
  - *Does Everyone Have a Constitutional Right to Use Social Media?* (Chapter 1)
  - *Using Twitter to Cause Seizures—A Crime?* (Chapter 7)
  - *Programs That Predict Employee Misconduct* (Chapter 19)



5. **Ethical Issue** features focus on the ethical aspects of a topic being discussed in order to emphasize that ethics is an integral part of a business law course. Examples include:
  - *How Enforceable Are Click-on Agreements to Donate Funds to Charity?* (Chapter 8)
  - *Is It Fair to Classify Uber and Lyft Drivers as Independent Contractors?* (Chapter 16)
  - *Is It Ethical (and Legal) to Brew “Imported” Beer Brands Domestically?* (Chapter 25)
6. **Beyond Our Borders** features illustrate how other nations deal with specific legal issues to give students a sense of the global legal environment. Topics include:
  - *Does Cloud Computing Have a Nationality?* (Chapter 19)
  - *Can a River Be a Legal Person?* (Chapter 24)
7. **Landmark in the Law** features discuss a landmark case, statute, or development that has significantly affected business law. Examples include:
  - *Palsgraf v. Long Island Railroad Co.* (Chapter 4)
  - *The Bankruptcy Abuse Prevention and Consumer Protection Act* (Chapter 15)
  - *Changes to Regulation A: “Reg A+”* (Chapter 20)

## New Emphasis on Making Ethical Business Decisions—The IDDR Approach

The ability of businesspersons to reason through ethical issues is now more important than ever. For the Twelfth Edition of *Business Law Today, The Essentials*, I have created a completely new framework for helping students (and businesspersons) make ethical decisions—entitled the **IDDR approach**, which is introduced in Chapter 3, Ethics in Business. This systematic approach provides students with a clear step-by-step process to analyze the legal and ethical implications of decisions that arise in everyday business operations. The IDDR approach uses four logical steps:

- **Step 1: Inquiry**
- **Step 2: Discussion**
- **Step 3: Decision**
- **Step 4: Review**

Students can easily remember the first letter of each step by using the phrase “I Desire to Do Right.” A *completely revised Chapter 3 on Ethics in Business* details the goals of each IDDR step and then provides a sample scenario to show students how to apply this new approach to ethical decision making. In addition to introducing the IDDR approach, I have made Chapter 3 more current and more practical. I also present fewer theoretical ethical principles and focus more on real-life application of ethical principles.

After Chapter 3, to reinforce the application of the IDDR approach, students are asked to its steps when answering each chapter’s *A Question of Ethics* problem. Each of these problems has been updated and is based on a 2017 case. In addition, the Twelfth Edition retains the *Ethical Issue* features in most chapters, many of which have been refreshed with timely topics involving the ever-evolving technologies and trends in business.

## New Cases and Case Problems

The Twelfth Edition of *Business Law Today, The Essentials*, has new cases and case problems from 2018 and 2017 in every chapter. The new cases have been carefully selected to illustrate important points of law and to be of high interest to students and instructors. I have made it a point to find recent cases that enhance learning and are straightforward enough for business law students to understand.



Certain cases and case problems have been carefully chosen as good teaching cases and are designated as *Spotlight Cases* and *Spotlight Case Problems*. Some examples include *Spotlight on Apple*, *Spotlight on Beer Labels*, *Spotlight on Nike*, and *Spotlight on the Seattle Mariners*. Instructors will find these *Spotlight* decisions useful to illustrate the legal concepts under discussion, and students will enjoy studying the cases because they involve interesting and memorable facts. Other cases have been chosen as *Classic Cases* because they establish a legal precedent in a particular area of law.

Each case concludes with a section, called *Critical Thinking*, that includes at least one question. Each question is labeled *Ethical*, *Economic*, *Legal Environment*, *Political*, *Social*, or *What If the Facts Were Different?* In addition, *Classic Cases* include an *Impact of This Case on Today's Law* section that clarifies how the case has affected the legal environment. Suggested answers to all case-ending questions can be found in the *Solutions Manual* for this text.

## Many New Highlighted and Numbered Case Examples

Many instructors use cases and examples to illustrate how the law applies to business. This edition of *Business Law Today, The Essentials*, offers hundreds of highlighted and consecutively numbered *Examples* and *Case Examples*. *Examples* illustrate how the law applies in a specific situation, and *Case Examples* present the facts and issues of an actual case and then describe the court's decision and rationale.

New to this edition are *Spotlight Case Examples*, which deal with especially high-interest cases, and *Classic Case Examples*, which discuss older, landmark decisions. The numbered *Examples* and various types of *Case Examples* are integrated throughout the text to help students better understand how courts apply legal principles in the real world.

## Critical Thinking and Legal Reasoning Elements

For this edition of *Business Law Today, The Essentials*, I have included a discussion of legal reasoning in Chapter 1. The new *Business Law Analysis* features that can be found throughout the text emphasize legal reasoning skills as well. Critical thinking questions conclude most of the features and cases in this text, and at the end of each chapter is a *Debate This* question that requires students to think critically about the rationale underlying the law on a particular topic.

The chapter-ending materials also include a separate section of questions that focus on critical thinking and writing. This section always includes a *Time-Limited Group Assignment* and may also include a *Critical Legal Thinking* question requiring students to think critically about some aspect of the law discussed in the chapter or a *Business Law Writing* question requiring students to compose a written response.

Answers to all critical thinking questions, as well as to the *Business Scenarios and Case Problems* at the end of every chapter, are presented in the *Solutions Manual* for the text. In addition, the answer to each *Business Case Problem with Sample Answer* appears in *Appendix C*.

## Other Pedagogical Devices within Each Chapter

- **Learning Objectives** (questions listed at the beginning of each chapter and repeated in the margins of the text provide a framework of main chapter concepts for the student).
- **Margin definitions** of each boldfaced **Key Term**.
- **Quotations** and **Know This** (margin features).
- **Exhibits** (in most chapters).
- **Photographs** (with critical-thinking questions) and **cartoons**.



## Chapter-Ending Pedagogy

- **Practice and Review** (in every chapter).
- **Debate This** (a statement or question at the end of *Practice and Review*).
- **Key Terms** (with appropriate page references).
- **Chapter Summary** (in table format).
- **Issue Spotters** (in every chapter, with answers in *Appendix B*).
- **Business Scenarios and Case Problems** (including in every chapter, a *Business Case Problem with Sample Answer* that is answered in *Appendix C*; in selected chapters, a *Spotlight Case Problem*; and in every chapter, a *A Question of Ethics* problem—based on a 2017 case—that applies the Twelfth Edition's **IDDR approach** to business ethics).
- **Critical Thinking and Writing Assignments** (including a *Time-Limited Group Assignment* in every chapter, and a *Business Law Writing* or a *Critical Legal Thinking* question in selected chapters).

## Supplements

*Business Law Today, The Essentials*, Twelfth Edition, provides a comprehensive supplements package designed to make the tasks of teaching and learning more enjoyable and efficient. The following supplements are available for instructors.

### **MindTap Business Law for Business Law Today, The Essentials, Twelfth Edition**

*MindTap™* is a fully online, highly personalized learning experience built on authoritative Cengage Learning content. By combining readings, multimedia, activities, and assessments into a singular Learning Path, *MindTap* guides students through their course with ease and engagement. Instructors personalize the Learning Path by customizing Cengage Learning resources and adding their own content via apps that integrate into the *MindTap* framework seamlessly with Learning Management Systems.

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## Instructor's Companion Website

The *Instructor's Companion Website* contains the following supplements:

- ***Instructor's Manual.*** Includes sections entitled “*Additional Cases Addressing This Issue*” at the end of selected case synopses.
- ***Solutions Manual.*** Provides answers to all questions presented in the text, including the *Learning Objectives*, the questions in each case and feature, the *Issue Spotters*, the *Business Scenarios and Case Problems*, and the *Critical Thinking and Writing Assignments*.
- ***Test Bank.*** A comprehensive test bank contains multiple choice, true/false, and short essay questions.
- ***Case-Problem Cases.***
- ***Case Printouts.***
- ***PowerPoint Slides.***
- ***Lecture Outlines.***
- ***MindTap Integrated Syllabus.***
- ***MindTap Answer Key.***



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University of Denver, Colorado

Peter Clapp  
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Dale Clark  
Corning Community College, New York

Tammy W. Cowart  
University of Texas, Tyler

Stanley J. Dabrowski  
Hudson County Community College,  
New Jersey

Sandra J. Defebaugh  
Eastern Michigan University

Patricia L. DeFrain  
Glendale College, California

Julia G. Derrick  
Brevard Community College, Florida

Joe D. Dillsaver  
Northeastern State University, Oklahoma

Claude W. Dotson  
Northwest College, Wyoming

Larry R. Edwards  
Tarrant County Junior College,  
South Campus, Texas

Jacolin Eichelberger  
Hillsborough Community College, Florida

George E. Eigsti  
Kansas City, Kansas, Community College

Florence E. Elliott-Howard  
Stephen F. Austin State University, Texas

Tony Enerva  
Lakeland Community College, Ohio

Benjamin C. Fassberg  
Prince George's Community College, Maryland

Joseph L. Flack  
Washtenaw Community College, Michigan

Jerry Furniss  
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Joan Gabel  
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Elizabeth J. Guerriero  
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Phil Harmeson  
University of South Dakota

Nancy L. Hart  
Midland College, Texas

Mo Hassan  
Cabrillo College, California

Andy E. Hendrick  
Coastal Carolina University, South Carolina

Janine S. Hiller  
Virginia Polytechnic Institute & State University

Karen A. Holmes  
Hudson Valley Community College, New York

Fred Ittner  
College of Alameda, California

Susan S. Jarvis  
University of Texas, Pan American

Jack E. Karns  
East Carolina University, North Carolina

Sarah Weiner Keidan  
Oakland Community College, Michigan

Richard N. Kleeberg  
Solano Community College, California

Bradley T. Lutz  
Hillsborough Community College, Florida

Diane MacDonald  
Pacific Lutheran University, Washington

Darlene Mallick  
Anne Arundel Community College, Maryland

John D. Mallonee  
Manatee Community College, Florida

Joseph D. Marcus  
Prince George's Community College, Maryland

Woodrow J. Maxwell  
Hudson Valley Community College, New York

Diane May  
Winona State University, Minnesota

Beverly McCormick  
Morehead State University, Kentucky

William J. McDevitt  
Saint Joseph's University, Pennsylvania

John W. McGee  
Aims Community College, Colorado

James K. Miersma  
Milwaukee Area Technical Institute, Wisconsin

Susan J. Mitchell  
Des Moines Area Community College, Iowa

Jim Lee Morgan  
West Los Angeles College, California

Jack K. Morton  
University of Montana

Annie Laurie I. Myers  
Northampton Community College, Pennsylvania

Solange North  
Fox Valley Technical Institute, Wisconsin

Jamie L. O'Brien  
South Dakota State University

Ruth R. O'Keefe  
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Robert H. Orr  
Florida Community College at Jacksonville

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Thomas L. Palmer  
Northern Arizona University

David W. Pan  
University of Tulsa, Oklahoma

Victor C. Parker, Jr.  
North Georgia College and State University

Donald L. Petote  
Genesee Community College, New York

Francis D. Polk  
Ocean County College, New Jersey

Gregory Rabb  
Jamestown Community College, New York

Brad Reid  
Abilene Christian University, Texas

Anne Montgomery Ricketts  
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Hugh Rode  
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Gerald M. Rogers  
Front Range Community College, Colorado

Dr. William J. Russell  
Northwest Nazarene University, Idaho



William M. Rutledge  
Macomb Community College, Michigan

Martha Wright Sartoris  
North Hennepin Community College, Minnesota

Anne W. Schacherl  
Madison Area Technical College, Wisconsin

Edward F. Shafer  
Rochester Community College, Minnesota

Lance Shoemaker, J.D.,  
M.C.P., M.A.  
West Valley College, California

Lou Ann Simpson  
Drake University, Iowa

Denise Smith  
Missouri Western State College

Hugh M. Spall  
Central Washington University

Catherine A. Stevens  
College of Southern Maryland

Maurice Tonissi  
Quinsigamond Community College,  
Massachusetts

James D. Van Tassel  
Mission College, California

Russell A. Waldon  
College of the Canyons, California

Frederick J. Walsh  
Franklin Pierce College, New Hampshire

James E. Walsh, Jr.  
Tidewater Community College, Virginia

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Richland College, Texas

Jerry Wegman  
University of Idaho

Edward L. Welsh, Jr.  
Phoenix College, Arizona

Clark W. Wheeler  
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## *Dedication*

To Anton and Mimi,

Making new friends  
is rare, but so  
very rewarding.  
Thanks.

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Feverpitched/Getty Images

# Legal and Constitutional Foundations of Business

## 1

*“Laws should be like clothes. They should be made to fit the people they are meant to serve.”*

**Clarence Darrow**  
1857–1938  
(American lawyer)

In the chapter-opening quotation, Clarence Darrow asserts that law should be created to serve the public. Because you are part of that public, the law is important to you. In particular, those entering the world of business will find themselves subject to numerous laws and government regulations. A basic knowledge of these laws and regulations is beneficial—if not essential—to anyone contemplating a successful career in today’s business environment.

Although the law has various definitions, all of them are based on the general observation that **law** consists of *enforceable rules governing relationships among individuals and between individuals and their society*. In some societies, these enforceable rules consist of unwritten principles of behavior. In other societies, they are set forth in law codes. In the United States, our rules consist of written laws and court decisions created by modern legislative and judicial bodies. Regardless of how such rules are created, they all have one feature in common: *they establish rights, duties, and privileges that are consistent with the values and beliefs of a society or its ruling group*.

In this introductory chapter, we look at how business law and the legal environment affect business decisions. For instance, suppose that Hellix Communications, Inc., wants to buy a competing cellular company. It also wants to offer unlimited data plans once it has acquired this competitor. Management fears that if the company does not expand, one of its bigger rivals will put it out of business. But Hellix Communications cannot simply buy its rivals. Nor can it just offer a low-cost cell-phone plan to its customers. It has to follow the laws pertaining to its proposed actions. Some of these laws (or regulations)

### Learning Objectives

*The six Learning Objectives below are designed to help improve your understanding. After reading this chapter, you should be able to answer the following questions:*

1. What are four primary sources of law in the United States?
2. What is a precedent? When might a court depart from precedent?
3. What are some important differences between civil law and criminal law?
4. What constitutional clause gives the federal government the power to regulate commercial activities among the states?
5. What is the Bill of Rights? What freedoms does the First Amendment guarantee?
6. Where in the Constitution can the due process clause be found?



**Law** A body of enforceable rules governing relationships among individuals and between individuals and their society.

**Primary Source of Law** A document that establishes the law on a particular issue, such as a constitution, a statute, an administrative rule, or a court decision.

### Learning Objective 1

What are four primary sources of law in the United States?

**Secondary Source of Law** A publication that summarizes or interprets the law, such as a legal encyclopedia, a legal treatise, or an article in a law review.

**Constitutional Law** The body of law derived from the U.S. Constitution and the constitutions of the various states.

**Statutory Law** The body of law enacted by legislative bodies (as opposed to constitutional law, administrative law, or case law).

**Citation** A reference to a publication in which a legal authority—such as a statute or a court decision—or other source can be found.

depend on interpretations by those running various regulatory federal agencies. The rules that control Hellix Communications' actions reflect past and current thinking about how large telecommunications companies should and should not act.

Our goal in this text is not only to teach you about specific laws, but also to teach you how to think about the law and legal environment, and to develop your critical-thinking and legal reasoning skills. The laws may change, but the ability to analyze and evaluate the legal (and ethical) ramifications of situations as they arise is an invaluable and lasting skill.

## 1-1 Sources of American Law

There are numerous sources of American law. **Primary sources of law**, or sources that establish the law, include the following:

- The U.S. Constitution and the constitutions of the various states.
- Statutory law—including laws passed by Congress, state legislatures, and local governing bodies.
- Regulations created by administrative agencies, such as the federal Food and Drug Administration.
- Case law (court decisions).

We describe each of these important primary sources of law in the following pages.

**Secondary sources of law** are books and articles that summarize and clarify the primary sources of law. Legal encyclopedias, compilations (such as *Restatements of the Law*, which summarize court decisions on a particular topic), official comments to statutes, treatises, articles in law reviews published by law schools, and articles in other legal journals are examples of secondary sources of law. Courts often refer to secondary sources of law for guidance in interpreting and applying the primary sources of law discussed here.

### 1-1a Constitutional Law

The federal government and the states have written constitutions that set forth the general organization, powers, and limits of their respective governments. **Constitutional law**, which deals with the fundamental principles by which the government exercises its authority, is the law as expressed in these constitutions.

The U.S. Constitution is the basis of all law in the United States. It provides a framework for statutes and regulations, and thus is the supreme law of the land. A law in violation of the U.S. Constitution, if challenged, will be declared unconstitutional and will not be enforced, no matter what its source.

The Tenth Amendment to the U.S. Constitution reserves to the states all powers not granted to the federal government. Each state in the union has its own constitution. Unless it conflicts with the U.S. Constitution or a federal law, a state constitution is supreme within that state's borders.

### 1-1b Statutory Law

Laws enacted by legislative bodies at any level of government, such as the statutes passed by Congress or by state legislatures, make up the body of law generally referred to as **statutory law**. When a legislature passes a statute, that statute ultimately is included in the federal code of laws or the relevant state code of laws.

Whenever a particular statute is mentioned in this text, we usually provide a footnote showing its **citation** (a reference to a publication in which a legal authority—such as a statute or a court decision—or other source can be found). In the appendix following this chapter, we explain how you can use these citations to find statutory law.



Statutory law also includes local **ordinances**—regulations passed by municipal or county governing units to deal with matters not covered by federal or state law. Ordinances commonly have to do with city or county land use (zoning ordinances), building and safety codes, and other matters affecting only the local governing unit.

**Applicability of Statutes** A federal statute, of course, applies to all states. A state statute, in contrast, applies only within the state's borders. State laws thus may vary from state to state. No federal statute may violate the U.S. Constitution, and no state statute or local ordinance may violate the U.S. Constitution or the relevant state constitution.

**Example 1.1** The tension between federal, state, and local laws is evident in the national debate over so-called sanctuary cities—cities that limit their cooperation with federal immigration authorities. Normally, law enforcement officials are supposed to alert federal immigration authorities when they come into contact with undocumented immigrants. Then, immigration officials request the state and local authorities to detain the individuals for possible deportation.

But a number of cities across the United States have adopted either local ordinances or explicit policies that do not follow this procedure. Police in these cities often do not ask or report the immigration status of individuals with whom they come into contact. Other places refuse to detain undocumented immigrants who are accused of low-level offenses. ■

**Uniform Laws** During the 1800s, the differences among state laws frequently created difficulties for businesspersons conducting trade and commerce among the states. To counter these problems, a group of legal scholars and lawyers formed the National Conference of Commissioners on Uniform State Laws (NCCUSL, online at [www.uniformlaws.org](http://www.uniformlaws.org)) in 1892 to draft **uniform laws** (“model statutes”) for the states to consider adopting. The NCCUSL still exists today and continues to issue uniform laws.

Each state has the option of adopting or rejecting a uniform law. *Only if a state legislature adopts a uniform law does that law become part of the statutory law of that state.* Furthermore, a state legislature may choose to adopt only part of a uniform law or to rewrite the sections that are adopted. Hence, even though many states may have adopted a uniform law, those laws may not be entirely “uniform.”

**The Uniform Commercial Code (UCC)** One of the most important uniform acts is the Uniform Commercial Code (UCC), which was created through the joint efforts of the NCCUSL and the American Law Institute.<sup>1</sup> The UCC was first issued in 1952 and has been adopted in all fifty states,<sup>2</sup> the District of Columbia, and the Virgin Islands.

The UCC facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions. Because of its importance in the area of commercial law, we cite the UCC frequently in this text. From time to time, the NCCUSL revises the articles contained in the UCC and submits the revised versions to the states for adoption.

### 1–1c Administrative Law

Another important source of American law is **administrative law**, which consists of the rules, orders, and decisions of administrative agencies. An **administrative agency** is a federal, state, or local government agency established to perform a specific function.

1. This institute was formed in the 1920s and consists of practicing attorneys, legal scholars, and judges.

2. Louisiana has adopted only Articles 1, 3, 4, 5, 7, 8, and 9.

**Ordinance** A regulation enacted by a city or county legislative body that becomes part of that city's or county's statutory law.



How have local “sanctuary cities” frustrated federal immigration procedures?

**Uniform Law** A model law developed by the National Conference of Commissioners on Uniform State Laws for the states to consider enacting into statute.

**Administrative Law** The body of law created by administrative agencies in order to carry out their duties and responsibilities.

**Administrative Agency** A federal, state, or local government agency created by the legislature to perform a specific function, such as to make and enforce rules pertaining to the environment.



Rules issued by various administrative agencies affect almost every aspect of a business's operations. Regulations govern a business's capital structure and financing, its hiring and firing procedures, its relations with employees and unions, and the way it manufactures and markets its products.

At the national level, numerous *executive agencies* exist within the cabinet departments of the executive branch. The Food and Drug Administration, for example, is an agency within the U.S. Department of Health and Human Services. Executive agencies are subject to the authority of the president, who has the power to appoint and remove their officers.

There are also major *independent regulatory agencies* at the federal level, including the Federal Trade Commission, the Securities and Exchange Commission, and the Federal Communications Commission. The president's power is less pronounced in regard to independent agencies, whose officers serve for fixed terms and cannot be removed without just cause.

There are administrative agencies at the state and local levels as well. Just as federal statutes take precedence over conflicting state statutes, so do federal agency regulations take precedence over conflicting state regulations.

**Agency Creation** Because Congress cannot possibly oversee the actual implementation of all the laws it enacts, it delegates such tasks to agencies. Congress creates an administrative agency by enacting **enabling legislation**, which specifies the name, composition, purpose, and powers of the agency being created.

**Example 1.2** The Federal Trade Commission (FTC) was created in 1914 by the Federal Trade Commission Act.<sup>3</sup> This act prohibits unfair and deceptive trade practices. It also describes the procedures the agency must follow to charge persons or organizations with violations of the act, and it provides for judicial review (review by the courts) of agency orders.

Under the act, the FTC has the power to “make rules and regulations for the purpose of carrying out the Act,” and to conduct investigations. The agency can obtain reports from interstate corporations concerning their business practices, investigate possible violations of the act, publish findings of its investigations, and recommend new legislation. It can also hold trial-like hearings and **adjudicate** (resolve judicially) certain kinds of disputes involving its regulations.

Note that the powers granted to the FTC incorporate functions associated with the legislative branch of government (rulemaking), the executive branch (investigation and enforcement), and the judicial branch (adjudication). Taken together, these functions constitute the **administrative process**, which is the administration of law by administrative agencies. The administrative process involves rulemaking, enforcement, and adjudication.

**Rulemaking** A major function of an administrative agency is **rulemaking**—formulating new regulations or amending old ones.

**Legislative Rules.** When Congress enacts an agency's enabling legislation, it confers the power to make **legislative rules**, or substantive rules, which are legally binding on all businesses. The Administrative Procedure Act (APA)<sup>4</sup> imposes strict procedural requirements that agencies must follow in legislative rulemaking, as well as other functions. If an agency fails to follow these procedures, the resulting rule may not be binding.

Legislative rulemaking under the APA typically involves the following three steps (referred to as *notice-and-comment rulemaking*).

1. **Notice of the proposed rulemaking.** The notice must be published in the *Federal Register*, a daily publication of the U.S. government.

**Enabling Legislation** A statute enacted by Congress that authorizes the creation of an administrative agency and specifies the name, composition, purpose, and powers of the agency being created.

**Adjudicate** To render a judicial decision. Adjudication is the trial-like proceeding in which an administrative law judge hears and resolves disputes involving an administrative agency's regulations.

**Administrative Process** The procedure used by administrative agencies in fulfilling their three basic functions: rulemaking, enforcement, and adjudication.

**Rulemaking** The process by which an administrative agency formally adopts a new regulation or amends an old one.

**Legislative Rule** An administrative agency rule that carries the same weight as a congressionally enacted statute.

3. 15 U.S.C. Sections 45–58.

4. 5 U.S.C. Sections 551–706.



2. *A comment period.* The agency must allow ample time for interested parties to comment in writing on the proposed rule. The agency takes these comments into consideration when drafting the final version of the regulation.
3. *The final rule.* Once the agency has drafted the final rule, it is published in the *Federal Register*. (See the appendix at the end of this chapter for an explanation of how to find agency regulations.)

**Interpretive Rules.** Administrative agencies also issue **interpretive rules** that are not legally binding but simply indicate how an agency plans to interpret and enforce its statutory authority. The APA does not apply to interpretive rulemaking. **Example 1.3** The Equal Employment Opportunity Commission periodically issues interpretive rules indicating how it plans to interpret the provisions of certain statutes, such as the Americans with Disabilities Act. These informal rules provide enforcement guidelines for agency officials. ■

**Enforcement and Investigation** Agencies often enforce their own rules and have both investigatory and prosecutorial powers. Agencies investigate a wide range of activities, including coal mining, automobile manufacturing, and the industrial discharge of pollutants into the environment.

In an investigation, an agency can request that individuals or organizations hand over specified books, papers, electronic records, or other documents. In addition, agencies may conduct on-site inspections, although a search warrant is normally required for such inspections. Sometimes, a search of a home, an office, or a factory is the only means of obtaining evidence needed to prove a regulatory violation.

After investigating a suspected rule violation, an agency may decide to take action against an individual or a business. Most administrative actions are resolved through negotiated settlement at their initial stages without the need for formal adjudication. If a settlement cannot be reached, though, the agency may issue a formal complaint and proceed to adjudication.

**Adjudication** Agency adjudication involves a trial-like hearing before an **administrative law judge (ALJ)**. Hearing procedures vary widely from agency to agency. After the hearing, the ALJ renders a decision in the case. The ALJ can fine the charged party or prohibit the party from carrying on some specified activity.

Either the agency or the charged party may appeal the ALJ's decision to the commission or board that governs the agency. If the party fails to get relief there, appeal can be made to a federal court. Courts give significant weight (deference) to an agency's judgment and interpretation of its rules, though, and typically uphold the ALJ's decision unless it is unreasonable. If neither side appeals the case, the ALJ's decision becomes final.

## 1-1d Case Law and Common Law Doctrines

The rules of law announced in court decisions constitute another basic source of American law. These rules of law include *interpretations* of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies.

Today, this body of judge-made law is referred to as **case law**. Case law—the doctrines and principles announced in cases—governs all areas not covered by statutory law or administrative law and is part of our common law tradition. We look at the origins and characteristics of the common law tradition in the pages that follow.

## 1-2 The Common Law

Because of our colonial heritage, much American law is based on the English legal system. Knowledge of this system is crucial to understanding our legal system today because judges in the United States still apply common law principles when deciding cases.

**Interpretive Rule** A nonbinding rule or policy statement issued by an administrative agency that explains how it interprets and intends to apply the statutes it enforces.

*“Laws and institutions, like clocks, must occasionally be cleaned, wound up, and set to true time.”*

**Henry Ward Beecher**

1813–1887

(American clergyman and abolitionist)

### Administrative Law Judge (ALJ)

One who presides over an administrative agency hearing and has the power to administer oaths, take testimony, rule on questions of evidence, and make determinations of fact.

**Case Law** The rules of law announced in court decisions. Case law interprets statutes, regulations, and constitutional provisions, and governs all areas not covered by statutory or administrative law.



**Common Law** The body of law developed from custom or judicial decisions in English and U.S. courts, not attributable to a legislature.

## Learning Objective 2

What is a precedent? When might a court depart from precedent?

**Precedent** A court decision that furnishes an example or authority for deciding subsequent cases involving identical or similar facts.

**Stare Decisis** A common law doctrine under which judges are obligated to follow the precedents established in prior decisions.

**Binding Authority** Any source of law that a court *must* follow when deciding a case.

### 1–2a Early English Courts

After the Normans conquered England in 1066, William the Conqueror and his successors began the process of unifying the country under their rule. One of the means they used to do this was the establishment of the king's courts, or *curiae regis*. Before the Norman Conquest, disputes had been settled according to the local legal customs and traditions in various regions of the country. The king's courts sought to establish a uniform set of rules for the country as a whole. What evolved in these courts was the beginning of the **common law**—a body of general rules that applied throughout the English realm. Eventually, the common law tradition became part of the heritage of all nations that were once British colonies, including the United States.

Courts developed the common law rules from the principles underlying judges' decisions in actual legal controversies. Judges attempted to be consistent, and whenever possible, they based their decisions on the principles suggested by earlier cases. They sought to decide similar cases in a similar way and considered new cases with care because they knew that their decisions would make new law. Each interpretation became part of the law on the subject and served as a legal **precedent**—a court decision that furnished an example or authority for deciding subsequent cases involving identical or similar legal principles or facts.

In the early years of the common law, there was no single place or publication where court opinions, or written decisions, could be found. Beginning in the late thirteenth and early fourteenth centuries, however, portions of significant decisions from each year were gathered together and recorded in *Year Books*. The *Year Books* were useful references for lawyers and judges. In the sixteenth century, the *Year Books* were discontinued, and other reports of cases became available. (See the appendix to this chapter for a discussion of how cases are reported, or published, in the United States today.)

### 1–2b Stare Decisis

The practice of deciding new cases with reference to former decisions, or precedents, eventually became a cornerstone of the English and U.S. judicial systems. The practice forms a doctrine called **stare decisis**<sup>5</sup> (a Latin phrase meaning “to stand on decided cases”). The doctrine of *stare decisis* helps the courts to be more efficient because if other courts have carefully reasoned through a similar case, their legal reasoning and opinions can serve as guides. (The legal reasoning process is described in Appendix A at the end of this text.) *Stare decisis* also makes the law more stable and predictable.

Under the doctrine of *stare decisis*, judges are obligated to follow the precedents established within their jurisdictions. (The term *jurisdiction* refers to a geographic area in which a court has the power to apply the law.) Once a court has set forth a principle of law as being applicable to a certain set of facts, that court must apply the principle in future cases involving similar facts. Courts of lower rank (within the same jurisdiction) must do likewise. Thus, *stare decisis* has two aspects:


1. A court should not overturn its own precedents unless there is a strong reason to do so.
2. Decisions made by a higher court are binding on lower courts.

**Controlling Precedents** Precedents that must be followed within a jurisdiction are known as controlling precedents. Controlling precedents are binding authorities. A **binding authority** is any source of law that a court must follow when deciding a case. Binding authorities include constitutions, statutes, and regulations that govern the issue being decided, as well as court decisions that are controlling precedents within the jurisdiction. United States Supreme Court case decisions, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation.

5. Pronounced *stahr-ee dih-si-sis*.



**Departures from Precedent** Although courts are obligated to follow precedents, sometimes a court will depart from the rule of precedent. If a court decides that a precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court may rule contrary to the precedent. Cases that overturn precedent often receive a great deal of publicity.

 **Classic Case Example 1.4** In *Brown v. Board of Education of Topeka*,<sup>6</sup> the United States Supreme Court expressly overturned precedent. The Court concluded that separate educational facilities for whites and blacks, which had previously been upheld as constitutional,<sup>7</sup> were inherently unequal. The Supreme Court's departure from precedent in the *Brown* decision received a tremendous amount of publicity as people began to realize the ramifications of this change in the law. ■

**When There Is No Precedent** Occasionally, courts must decide cases for which no precedents exist, called *cases of first impression*. For instance, as you will read throughout this text, the Internet and certain other technologies have presented many new and challenging issues for the courts to decide.

**Example 1.5** Google Glass is a Bluetooth-enabled, hands-free, wearable computer. A person using Google Glass can use voice commands to take photos and videos, surf the Internet, and do other things. When it was first sold, many people expressed concerns that this wearable technology makes it easier to secretly film or photograph others. Numerous bars and restaurants banned the use of Google Glass to protect their patrons' privacy. In addition, police officers were concerned about driver safety. In a California case of first impression, a woman was ticketed for wearing Google Glass while driving. The court dismissed the case because it was not clear whether the device had been in operation at the time of the offense. ■

When deciding cases of first impression, courts often look at **persuasive authorities** (legal authorities that a court may consult for guidance but that are not binding on the court). A court may consider precedents from other jurisdictions, for instance, although those precedents are not binding. A court may also consider legal principles and policies underlying previous court decisions or existing statutes. Additionally, a court might look at fairness, social values and customs, and public policy (governmental policy based on widely held societal values). Federal courts can also look at unpublished opinions (those not intended for publication in a printed legal reporter) as sources of persuasive authority.<sup>8</sup>

## 1-2c Equitable Remedies and Courts of Equity

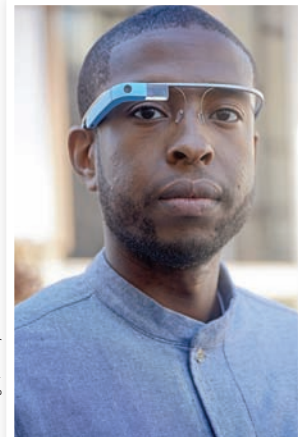
A **remedy** is the means given to a party to enforce a right or to compensate for the violation of a right. **Example 1.6** Elena is injured because of Rowan's wrongdoing. If Elena files a lawsuit and is successful, a court can order Rowan to compensate Elena for the harm by paying her a certain amount. The compensation is Elena's remedy. ■

The kinds of remedies available in the early king's courts of England were severely restricted. If one person wronged another, the king's courts could award either money or property, including land, as compensation. These courts became known as *courts of law*, and the remedies were called *remedies at law*. Even though this system introduced uniformity in the settling of disputes, when a person wanted a remedy other than property or economic compensation, the courts of law could do nothing, so "no remedy, no right."

**Remedies in Equity** *Equity* is a branch of law—founded on notions of justice and fair dealing—that seeks to supply a remedy when no adequate remedy at law is available. When individuals could not obtain an adequate remedy in a court of law, they petitioned the king

## Know This

Courts normally must follow the rules set forth by higher courts in deciding cases with similar fact patterns.



Ira Berger/Alamy

Under what circumstances could a user of Google Glass be violating the right to privacy of others?

**Persuasive Authority** Any legal authority or source of law that a court may look to for guidance but need not follow when making its decision.

**Remedy** The relief given to an innocent party to enforce a right or compensate for the violation of a right.

6. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

7. See *Plessy v. Ferguson*, 163 U.S. 537, 16 S.Ct. 1138, 41 L.Ed. 256 (1896).

8. Rule 32.1 of the Federal Rules of Appellate Procedure.



**Plaintiff** One who initiates a lawsuit.

**Defendant** One against whom a lawsuit is brought or the accused person in a criminal proceeding.

**Know This**  
Even though courts of law and equity have merged, the principles of equity still apply, and courts will not grant an equitable remedy unless the remedy at law is inadequate.

**Substantive Law** Law that defines, describes, regulates, and creates legal rights and obligations.

**Procedural Law** Law that establishes the methods of enforcing the rights established by substantive law.

**Cyberlaw** An informal term used to refer to all laws governing electronic communications and transactions, particularly those conducted via the Internet.

for relief. Eventually, formal courts called *courts of equity* were established. The remedies granted by these courts were called *remedies in equity*.  
**Plaintiffs** (those bringing lawsuits) had to specify whether they were bringing an “action at law” or an “action in equity,” and they chose their courts accordingly. A plaintiff might ask a court of equity to issue a decree for *specific performance*—an order for the **defendant** (the one being sued) to perform what was promised. A court of equity could also issue an *injunction*, directing a party to do or refrain from doing a particular act. In certain cases, a court of equity could allow for the *rescission* (cancellation) of the contract, thereby returning the parties to the positions that they held prior to the contract’s formation. Equitable remedies will be discussed in greater detail in the chapters covering contracts.

**The Merging of Law and Equity** Today, in most states, the courts of law and equity have merged, and thus the distinction between the two courts has largely disappeared. A plaintiff may now request both legal and equitable remedies in the same action, and the trial court judge may grant either form—or both forms—of relief.  
The distinction between legal and equitable remedies remains significant, however, because a court normally will grant an equitable remedy only when the remedy at law is inadequate. To request the proper remedy, a businessperson (or her or his attorney) must know what remedies are available for the specific kinds of harms suffered. Exhibit 1–1 summarizes the procedural differences (applicable in most states) between an action at law and an action in equity.

1–3 **Classifications of Law**

The law can be broken down according to several classification systems. One system divides law into **substantive law** (all laws that define, describe, regulate, and create legal rights and obligations) and **procedural law** (all laws that establish the methods of enforcing the rights established by substantive law).  
**Example 1.7** A state law that provides employees with the right to workers’ compensation benefits for any on-the-job injuries they sustain is a substantive law because it creates legal rights. Procedural laws, in contrast, establish the method by which an employee must notify the employer about an on-the-job injury, prove the injury, and periodically submit additional proof to continue receiving workers’ compensation benefits. ■ Note that a law may contain both substantive and procedural provisions.  
Other classification systems divide law into federal law and state law, and private law (dealing with relationships between persons) and public law (addressing the relationship between persons and their governments). Frequently, people use the term **cyberlaw** to refer to the emerging body of law that governs transactions conducted via the Internet, but cyberlaw is not really a classification of law. Rather, it is an informal term used to refer to both new laws and modifications of traditional legal principles that relate to the online environment.

**Exhibit 1–1** Procedural Differences between an Action at Law and an Action in Equity

PROCEDURE	ACTION AT LAW	ACTION IN EQUITY
Initiation of lawsuit	By filing a complaint	By filing a petition
Decision	By jury or judge	By judge (no jury)
Result	Judgment	Decree
Remedy	Monetary damages or property	Injunction, specific performance, or rescission



### 1-3a Civil Law and Criminal Law

**Civil law** spells out the rights and duties that exist between persons and between persons and their governments, as well as the relief available when a person's rights are violated. Typically, in a civil case, a private party sues another private party who has failed to comply with a duty. Much of the law that we discuss in this text—including contract law and tort law—is civil law.

Note that *civil law* is not the same as a *civil law system*. A **civil law system** is a legal system based on a written code of laws. In nations with civil law systems, such as China and Mexico, statutes are the primary source of law, and case precedents are not binding on judges (*stare decisis* does not apply).

**Criminal law** has to do with wrongs committed against society for which society demands redress. Criminal acts are proscribed by local, state, or federal government statutes. Thus, criminal defendants are prosecuted by public officials, such as a district attorney, on behalf of the state, not by their victims or other private parties.

Whereas in a civil case the object is to obtain a remedy (such as monetary damages) to compensate the injured party, in a criminal case the object is to punish the wrongdoer in an attempt to deter others from similar actions. Penalties for violations of criminal statutes consist of fines and/or imprisonment—and, in some cases, death.

### 1-3b National and International Law

U.S. businesspersons increasingly engage in transactions that extend beyond our national borders. For this reason, those who pursue a career in business today should have an understanding of the global legal environment.

The law of a particular nation, such as Japan or Germany, is **national law**. National law, of course, varies from country to country because each country's law reflects the interests, customs, activities, and values that are unique to that nation's culture.

In contrast, international law applies to more than one nation. **International law** can be defined as a body of written and unwritten laws observed by independent nations and governing the acts of individuals as well as governments. It is a mixture of rules and constraints derived from a variety of sources, including the laws of individual nations, customs developed among nations, and international treaties and organizations.

The key difference between national law and international law is that government authorities can enforce national law. If a nation violates an international law, however, enforcement is up to other countries or international organizations, which may or may not choose to act. If persuasive tactics fail, the only option is to take coercive actions against the violating nation. Coercive actions range from the severance of diplomatic relations and boycotts to sanctions and, as a last resort, war.

### Learning Objective 3

What are some important differences between civil law and criminal law?



A witness points out someone in the courtroom to the judge.

**Civil Law** The branch of law dealing with the definition and enforcement of all private or public rights, as opposed to criminal matters.

**Civil Law System** A system of law derived from Roman law that is based on codified laws (rather than on case precedents).

**Criminal Law** The branch of law that defines and punishes wrongful actions committed against the public.

**National Law** Law that pertains to a particular nation (as opposed to international law).

**International Law** Law that governs relations among nations.

## 1-4 The Constitutional Powers of Government

Laws that govern business have their origin in the lawmaking authority granted by the U.S. Constitution. Following the Revolutionary War, the United States created a *confederal* form of government in which the states governed themselves and the national government exercised only limited powers. When problems arose with this form of government, a national



**Federal Form of Government** A system of government in which the states form a union and the sovereign power is divided between the central government and the member states.

**Sovereignty** The power of a state to do what is necessary to govern itself. Individual state sovereignty is determined by the U.S. Constitution.

**Police Powers** Powers possessed by the states as part of their inherent sovereignty. These powers may be exercised to protect or promote the public order, health, safety, morals, and general welfare.

convention was called, and the delegates drafted the U.S. Constitution. This document, after its ratification by the states in 1789, became the basis for an entirely new form of government.

### 1–4a A Federal Form of Government

The new government created by the Constitution reflected a series of compromises made by the convention delegates on various issues. Some delegates wanted sovereign power to remain with the states, whereas others wanted the national government alone to exercise sovereign power. The end result was a compromise—a **federal form of government** in which the national government and the states *share* sovereign power.

**Federal Powers** The Constitution sets forth specific powers that can be exercised by the national government. It also provides that the national government has the implied power to undertake actions necessary to carry out its expressly designated powers. All other powers are “reserved” to the states.



elena lenova / iStock/Getty Images

Because the Constitution reserves to the states all powers not delegated to the national government, the states can and do regulate many types of commercial activities within their borders. So, too, do municipalities. One of these powers is the imposition of building codes. What is the general term that applies to such powers?

**Checks and Balances** The system under which the powers of the national government are divided among three separate branches—the executive, legislative, and judicial branches—each of which exercises a check on the actions of the others.

**Regulatory Powers of the States** As part of their inherent **sovereignty** (power to govern themselves), state governments have the authority to regulate certain affairs within their borders. This authority stems, in part, from the Tenth Amendment, which reserves all powers not delegated to the national government to the states or to the people.

State regulatory powers are often referred to as **police powers**. The term encompasses more than just the enforcement of criminal laws. Police powers also give a state government broad rights to regulate private activities to protect or promote the public order, health, safety, morals, and general welfare. Fire and building codes, parking regulations, zoning restrictions, licensing requirements, and thousands of other state statutes have been enacted pursuant to states’ police powers. Local governments, such as cities, also exercise police powers.

### 1–4b The Separation of Powers

To make it difficult for the national government to use its power arbitrarily, the Constitution divided the national government’s powers among the three branches of government. The legislative branch makes the laws, the executive branch enforces the laws, and the judicial branch interprets the laws. Each branch performs a separate function, and no branch may exercise the authority of another branch.

Additionally, a system of **checks and balances** allows each branch to limit the actions of the other two branches, thus preventing any one branch from exercising too much power. The following are examples of these checks and balances:

1. The legislative branch (Congress) can enact a law, but the executive branch (the president) has the constitutional authority to veto that law.
2. The executive branch is responsible for foreign affairs, but treaties with foreign governments require the advice and consent of the Senate.
3. Congress determines the jurisdiction of the federal courts, and the president appoints federal judges, with the advice and consent of the Senate. The judicial branch has the power to hold actions of the other two branches unconstitutional.



### 1-4c The Commerce Clause

To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution explicitly gave the national government the power to regulate interstate commerce. Article I, Section 8, of the U.S. Constitution expressly permits Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” This clause, referred to as the **commerce clause**, has had a greater impact on business than any other provision in the Constitution.

Initially, the commerce power was interpreted as being limited to *interstate* commerce (commerce among the states) and not applicable to *intrastate* commerce (commerce within a state). In 1824, however, the United States Supreme Court decided that commerce within a state could also be regulated by the national government as long as the commerce *substantially affected* commerce involving more than one state.<sup>9</sup>

**The Expansion of National Powers under the Commerce Clause** As the nation grew and faced new kinds of problems, the commerce clause became a vehicle for the additional expansion of the national government’s regulatory powers. Even activities that seemed purely local came under the regulatory reach of the national government if those activities were deemed to substantially affect interstate commerce. In 1942, the Supreme Court held that wheat production by an individual farmer intended wholly for consumption on his own farm was subject to federal regulation.<sup>10</sup>

Today, at least theoretically, the power over commerce authorizes the national government to regulate almost every commercial enterprise in the United States. The breadth of the commerce clause permits the national government to legislate in areas in which Congress has not explicitly been granted power. Only occasionally has the Supreme Court curbed the national government’s regulatory authority under the commerce clause.

The following *Classic Case* involved a challenge to the scope of the national government’s constitutional authority to regulate local activities.

**Commerce Clause** The provision in Article I, Section 8, of the U.S. Constitution that gives Congress the power to regulate interstate commerce.

### Learning Objective 4

What constitutional clause gives the federal government the power to regulate commercial activities among the states?

9. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

10. *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942).



## Classic Case 1.1

### Heart of Atlanta Motel v. United States

Supreme Court of the United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964).

**Facts** In the 1950s, the United States Supreme Court ruled that racial segregation imposed by the states in school systems and other public facilities violated the Constitution. Privately owned facilities were not affected until Congress passed the Civil Rights Act of 1964, which prohibited racial discrimination in “establishments affecting interstate commerce.”



President Lyndon Johnson signs the 1964 Civil Rights Act.

Library photo by Cecil Stoughton

The owner of the Heart of Atlanta Motel, in violation of the Civil Rights Act of 1964, refused to rent rooms to African Americans. The motel owner brought an action in a federal district court to have the Civil Rights Act declared unconstitutional on the ground that Congress had exceeded its constitutional authority to regulate commerce by enacting the statute.

(Continues)



The owner argued that his motel was not engaged in interstate commerce but was “of a purely local character.” The motel, however, was accessible to state and interstate highways. The owner advertised nationally, maintained billboards throughout the state, and accepted convention trade from outside the state (75 percent of the guests were residents of other states).

The district court ruled that the act did not violate the Constitution and enjoined (prohibited) the owner from discriminating on the basis of race. The owner appealed. The case ultimately went to the United States Supreme Court.

**Issue** Did Congress exceed its constitutional power to regulate interstate commerce by enacting the Civil Rights Act of 1964?

**Decision** No. The United States Supreme Court upheld the constitutionality of the act.

**Reason** The Court noted that the act was passed to correct “the deprivation of personal dignity” accompanying the denial of equal access to “public establishments.” Testimony before Congress leading to the passage of the act indicated that African Americans in particular experienced substantial discrimination in attempting to secure lodging while traveling. This discrimination impeded interstate travel and thus impeded interstate commerce.

As for the owner’s argument that his motel was “of a purely local character,” the Court said that even if this was true, the motel affected interstate commerce. According to the Court, “if it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.” Therefore, under the commerce clause, “the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities.”

### Critical Thinking

• **What If the Facts Were Different?** *If this case had involved a small, private retail business that did not advertise nationally, would the result have been the same? Why or why not?*

• **Impact of This Case on Today’s Law** *If the United States Supreme Court had invalidated the Civil Rights Act of 1964, the legal landscape of the United States would be much different today. The act prohibits discrimination based on race, color, national origin, religion, or gender in all “public accommodations,” including hotels and restaurants. The act also prohibits discrimination in employment based on these criteria. Although state laws now prohibit many of these forms of discrimination as well, the protections available vary from state to state—and it is not certain whether such laws would have been passed had the outcome in this case been different.*

“The United States Constitution has proved itself the most marvelously elastic compilation of rules of government ever written.”

**Franklin D. Roosevelt**

1882–1945

(Thirty-second president of the United States, 1933–1945)

**The “Dormant” Commerce Clause** The United States Supreme Court has interpreted the commerce clause to mean that the national government has the *exclusive* authority to regulate commerce that substantially affects trade and commerce among the states. This express grant of authority to the national government, which is often referred to as the “positive” aspect of the commerce clause, implies a negative aspect—that the states do *not* have the authority to regulate interstate commerce. This negative aspect of the commerce clause is often referred to as the “dormant” (implied) commerce clause.

The dormant commerce clause comes into play when state regulations affect interstate commerce. In this situation, the courts normally weigh the state’s interest in regulating a certain matter against the burden that the state’s regulation places on interstate commerce. Because courts balance the interests involved, predicting the outcome in a particular case can be extremely difficult.

**Case Example 1.8** Maryland imposed personal income taxes on its residents at the state level and the county level. Maryland residents who paid income tax in another state were allowed a credit against the *state* portion of their Maryland taxes, but not the *county* portion. Several Maryland residents who had earned profits in and paid taxes to other states but had not received a credit against their county tax liability sued. They claimed that Maryland’s system discriminated against interstate commerce because those who earned income in other states paid more taxes than residents whose only income came from within Maryland. When the case reached the United States Supreme Court, the Court held that Maryland’s personal income tax scheme violated the dormant commerce clause.<sup>11</sup>

11. *Comptroller of Treasury of Maryland v. Wynne*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 1787, 191 L.Ed.2d 813 (2015). Also see *State of South Dakota v. Wayfair, Inc.*, 2017 S.D. 56, 901 N.W.2d 754 (2017), *cert. granted*, 138 S.Ct. 735 (2018).




## 1-4d The Supremacy Clause

Article VI of the Constitution provides that the Constitution, laws, and treaties of the United States are “the supreme Law of the Land.” This article, commonly referred to as the **supremacy clause**, is important in the ordering of state and federal relationships.

**Preemption** Under the supremacy clause, when there is a direct conflict between a federal law and a state law, the state law is rendered invalid. Because some powers are *concurrent* (shared by the federal government and the states), however, it is necessary to determine which law governs in a particular circumstance. **Preemption** occurs when Congress chooses to act exclusively in a concurrent area. In this circumstance, a valid federal statute or regulation will take precedence over a conflicting state or local law or regulation on the same general subject.

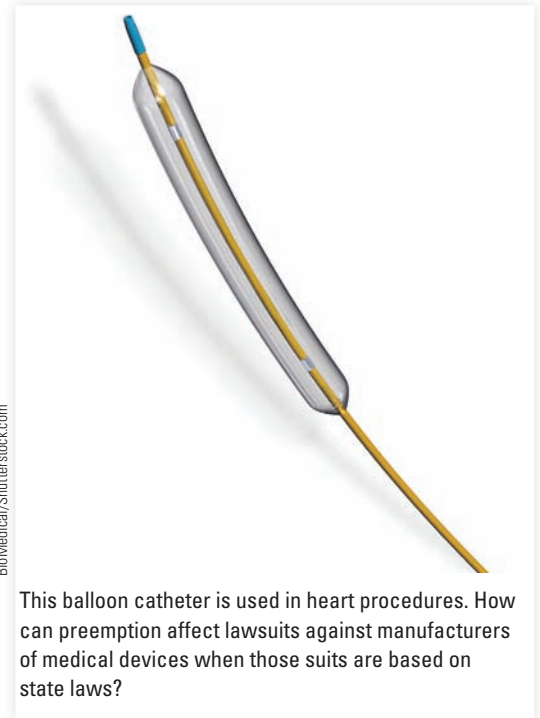
**Congressional Intent** Often, it is not clear whether Congress, in passing a law, intended to preempt an entire subject area against state regulation. In these situations, the courts determine whether Congress intended to exercise exclusive power.

Generally, congressional intent to preempt will be found if a federal law regulating an activity is so pervasive, comprehensive, or detailed that the states have little or no room to regulate in that area. Also, when a federal statute creates an agency to enforce a law, the agency’s decisions in matters that come within its jurisdiction will likely preempt state laws.

 **Classic Case Example 1.9** A man who alleged that he had been injured by a faulty medical device (a balloon catheter that had been inserted into his artery following a heart attack) sued the manufacturer. The case ultimately came before the United States Supreme Court. The Court noted that the relevant federal law (the Medical Device Amendments) included a preemption provision. Furthermore, the device had passed the U.S. Food and Drug Administration’s rigorous premarket approval process. Therefore, the Court ruled that the federal regulation of medical devices preempted the man’s state law claims for negligence, strict liability, and implied warranty.<sup>12</sup>

**Supremacy Clause** The provision in Article VI of the U.S. Constitution that the Constitution, laws, and treaties of the United States are “the supreme Law of the Land.”

**Preemption** A doctrine under which certain federal laws preempt, or take precedence over, conflicting state or local laws.



## 1-5 Business and the Bill of Rights

The importance of having a written declaration of the rights of individuals eventually caused the first Congress of the United States to enact twelve amendments to the Constitution and submit them to the states for approval. The first ten of these amendments, commonly known as the **Bill of Rights**, were adopted in 1791.

The Bill of Rights embodies a series of protections for the individual against various types of conduct by the federal government. Some constitutional protections apply to business entities as well. For example, corporations exist as separate legal entities, or legal persons, and enjoy many of the same rights and privileges as natural persons do.

Summarized next are the protections guaranteed by the first ten amendments:

1. The First Amendment guarantees the freedoms of religion, speech, and the press and the rights to assemble peaceably and to petition the government.
2. The Second Amendment guarantees the right to keep and bear arms.
3. The Third Amendment prohibits, in peacetime, the lodging of soldiers in any house without the owner’s consent.

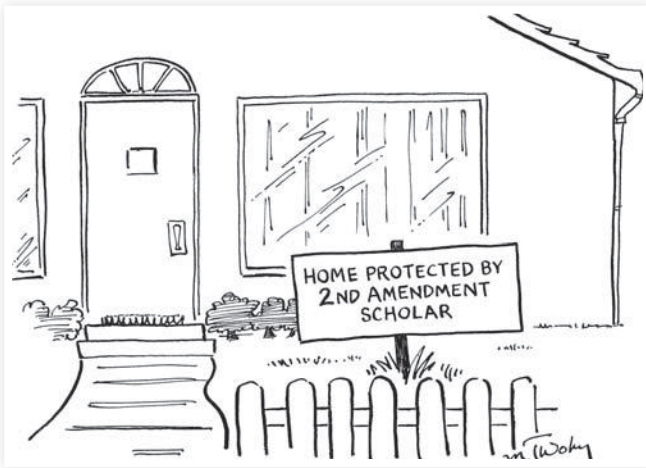
### Learning Objective 5

What is the Bill of Rights?  
What freedoms does the First Amendment guarantee?

**Bill of Rights** The first ten amendments to the U.S. Constitution.

12. *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 128 S.Ct. 999, 169 L.Ed.2d 892 (2008); see also *Mink v. Smith & Nephew, Inc.*, 860 F.3d 1319 (11th Cir. 2017).





Mike Twolby/Conde Nast

4. The Fourth Amendment prohibits unreasonable searches and seizures of persons or property.
5. The Fifth Amendment guarantees the rights to *indictment* (formal accusation) by a grand jury, to due process of law, and to fair payment when private property is taken for public use. The Fifth Amendment also prohibits compulsory self-incrimination and double jeopardy (prosecution for the same crime twice).
6. The Sixth Amendment guarantees the accused in a criminal case the right to a speedy and public trial by an impartial jury and with counsel. The accused has the right to cross-examine witnesses against him or her and to solicit testimony from witnesses in his or her favor.
7. The Seventh Amendment guarantees the right to a trial by jury in a civil (noncriminal) case involving at least twenty dollars.<sup>13</sup>
8. The Eighth Amendment prohibits excessive bail and fines, as well as cruel and unusual punishment.

9. The Ninth Amendment establishes that the people have rights in addition to those specified in the Constitution.

10. The Tenth Amendment establishes that those powers neither delegated to the federal government nor denied to the states are reserved for the states.

Next, we examine two important guarantees of the First Amendment—freedom of speech and freedom of religion. First, though, we look at how the Bill of Rights puts certain limits on government.

## Know This

Although most of the rights in the Bill of Rights apply to actions of the states, some of them apply only to actions of the federal government.

### 1–5a Limits on Federal and State Governmental Actions

As originally intended, the Bill of Rights limited only the powers of the national government. Over time, however, the United States Supreme Court “incorporated” most of these rights into the protections against state actions afforded by the Fourteenth Amendment to the Constitution.

**The Fourteenth Amendment** Passed in 1868 after the Civil War, the Fourteenth Amendment provides, in part, that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”

Starting in 1925, the Supreme Court began to define various rights and liberties guaranteed in the national Constitution as constituting “due process of law,” which was required of state governments under the Fourteenth Amendment. Today, most of the rights and liberties set forth in the Bill of Rights apply to state governments as well as to the national government.

**Judicial Interpretation** The rights secured by the Bill of Rights are not absolute. Many of the rights guaranteed by the first ten amendments are described in very general terms. For instance, the Second Amendment states that people have a right to keep and bear arms, but it does not explain the extent of this right. As the Supreme Court once stated, the right does not extend so far that people can “keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”<sup>14</sup> Legislatures can prohibit the carrying of concealed weapons or certain types of weapons, such as machine guns.

Ultimately, the Supreme Court, as the final interpreter of the Constitution, gives meaning to constitutional rights and determines their boundaries. (For a discussion of how the Supreme Court may consider other nations’ laws when determining the appropriate balance of individual rights, see this chapter’s *Beyond Our Borders* feature.)

<sup>13</sup>. Twenty dollars was forty days’ pay for the average person when the Bill of Rights was written.

<sup>14</sup>. *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).



## The Impact of Foreign Law on the United States Supreme Court

The United States Supreme Court interprets the rights provided in the U.S. Constitution. Changing public views on controversial topics, such as privacy in an era of terrorist threats or the rights of gay men and lesbians, may affect the way the Supreme Court decides a case. But should the Court also consider other nations' laws and world opinion when balancing individual rights in the United States?

Justices on the Supreme Court have increasingly considered foreign law when deciding issues of national importance. This trend started in 2003 when, for the first time ever, foreign law was cited in a majority opinion of the Supreme Court. The case was a controversial one in which the Court struck down laws that prohibited oral and

anal sex between consenting adults of the same gender. In the majority opinion, Justice Anthony Kennedy mentioned that the European Court of Human Rights and other foreign courts have consistently acknowledged that homosexuals have a right "to engage in intimate, consensual conduct."<sup>a</sup>

The practice of looking at foreign law has many critics, including some conservative members of the Supreme Court, who believe that foreign views are irrelevant to rulings on U.S. law. Other Supreme Court justices, however, including Justice Stephen Breyer and Justice Ruth Bader Ginsburg, have publicly stated that in our

a. *Lawrence v. Texas*, 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003).

## Beyond Our Borders

increasingly global community we should not ignore the opinions of courts in the rest of the world.

### Critical Thinking

*Should U.S. courts, and particularly the United States Supreme Court, look to other nations' laws for guidance when deciding important issues—including those involving rights granted by the Constitution? If so, what impact might this have on their decisions? Explain.*

## 1–5b The First Amendment—Freedom of Speech

A democratic form of government cannot survive unless people can freely voice their political opinions and criticize government actions or policies. Freedom of speech, particularly political speech, is thus a prized right, and traditionally the courts have protected it to the fullest extent possible.

**Symbolic speech**—gestures, movements, articles of clothing, and other forms of expressive conduct—is also given substantial protection by the courts. The burning of the American flag to protest government policies, for instance, is a constitutionally protected form of expression. So is wearing a T-shirt with a photo of a presidential candidate or taking a knee during the national anthem at a sporting event.

The test is whether a reasonable person would interpret the conduct as conveying some sort of message. **Example 1.10** As a form of expression, Eric has gang signs tattooed on his torso, arms, neck, and legs. If a reasonable person would interpret this conduct as conveying a message, then it might be a protected form of symbolic speech.

**Reasonable Restrictions** Expression—oral, written, or symbolized by conduct—is subject to reasonable restrictions. A balance must be struck between a government's obligation to protect its citizens and those citizens' exercise of their rights. Reasonableness is analyzed on a case-by-case

**Symbolic Speech** Nonverbal expressions of beliefs. Symbolic speech, which includes gestures, movements, and articles of clothing, is given substantial protection by the courts.



Robert Nickelsberg/Getty Images News/Getty Images

When will a tattoo be considered symbolic speech?



basis. (See this chapter's *Adapting the Law to the Online Environment* feature for a discussion of how the United States Supreme Court balanced the government's obligation against the rights of a convicted sex offender.)

**Content-Neutral Laws.** Laws that regulate the time, manner, and place, but not the content, of speech receive less scrutiny by the courts than do laws that restrict the content of expression. If a restriction imposed by the government is content neutral, then a court may allow it. To be content neutral, the restriction must be aimed at combating some secondary societal problem, such as crime, and not be aimed at suppressing the expressive conduct or its message.

Courts have often protected nude dancing as a form of symbolic expression. Nevertheless, the courts typically allow content-neutral laws that ban *all* public nudity. **Case Example 1.11** Rita Ora was charged with dancing nude at an annual “anti-Christmas” protest in Harvard Square in Cambridge, Massachusetts. Ora argued that the statute was overly broad and unconstitutional, and a trial court agreed. On appeal, a state appellate court reversed. The court found that the statute was constitutional because it banned public displays of open and gross lewdness in situations in which there was an unsuspecting or unwilling audience.<sup>15</sup>

**Laws That Restrict the Content of Speech.** If a law regulates the content of the expression, it must serve a compelling state interest and must be narrowly written to achieve that interest. Under the **compelling government interest** test, the government's interest is balanced

### Compelling Government

**Interest** A test of constitutionality that requires the government to have convincing reasons for passing any law that restricts fundamental rights, such as free speech, or distinguishes between people based on a suspect trait.

15. *Commonwealth of Massachusetts v. Ora*, 451 Mass. 125, 883 N.E.2d 1217 (2008).

## Does Everyone Have a Constitutional Right to Use Social Media?

Social media have become the predominant means by which many Americans communicate, obtain news updates, and discover what is “trending.” At least one state, though, legislated a ban on the use of social media by convicted sex offenders. One sex offender chose to challenge the law.

### North Carolina and the Use of Social Media

North Carolina's legislature passed the “Protect Children from Sexual Predators Act” in 2008. The goal, of course, was to prevent predators from finding potential victims on the Internet. Part of that act was codified as North Carolina General Statute 14-202.5. About one thousand sex offenders have been prosecuted for violating it.

### A Long Road through the Courts

When convicted sex offender Lester Packingham, Jr., wrote a Facebook post

about a traffic ticket, a police officer saw the post and reported it, and Packingham was convicted of violating a criminal statute. He fought his conviction, and on appeal it was overturned.<sup>a</sup> The state, though, continued to fight the appellate decision. The North Carolina Supreme Court ruled in favor of the state.

Packingham then appealed to the United States Supreme Court, where he prevailed.<sup>b</sup> The Court pointed out that prohibiting sex offenders from accessing all social media violates their First Amendment rights to free speech. Further, this prohibition “bars access to what for many are the principle sources of knowing current events, checking ads for employment,

## Adapting the Law to the Online Environment

speaking and listening in a modern public square, and otherwise exploring the vast realms of human thought and knowledge.”

### Critical Thinking


*The Court said in its opinion that “specific criminal acts are not protected speech even if speech is the means for their commission.” What use of social media and the Internet might therefore still be unlawful (and not protected free speech) for registered sex offenders?*

a. *North Carolina v. Packingham*, 229 N.C.App. 293, 748 S.E.2d 146 (2013).

b. *Packingham v. North Carolina*, \_\_\_ U.S. \_\_\_, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017).



against the individual's constitutional right to be free of government interference. For the statute to be valid, there must be a compelling government interest that can be furthered only by the law in question.

The United States Supreme Court has held that schools may restrict students' speech at school events.  **Spotlight Case Example 1.12** Some high school students held up a banner saying "Bong Hits 4 Jesus" at an off-campus but school-sanctioned event. The majority of the Court ruled that school officials did not violate the students' free speech rights when they confiscated the banner and suspended the students for ten days. Because the banner could reasonably be interpreted as promoting drugs, the Court concluded that the school's actions were justified. Several justices disagreed, however, noting that the majority's holding creates a special exception that will allow schools to censor any student speech that mentions drugs.<sup>16</sup>

In the following case, the issue before the court was whether a restriction on the making of audio and video recordings of an agricultural production facility could meet the narrow tailoring requirement.

16. *Morse v. Frederick*, 551 U.S. 393, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007).

## Case 1.2

### Animal Legal Defense Fund v. Wasden

United States Court of Appeals, Ninth Circuit, 878 F.3d 1184 (2018).

**Facts** An animal rights activist worked at an Idaho dairy farm, where he secretly filmed ongoing animal abuse. Posted online, the film attracted national attention. The dairy owner fired the abusive employees, established a code of conduct, and undertook an animal welfare audit of the farm.

Meanwhile, the Idaho state legislature enacted the Interference with Agricultural Production statute, which was targeted at undercover investigation of agricultural operations. The statute's "Recordings Clause" criminalized making audio and video recordings of an agricultural production facility without the owner's consent.

The Animal Legal Defense Fund filed a suit in a federal district court against Lawrence Wasden, the Idaho attorney general, alleging that the statute's Recordings Clause violated the First Amendment. The court issued an injunction against its enforcement. The state appealed this order to the U.S. Court of Appeals for the Ninth Circuit.

**Issue** Was the Recordings Clause an unconstitutional content-based restriction?

**Decision** Yes. The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court's order enjoining the enforcement of the statute. "The Recordings Clause regulates speech protected by the First Amendment and is a classic example of a content-based restriction that cannot survive strict scrutiny."

**Reason** The First Amendment protects audiovisual recordings as a recognized medium of public opinion for the communication

of ideas. Creating a recording is similarly protected, just as the writing of a book is as protected as the book itself. The Recordings Clause is clearly content-based—it distinguishes between messages that a videographer might convey, and its purpose is to ban the recording of the specified facilities' operations.

Idaho claimed that the Recordings Clause protected property and privacy interests. The court concluded, however, "Even assuming a compelling government interest, Idaho has not satisfied the narrow tailoring requirement because the statute is both under-inclusive and over-inclusive." For example, it prohibits video recordings, but not photos. And it suppresses more speech than necessary to accomplish its aims. There are other laws that allow agricultural production facility owners to vindicate their rights, including tort laws covering trespass and invasion of privacy.

### Critical Thinking

• **Legal Environment** *How does the making of "audio and video recordings of an agricultural production facility" fall under the protection of the First Amendment?*

• **What If the Facts Were Different?** *Suppose that instead of banning recordings of an agricultural production facility's operations, the state had criminalized misrepresentations by journalists to gain access to such a facility. Would the result have been different? Explain.*





## Ethical Issue

### Can a high school suspend teenagers from extracurricular activities because they posted suggestive photos of themselves online at social networking sites?


T.V. and M.K. were students at a public high school. During summer sleepovers, the girls took photos of each other pretending to suck penis-shaped, rainbow-colored lollipops and holding them in various suggestive positions. They later posted the photos on Facebook, MySpace, and Photo Bucket to be seen by persons granted “friend” status or given a password. When a parent complained to the school about the provocative online display, school officials suspended both girls from the high school volleyball team. M.K. was also suspended from the cheerleading squad and the show choir. Through their parents, the girls filed a lawsuit claiming that the school had violated their First Amendment rights.

A federal judge in Indiana ruled that a high school did not have the right to punish students for posting suggestive photos of themselves on the Internet. Expressive conduct is entitled to First Amendment protection if it is intended to convey a particular message and is likely to be understood by those viewing it as expressing a message. Here, both girls testified that they were just trying to be funny when they took the photos and posted them online for their friends to see. The court reasoned that the conduct depicted in the photos was intended to be humorous and would be understood as such by their teenage audience. Therefore, the photos were entitled to First Amendment protection as symbolic speech.<sup>17</sup>

“If the freedom of speech is taken away, then dumb and silent we may be led like sheep to the slaughter.”

**George Washington**  
1732–1799  
(First president of the United States, 1789–1797)

**Corporate Political Speech** Political speech by corporations falls within the protection of the First Amendment. Many years ago, the United States Supreme Court reviewed a Massachusetts statute that prohibited corporations from making political contributions or expenditures that individuals were permitted to make. The Court ruled that the Massachusetts law was unconstitutional because it violated the right of corporations to freedom of speech.<sup>18</sup>

Corporate political speech continues to be given significant protection under the First Amendment.  **Classic Case Example 1.13** In *Citizens United v. Federal Election Commission*,<sup>19</sup> the Supreme Court overturned a twenty-year-old precedent on campaign financing. The case involved Citizens United, a nonprofit corporation.

Citizens United had produced a film called *Hillary: The Movie* that was critical of Hillary Clinton, who was seeking the Democratic presidential nomination. Campaign-finance law prohibited Citizens United from broadcasting the movie, however. The Court ruled that the restrictions were unconstitutional and that First Amendment rights extend to independent political expenditures by corporations. ■

**Commercial Speech** The courts also give substantial protection to *commercial speech*, which consists of communications—primarily advertising and marketing—made by business firms that involve only their commercial interests. The protection given to commercial speech under the First Amendment is not as extensive as that afforded to noncommercial speech, however. A state may restrict



smontgome5/Stock Editorial/Getty Images

The U.S. Supreme Court decision *Citizens United* allows corporations to spend funds to elect or defeat candidates for president and Congress. Why did this decision upset some people?

17. *T.V. ex rel. B.V. v. Smith-Green Community School Corp.*, 807 F.Supp.2d 767 (N.D.Ind. 2011).

18. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978).

19. *Citizens United v. Federal Election Commission*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010).



certain kinds of advertising, for instance, in the interest of protecting consumers from being misled. States also have a legitimate interest in the beautification of roadsides, and this interest allows states to place restraints on billboard advertising.

Generally, a restriction on commercial speech will be considered valid as long as it (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective. A substantial government interest exists when the government has an important stake in the matter at hand. For instance, the substantial-interest requirement limits the power of the government to regulate commercial speech.

At issue in the following *Spotlight Case* was whether a government agency had unconstitutionally restricted commercial speech when it prohibited the use of a certain illustration on beer labels.



## Spotlight on Beer Labels: Case 1.3

### Bad Frog Brewery, Inc. v. New York State Liquor Authority

United States Court of Appeals, Second Circuit, 134 F.3d 87 (1998).

**Facts** Bad Frog Brewery, Inc., makes and sells alcoholic beverages. Some of the beverages feature labels with a drawing of a frog making the gesture generally known as “giving the finger.” Renaissance Beer Company was Bad Frog’s authorized New York distributor. Renaissance applied to the New York State Liquor Authority (NYSLA) for brand label approval, as required by state law before the beer could be sold in New York.

The NYSLA denied the application, in part, because “the label could appear in grocery and convenience stores, with obvious exposure on the shelf to children of tender age.” Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against the denial of the application. The court granted summary judgment in favor of the NYSLA. Bad Frog appealed to the U.S. Court of Appeals for the Second Circuit.

**Issue** Was the NYSLA’s ban of Bad Frog’s beer labels a reasonable restriction on commercial speech?

**Decision** No. The U.S. Court of Appeals for the Second Circuit reversed the judgment of the district court and remanded the case for judgment to be entered in favor of Bad Frog.

**Reason** The appellate court held that the NYSLA’s denial of Bad Frog’s application violated the First Amendment. The ban on the use of the labels lacked a “reasonable fit” with the state’s interest in shielding minors from vulgarity. The court



Eric Isselee/Shutterstock.com

*Can a label be too offensive?*

acknowledged that the NYSLA’s interest “in protecting children from vulgar and profane advertising” was “substantial.” The question was whether banning Bad Frog’s labels “directly advanced” that interest. “In view of the wide currency of vulgar displays throughout contemporary society, including comic books targeted directly at children, barring such displays from labels for alcoholic beverages cannot realistically be expected to

reduce children’s exposure to such displays to any significant degree.”

The court concluded that a commercial speech limitation must be “part of a substantial effort to advance a valid state interest, not merely the removal of a few grains of offensive sand from a beach of vulgarity.” Finally, as to whether the ban on the labels was more extensive than necessary to serve this interest, the court pointed out that there were “numerous less intrusive alternatives.” For example, the NYSLA could have placed restrictions on the permissible locations where the appellant’s products could be displayed in stores.

### Critical Thinking

• **Legal Environment** *Whose interests are advanced by the banning of certain types of advertising?*

• **What If the Facts Were Different?** *If Bad Frog had sought to use the label to market toys instead of beer, would the court’s ruling likely have been the same? Explain your answer.*



**Unprotected Speech** The United States Supreme Court has made it clear that certain types of speech will not be given any protection under the First Amendment. Speech that harms the good reputation of another, or defamatory speech (defamation is discussed in the torts chapter), will not be protected. In addition, speech that violates criminal laws (such as threatening or obscene speech) is not constitutionally protected.

Note that in the case of threatening speech, the speaker must have posed a “true threat.” In other words, the speaker must have meant to communicate a serious intent to commit an unlawful, violent act against a particular person or group. **Case Example 1.14** After Anthony Elonis’s wife, Tara, left him and took their two children, Elonis began to experience problems at work. Eventually he was fired, and he then began posting violent statements on his Facebook page. After posting statements about killing his former wife, Elonis was arrested and prosecuted for the posts.

Elonis was convicted by a jury of violating a statute and ordered to serve time in prison. He appealed to the United States Supreme Court, which held that it is not enough that a reasonable person might view the defendant’s Facebook posts as threats. Elonis must have intended to issue threats or known that his statements would be viewed as threats to be convicted of a crime. The Court reversed Elonis’s conviction and remanded the case back to the lower court to determine if there was sufficient evidence of intent.<sup>20</sup>

## 1–5c The First Amendment—Freedom of Religion

The First Amendment states that the government may neither establish any religion nor prohibit the free exercise of religious practices. The first part of this constitutional provision is referred to as the *establishment clause*, and the second part is known as the *free exercise clause*. Government action, both federal and state, must be consistent with this constitutional mandate.

**Establishment Clause** The provision in the First Amendment that prohibits the government from establishing any state-sponsored religion or enacting any law that promotes religion or favors one religion over another.

**The Establishment Clause** The **establishment clause** prohibits the government from establishing a state-sponsored religion, as well as from passing laws that promote (aid or endorse) religion or show a preference for one religion over another. Establishment clause cases often involve such issues as the legality of allowing or requiring school prayers, using state-issued vouchers to pay tuition at religious schools, and teaching creation theories versus evolution in public schools.

Although the establishment clause involves the separation of church and state, it does not require a complete separation. Federal or state laws that do not promote or place a significant burden on religion are constitutional even if they have some impact on religion. For a government law or policy to be constitutional, it must not have the primary effect of promoting or inhibiting religion.

Religious displays on public property have often been challenged as violating the establishment clause. The United States Supreme Court has ruled on a number of such cases, often focusing on the proximity of the religious display to nonreligious symbols or on the balance of symbols from different religions. The Supreme Court eventually decided that public displays having historical, as well as religious, significance do not necessarily violate the establishment clause.

**Case Example 1.15** Mount Soledad is a prominent hill near San Diego. There has been a forty-foot cross on top of Mount Soledad since 1913. In the 1990s, a war memorial was constructed next to the cross that included six walls listing the names of veterans. The site was privately owned until 2006, when Congress authorized the property’s transfer to the federal government “to preserve a historically significant war memorial.”

20. *Elonis v. United States*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 2001, 192 L.Ed.2d 1 (2015).



Steve Trunk and the Jewish War Veterans filed lawsuits claiming that the cross display violated the establishment clause because it endorsed the Christian religion. A federal appellate court agreed. The court noted that although not all cross displays at war memorials violate the establishment clause, the cross in this case physically dominated the site. Additionally, the cross was originally dedicated to religious purposes, had a long history of religious use, and was the only portion visible to drivers on the freeway below.<sup>21</sup> To gain a better understanding of how courts analyze whether public displays violate the establishment clause, see this chapter's *Business Law Analysis* feature.

**The Free Exercise Clause** The **free exercise clause** guarantees that people can hold any religious beliefs they want or can have no religious beliefs. The constitutional guarantee of personal religious freedom restricts only the actions of the government, however, and not those of individuals or private businesses.

**Restrictions Must Be Necessary.** To restrict the free exercise of religion, the government must have a compelling state interest, and the restriction must be the only way to further that interest. **Case Example 1.16** Gregory Holt, an inmate in an Arkansas state prison, was a devout Muslim who wished to grow a beard in accordance with his religious beliefs. The state corrections department prohibited inmates from growing beards. Holt asked for an exemption to grow a half-inch beard on religious grounds, and prison officials denied his request.



iStockPhoto.com/Beacon

Because the land on which this cross sits became public property, should it be removed as a violation of the establishment clause?

**Free Exercise Clause** The provision in the First Amendment that prohibits the government from interfering with people's religious practices or forms of worship.

21. *Trunk v. City of San Diego*, 629 F.3d 1099 (9th Cir. 2011).

## Determining When Public Religious Displays Violate the Establishment Clause

Judge James DeWeese hung a poster in his courtroom showing the Ten Commandments. The poster also included a number of editorial statements made by DeWeese, such as “God is the final authority, and we acknowledge His unchanging standards of behavior.”

The American Civil Liberties Union (ACLU) filed a suit, alleging that the poster violated the establishment clause. DeWeese responded that his purpose was not to promote religion but to educate others about two conflicting legal philosophies—moral relativism and moral absolutism. DeWeese expressed his view that “our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments.”

Does displaying this poster in a courtroom violate the establishment clause?

**Analysis:** 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 (in this case, displaying a religious poster in a courtroom), the courts look at the predominant purpose for the action and ask whether the action has the effect of endorsing religion. Although DeWeese claimed to have a nonreligious (educational) purpose for displaying the poster of the Ten Commandments, his own statements showed a religious purpose. DeWeese was trying to teach others to believe as he believes, that

our legal system is based on moral truths handed down by God.

**Result and Reasoning:** DeWeese's 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.” Based on his statements, DeWeese's poster had the religious purpose of endorsing Judeo-Christian religious views, which violated the establishment clause.

## Business Law Analysis





menonstockphoto/Stock/Getty Images

Can prison policy prevent a devout Muslim from keeping a short beard?

## Know This

The free exercise clause applies only to the actions of the state and federal governments, not to private employers. Private employers may nonetheless be required to accommodate their employees' religious beliefs.

## Learning Objective 6

Where in the Constitution can the due process clause be found?

Holt filed a suit in a federal court against Ray Hobbs, the director of the department, and others. A federal statute prohibits the government from taking any action that substantially burdens the religious exercise of a prisoner unless it is the least restrictive means of furthering a compelling government interest.

The defendant argued that beards compromise prison safety—a compelling government interest—because contraband can be hidden in them and because an inmate can quickly shave his beard to disguise his identity. The case ultimately reached the United States Supreme Court, which noted that “an item of contraband would have to be very small indeed to be concealed by a 1/2-inch beard.” Furthermore, the Court reasoned, the department could simply search the beard, the way it already searched prisoners’ hair and clothing.<sup>22</sup> ■

### **Restrictions Must Not Be a Substantial Burden.**

To comply with the free exercise clause, a government action must not be a substantial burden on religious practices. A burden is substantial if it pressures an individual to modify his or her behavior and to violate his or her beliefs.

**Case Example 1.17** Michael Thompson, a Muslim, was an inmate at a prison in Wisconsin. A central practice of the Islamic faith is a sunrise-to-sunset fast during the month of Ramadan. The prison accommodates this practice by providing “meal bags” at sunset to each Muslim prisoner listed as eligible. Ten days into Ramadan, Randall Lashock, a prison guard, withheld Thompson’s meal bags for two days. Thompson felt pressure to break his fast by going to the prison cafeteria, but under prison policy he would thereby forfeit meal bags for the rest of the fast. He did not know when—or even if—he would again be added to the Ramadan list and be given a meal bag. Meanwhile, hunger caused him to miss prayers and anxiety undercut his experience of Ramadan. Thompson sued several prison guards for violating his right to exercise his religion freely. A federal appellate court ultimately ruled in his favor. “Forcing an inmate to choose between daily nutrition and religious practice is a substantial burden” on the inmate’s free exercise right.<sup>23</sup> ■

**Public Welfare Exception.** When religious practices work against public policy and the public welfare, the government can act. For instance, the government can require that a child receive certain types of vaccinations or receive medical treatment when the child’s life is in danger—regardless of the child’s or parent’s religious beliefs.

In other words, when public safety is an issue, an individual’s religious beliefs often must give way to the government’s interests in protecting the public. **Example 1.18** In public, a woman of the Muslim faith may choose to wear a scarf, known as a *hijab*, over her head. Nevertheless, due to public safety concerns, many courts today do not allow the wearing of any headgear (hats or scarves) in courtrooms. ■

## 1-6 Due Process, Equal Protection, and Privacy

Two other constitutional guarantees of great significance to Americans are mandated by the due process clauses of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth Amendment. In addition, implied constitutional guarantees protect Americans’ right to privacy.

22. *Holt v. Hobbs*, \_\_\_ U.S. \_\_\_, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015).

23. *Thompson v. Holm*, 809 F.3d 376 (7th Cir. 2016).



## 1–6a Due Process

Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived “of life, liberty, or property, without due process of law.” The **due process clause** of each of these constitutional amendments has two aspects—procedural and substantive. Note that the due process clause applies to “legal persons,” such as corporations, as well as to individuals.

**Procedural Due Process** Procedural due process requires that any government decision to take life, liberty, or property must be made fairly. This means that the government must give a person proper notice and an opportunity to be heard. The government must also use fair procedures in determining whether a person will be subjected to punishment or have some burden imposed on him or her.

Fair procedure has been interpreted as requiring that the person have at least an opportunity to object to a proposed action before a fair, neutral decision maker (who need not be a judge). **Example 1.19** Doyle Burns, a nursing student in Kansas, poses for a photograph standing next to a placenta used as a lab specimen. Although she quickly deletes the photo from her library, it ends up on Facebook. When the director of nursing sees the photo, Burns is expelled. She sues for reinstatement and wins. The school violated Burns’s due process rights by expelling her from the nursing program for taking a photo without giving her an opportunity to present her side to school authorities. ■

**Substantive Due Process** Substantive due process focuses on the content of the legislation rather than the fairness of the procedures. Substantive due process limits what the government may do in its legislative and executive capacities. Legislation must be fair and reasonable in content and must further a legitimate governmental objective.

If a law or other governmental action limits a fundamental right, the courts will hold that it violates substantive due process unless it promotes a compelling state interest. Fundamental rights include interstate travel, privacy, voting, marriage and family, and all First Amendment rights. Thus, for instance, a state must have a substantial reason for taking any action that infringes on a person’s free speech rights.

In situations not involving fundamental rights, a law or action does not violate substantive due process if it rationally relates to any legitimate governmental end. It is almost impossible for a law or action to fail the “rationality” test. Under this test, almost any government regulation of business will be upheld as reasonable.

## 1–6b Equal Protection

Under the Fourteenth Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws.” The United States Supreme Court has used the due process clause of the Fifth Amendment to make the **equal protection clause** applicable to the federal government as well. Equal protection means that the government must treat similarly situated individuals in a similar manner.

Equal protection, like substantive due process, relates to the substance of the law or other governmental action. When a law or action limits the liberty of all persons to do something, it may violate substantive due process. When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. **Example 1.20** If a law prohibits all advertising on the sides of trucks, it raises a substantive due process question. If the law makes an exception to allow truck owners to advertise their own businesses, it raises an equal protection issue. ■

In an equal protection inquiry, when a law or action distinguishes between or among individuals, the basis for the distinction—that is, the classification—is examined. Depending on the classification, the courts apply different levels of scrutiny, or “tests,” to determine whether the law or action violates the equal protection clause. The courts use one of three standards: strict scrutiny, intermediate scrutiny, or the “rational basis” test.

**Due Process Clause** The provisions in the Fifth and Fourteenth Amendments that guarantee that no person shall be deprived of life, liberty, or property without due process of law. State constitutions often include similar clauses.

“Our Constitution protects aliens, drunks, and U.S. senators.”

**Will Rogers**  
1879–1935  
(American humorist)

### Equal Protection Clause

The provision in the Fourteenth Amendment that requires state governments to treat similarly situated individuals in a similar manner.





Amette Shaff/Shutterstock.com

Does the equal protection clause protect the homeless? If so, how?

**Strict Scrutiny** If a law or action prohibits or inhibits some persons from exercising a fundamental right, the law or action will be subject to “strict scrutiny” by the courts. A classification based on a *suspect trait*—such as race, national origin, or citizenship status—will also be subject to strict scrutiny. Under this standard, the classification must be necessary to promote a *compelling government interest*. Generally, few laws or actions survive strict-scrutiny analysis by the courts.

**Intermediate Scrutiny** Another standard, that of “intermediate scrutiny,” is applied in cases involving discrimination based on gender or legitimacy. Laws using these classifications must be substantially related to *important government objectives*. **Example 1.21** An important government objective is preventing illegitimate teenage pregnancies. Males and females are not similarly situated in this

regard because only females can become pregnant. Therefore, a law that punishes men but not women for statutory rape will be upheld even though it treats men and women unequally. ■

**The “Rational Basis” Test** In matters of economic and social welfare, a classification will be considered valid if there is any conceivable “rational basis” on which the classification might relate to a *legitimate government interest*. It is almost impossible for a law or action to fail the rational basis test.

**Case Example 1.22** A Kentucky statute prohibits businesses that sell substantial amounts of staple groceries or gasoline from selling wine and liquor. Maxwell’s Pic-Pac (a grocer) filed a suit against the state, alleging that the statute was unconstitutional under the equal protection clause. The court applied the rational basis test and ruled that the statute was rationally related to a legitimate government interest in reducing access to products with high alcohol content.

The court cited the problems caused by alcohol, including drunk driving, and noted that the state had a legitimate interest in limiting access to such products. Grocery stores and gas stations are likelier than other retailers to expose members of the public to alcohol. For these and other reasons, the state can restrict these places from selling wine and liquor.<sup>24</sup> ■

## 1–6c Privacy Rights

The U.S. Constitution does not explicitly mention a right to privacy. In a 1928 Supreme Court case, *Olmstead v. United States*,<sup>25</sup> Justice Louis Brandeis stated in his dissent that the right to privacy is “the most comprehensive of rights and the right most valued by civilized men.” The majority of the justices at that time, however, did not agree with Brandeis.

It was not until the 1960s that a majority on the Supreme Court endorsed the view that the Constitution protects individual privacy rights. In a landmark 1965 case, *Griswold v. Connecticut*,<sup>26</sup> the Supreme Court invalidated a Connecticut law that effectively prohibited the use of contraceptives on the ground that it violated the right to privacy. The Supreme Court held that a constitutional right to privacy was implied by the First, Third, Fourth, Fifth, and Ninth Amendments.

24. *Maxwell’s Pic-Pac, Inc. v. Dehner*, 739 F.3d 936 (6th Cir. 2014).

25. 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

26. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).



Today, privacy rights receive protection under various federal statutes as well as the U.S. Constitution. State constitutions and statutes also secure individuals' privacy rights, often to a significant degree. In addition, privacy rights are protected to an extent under tort law, consumer law, and employment law.

**Federal Privacy Legislation** Congress has enacted a number of statutes that protect the privacy of individuals in various areas of concern. Most of these statutes deal with personal information collected by governments or private businesses. For instance, the Freedom of Information Act allows any person to request copies of any information on her or him contained in federal government files. The Privacy Act also gives persons the right to access such information. These and other major federal laws protecting privacy rights are listed and briefly described in Exhibit 1–2.

**The USA Patriot Act** The USA Patriot Act was passed by Congress in the wake of the terrorist attacks of September 11, 2001, and then reauthorized twice.<sup>27</sup> The Patriot Act has given government officials increased authority to monitor Internet activities (such as e-mail and website visits) and to gain access to personal financial information and student information. Law enforcement officials can track the telephone and e-mail communications of one party to find out the identity of the other party or parties. To gain access to these communications, the government must certify that the information likely to be obtained is relevant to an ongoing criminal investigation, but it does not need to provide proof of any wrongdoing. Privacy advocates argue that the Patriot Act adversely affects the constitutional rights of all Americans, and it has been widely criticized.

*“There was, of course, no way of knowing whether you were being watched at any given moment.”*

**George Orwell**  
1903–1950  
(English author, from his famous novel *1984*)

27. The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, also known as the USA Patriot Act, was enacted as Pub. L. No. 107-56 (2001), and last reauthorized by Pub. L. No. 112-114 (2011).

### Exhibit 1–2 Federal Legislation Relating to Privacy

TITLE OF ACT	PROVISIONS CONCERNING PRIVACY
<b>Freedom of Information Act (1966)</b>	Provides that individuals have a right to access information about them collected in government files.
<b>Family Educational Rights and Privacy Act (1974)</b>	Limits access to computer-stored records of education-related evaluations and grades in private and public colleges and universities.
<b>Privacy Act (1974)</b>	Protects the privacy of individuals about whom the federal government has information. Regulates agencies' use and disclosure of data, and gives individuals access to and a means to correct inaccuracies.
<b>Electronic Communications Privacy Act (1986)</b>	Prohibits the interception of information communicated by electronic means.
<b>Driver's Privacy Protection Act (1994)</b>	Prevents states from disclosing or selling a driver's personal information without the driver's consent.
<b>Health Insurance Portability and Accountability Act (1996)</b>	Requires health-care providers and health-care plans to inform patients of their privacy rights and of how their personal medical information may be used. States that medical records may not be used for purposes unrelated to health care or disclosed without permission.
<b>Financial Services Modernization Act (Gramm-Leach-Bliley Act) (1999)</b>	Prohibits the disclosure of nonpublic personal information about a consumer to an unaffiliated third party unless strict disclosure and opt-out requirements are met.



## Practice and Review

A state legislature enacted a statute that required any motorcycle operator or passenger on the state's highways to wear a protective helmet. Jim Alderman, a licensed motorcycle operator, sued the state to block enforcement of the law. Alderman asserted that the statute violated the equal protection clause because it placed requirements on motorcyclists that were not imposed on other motorists. Using the information presented in the chapter, answer the following questions.

1. Why does this statute raise equal protection issues instead of substantive due process concerns?
2. What are the three levels of scrutiny that the courts use in determining whether a law violates the equal protection clause?
3. Which level of scrutiny or test would apply to this situation? Why?
4. Under this standard or test, is the helmet statute constitutional? Why or why not?

## Debate This

*Under the doctrine of stare decisis, courts are obligated to follow the precedents established in their jurisdiction unless there is a compelling reason not to do so. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute?*

## Key Terms

- |  |                                      |                                  |
|--|--------------------------------------|----------------------------------|
| <b>adjudicate</b> 4                      | <b>cyberlaw</b> 8                    | <b>plaintiff</b> 8               |
| <b>administrative agency</b> 3           | <b>defendant</b> 8                   | <b>plurality opinion</b> 37      |
| <b>administrative law</b> 3              | <b>dissenting opinion</b> 37         | <b>police powers</b> 10          |
| <b>administrative law judge (ALJ)</b> 5  | <b>due process clause</b> 23         | <b>precedent</b> 6               |
| <b>administrative process</b> 4          | <b>enabling legislation</b> 4        | <b>preemption</b> 13             |
| <b>Bill of Rights</b> 13                 | <b>equal protection clause</b> 23    | <b>primary source of law</b> 2   |
| <b>binding authority</b> 6               | <b>establishment clause</b> 20       | <b>procedural law</b> 8          |
| <b>case law</b> 5                        | <b>federal form of government</b> 10 | <b>remedy</b> 7                  |
| <b>checks and balances</b> 10            | <b>free exercise clause</b> 21       | <b>rulemaking</b> 4              |
| <b>citation</b> 2                        | <b>international law</b> 9           | <b>secondary source of law</b> 2 |
| <b>civil law</b> 9                       | <b>interpretive rule</b> 5           | <b>sovereignty</b> 10            |
| <b>civil law system</b> 9                | <b>law</b> 2                         | <b>stare decisis</b> 6           |
| <b>commerce clause</b> 11                | <b>legislative rule</b> 4            | <b>statutory law</b> 2           |
| <b>common law</b> 6                      | <b>majority opinion</b> 37           | <b>substantive law</b> 8         |
| <b>compelling government interest</b> 16 | <b>national law</b> 9                | <b>supremacy clause</b> 13       |
| <b>concurring opinion</b> 37             | <b>ordinance</b> 3                   | <b>symbolic speech</b> 15        |
| <b>constitutional law</b> 2              | <b>per curiam opinion</b> 37         | <b>uniform law</b> 3             |
| <b>criminal law</b> 9                    | <b>persuasive authority</b> 7        |                                  |



## Chapter Summary: Legal and Constitutional Foundations of Business

<b>Sources of American Law</b>	<ol style="list-style-type: none"> <li>1. <i>Constitutional law</i>—The law as expressed in the U.S. Constitution and the various state constitutions. The U.S. Constitution is the supreme law of the land. State constitutions are supreme within state borders to the extent that they do not violate the U.S. Constitution or a federal law.</li> <li>2. <i>Statutory law</i>—Laws or ordinances created by federal, state, and local legislatures. None of these laws can violate the U.S. Constitution, and no state statute or local ordinance can violate the relevant state constitution. Uniform laws, when adopted by a state legislature, become statutory law in that state.</li> <li>3. <i>Administrative law</i>—The rules, orders, and decisions of federal or state government administrative agencies. Federal administrative agencies are created by enabling legislation enacted by the U.S. Congress. Agency functions include rulemaking, enforcement, and adjudication.</li> <li>4. <i>Case law and common law doctrines</i>—Judge-made law, including interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies. Case law governs all areas not covered by statutory law or administrative law, and is part of our common law tradition.</li> </ol>
<b>The Common Law</b>	<ol style="list-style-type: none"> <li>1. <i>Common law</i>—Law that originated in medieval England with the creation of the king's courts, or <i>curiae regis</i>, and the development of a body of rules that were common to all regions of the country.</li> <li>2. <i>Stare decisis</i>—A doctrine under which judges “stand on decided cases” —or follow the rule of precedent—in deciding cases. <i>Stare decisis</i> is the cornerstone of the common law tradition.</li> <li>3. <i>Remedies</i>—A remedy is the means by which a court enforces a right or compensates for a violation of a right. Courts typically grant legal remedies (monetary damages or property) but may also grant equitable remedies (specific performance, injunction, or rescission) when the legal remedy is inadequate or unavailable.</li> </ol>
<b>Classifications of Law</b>	The law can be broken down according to several classification systems, such as substantive or procedural law, federal or state law, and private or public law. Two broad classifications are civil and criminal law, and national and international law. Cyberlaw is not really a classification of law but a term that refers to the growing body of case and statutory law that applies to Internet transactions.
<b>The Constitutional Powers of Government</b>	<p>The U.S. Constitution established a federal form of government, in which government powers are shared by the national government and the state governments. At the national level, government powers are divided among the legislative, executive, and judicial branches. The Tenth Amendment reserves to the states all powers not expressly delegated to the national government. Under their police powers, state governments may regulate private activities in order to protect or promote the public order, health, safety, morals, and general welfare.</p> <ol style="list-style-type: none"> <li>1. <i>Commerce clause</i>— <ol style="list-style-type: none"> <li>a. <i>The expansion of national powers</i>—The commerce clause expressly permits Congress to regulate commerce. Over time, courts expansively interpreted this clause, enabling the national government to wield extensive powers over the nation's economic life. Today, the commerce clause authorizes the national government, at least theoretically, to regulate almost every commercial enterprise in the United States.</li> <li>b. <i>The “dormant” commerce clause</i>—If state regulations substantially interfere with interstate commerce, they violate the “dormant” commerce clause of the U.S. Constitution. The positive aspect of the commerce clause, which gives the national government the exclusive authority to regulate interstate commerce, implies a “dormant” aspect—that the states do not have this power.</li> </ol> </li> <li>2. <i>Supremacy clause</i>—The U.S. Constitution provides that the Constitution, laws, and treaties of the United States are “the supreme Law of the Land.” Whenever a state law directly conflicts with a federal law, the state law is rendered invalid.</li> </ol>

(Continues)



### Business and the Bill of Rights

The Bill of Rights, which consists of the first ten amendments to the U.S. Constitution, embodies a series of protections for individuals—and, in some instances, business entities—against various types of interference by the federal government. Today, most of the protections apply against state governments as well. Freedoms guaranteed by the First Amendment that affect businesses include the following:

1. **Freedom of speech**—Speech, including symbolic speech, is given the fullest possible protection by the courts. Corporate political speech and commercial speech also receive substantial protection. Certain types of speech, such as defamatory speech and obscene speech, are not protected under the First Amendment.
2. **Freedom of religion**—Under the First Amendment, the government may neither establish any religion (the establishment clause) nor prohibit the free exercise of religion (the free exercise clause).

### Due Process, Equal Protection, and Privacy

1. **Due process**—Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived of “life, liberty, or property, without due process of law.” Procedural due process requires that any government decision to take life, liberty, or property must be made fairly, using fair procedures. Substantive due process focuses on the content of legislation. Generally, a law that limits a fundamental right violates substantive due process unless the law promotes a compelling state interest, such as public safety.
2. **Equal protection**—Under the Fourteenth Amendment, a law or action that limits the liberty of some persons but not others may violate the equal protection clause. Such a law may be upheld, however, if there is a rational basis for the discriminatory treatment of a given group or if the law substantially relates to an important government objective.
3. **Privacy rights**—The Constitution does not specifically guarantee a right to privacy, but such a right has been inferred from guarantees found in several constitutional amendments. A number of federal statutes protect privacy rights. Privacy rights are also protected by many state constitutions and statutes, as well as under tort law, consumer law, and employment law.

## Issue Spotters

1. The First Amendment to the U.S. Constitution provides protection for the free exercise of religion. A state legislature enacts a law that outlaws all religions that do not derive from the Judeo-Christian tradition. Is this law valid within that state? Why or why not? (See *Sources of American Law*.)
2. South Dakota wants its citizens to conserve energy. To help reduce consumer consumption of electricity, the state passes a law that bans all advertising by power utilities within the state. What argument could the power utilities use as a defense to the enforcement of this state law? (See *Business and the Bill of Rights*.)

—Check your answers to the *Issue Spotters* against the answers provided in Appendix B at the end of this text.

## Business Scenarios and Case Problems

**1–1. Binding versus Persuasive Authority.** A county court in Illinois is deciding a case involving an issue that has never been addressed before in that state’s courts. The Iowa Supreme Court, however, recently decided a case involving a very similar fact pattern. Is the Illinois court obligated to follow the Iowa Supreme Court’s decision on the issue? If the United States Supreme Court had decided a similar case, would that decision be binding on the Illinois court? Explain. (See *The Common Law*.)

**1–2. Sources of Law.** This chapter discussed a number of sources of American law. Which source of law takes priority in the following situations, and why? (See *Sources of American Law*.)

1. A federal statute conflicts with the U.S. Constitution.
2. A federal statute conflicts with a state constitutional provision.
3. A state statute conflicts with the common law of that state.
4. A state constitutional amendment conflicts with the U.S. Constitution.



**1–3. Equal Protection.** Abbott Laboratories licensed SmithKline Beecham Corp. to market an Abbott human immunodeficiency virus (HIV) drug in conjunction with one of SmithKline’s drugs. Abbott then increased the price of its drug fourfold, forcing SmithKline to increase its prices and thereby driving business to Abbott’s own combination drug. SmithKline filed a suit in a federal district court against Abbott. During jury selection, Abbott struck the only self-identified gay person among the potential jurors. (The pricing of HIV drugs is of considerable concern in the gay community.) Could the equal protection clause be applied to prohibit discrimination based on sexual orientation in jury selection? Discuss. [*SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014)] (See *Due Process, Equal Protection, and Privacy*.)

**1–4. Procedural Due Process.** Robert Brown applied for admission to the University of Kansas School of Law. Brown answered “no” to questions on the application asking if he had a criminal history and acknowledged that a false answer constituted “cause for . . . dismissal.” In fact, Brown had criminal convictions for domestic battery and driving under the influence. He was accepted for admission to the school. When school officials discovered his history, however, he was notified of their intent to dismiss him and given an opportunity to respond in writing. He demanded a hearing. The officials refused to grant Brown a hearing and then expelled him. Did the school’s actions deny Brown due process? Discuss. [*Brown v. University of Kansas*, 599 Fed.Appx. 833 (10th Cir. 2015)] (See *Due Process, Equal Protection, and Privacy*.)

**1–5. The Commerce Clause.** Regency Transportation, Inc., operates a freight business throughout the eastern United States. Regency maintains its corporate headquarters, four warehouses, and a maintenance facility and terminal location for repairing and storing vehicles in Massachusetts. All of the vehicles in Regency’s fleet were bought in other states. Massachusetts imposes a use tax on all taxpayers subject to its jurisdiction, including those that do business in interstate commerce, as Regency does. When Massachusetts imposed the tax on the purchase price of each tractor and trailer in Regency’s fleet, the trucking firm challenged the assessment as discriminatory under the commerce clause. What is the chief consideration under the commerce clause when a state law affects interstate commerce? Is Massachusetts’s use tax valid? Explain. [*Regency Transportation, Inc. v. Commissioner of Revenue*, 473 Mass. 459, 42 N.E.3d 1133 (2016)] (See *The Constitutional Powers of Government*.)

## 1–6. Business Case Problem with Sample Answer—



**Reading Citations.** Assume that you want to read the entire court opinion in the case of *Worldwide TechServices, LLC v. Commissioner of Revenue*, 479 Mass. 20, 91 N.E.3d 650 (2018).

Refer to the appendix to this chapter, and then explain specifically where you would find the court’s opinion. (See *Finding Case Law*.)

—For a sample answer to Problem 1–6, go to Appendix C at the end of this text.

**1–7. Freedom of Speech.** Wandering Dago, Inc. (WD), operates a food truck in Albany, New York. WD brands itself and the food it sells with language generally viewed as ethnic slurs. Owners Andrea Loguidice and Brandon Snooks, however, view the branding as giving a “nod to their Italian heritage” and “weakening the derogatory force of the slur.” Twice, WD applied to participate as a vendor in a summer lunch program in a state-owned plaza. Both times, the New York State Office of General Services (OGS) denied the application because of WD’s branding. WD filed a suit in a federal district court against RoAnn Destito, the commissioner of OGS, contending that the agency had violated WD’s right to free speech. What principles apply to the government’s regulation of the content of speech? How do those principles apply in WD’s case? Explain. [*Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018)] (See *Business and the Bill of Rights*.)

## 1–8. A Question of Ethics—Free Speech. Michael Mayfield,



the president of Mendo Mill and Lumber Co., received a “notice of a legal claim” from Edward Starski. The “claim” alleged that a stack of lumber had fallen on a customer as a result of a Mendo employee’s “incompetence.” The “notice” presented a settlement offer on the customer’s behalf in exchange for a release of liability for Mendo. In a follow-up phone conversation with Mayfield, Starski said that he was an attorney—which, in fact, he was not. Starski was arrested and charged with violating a state criminal statute that prohibited the unauthorized practice of law. [*People v. Starski*, 7 Cal.App.5th 215, 212 Cal.Rptr.3d 622 (1 Dist. Div. 2 2017)] (See *Business and the Bill of Rights*.)

1. Starski argued that “creating an illusion” that he was an attorney was protected by the First Amendment. Is Starski correct? Explain.
2. Identify, discuss, and resolve the conflict between the right to free speech and the government’s regulation of the practice of law.



## Critical Thinking and Writing Assignments

**1–9. Business Law Writing.** Puerto Rico enacted a law that required specific labels on cement sold in Puerto Rico and imposed fines for any violations of these requirements. The law prohibited the sale or distribution of cement manufactured outside Puerto Rico that does not carry a required label warning and barred that cement from being used in government-financed construction projects.



Antilles Cement Corp., a Puerto Rican firm that imports foreign cement, filed a complaint in federal court. Antilles claimed that this law violated the dormant commerce clause. (The dormant commerce clause doctrine applies not only to commerce among the states and U.S. territories, but also to international commerce.) Write three paragraphs discussing whether the Puerto Rican law violates the dormant commerce clause. Explain your reasons why or why not. (See *The Constitutional Powers of Government*.)

**1–10. Time-Limited Group Assignment—Court Opinions.**



Read through the subsection entitled “Decisions and Opinions” in the appendix following this chapter. (See *Reading and Understanding Case Law*.)

1. One group will explain the difference between a concurring opinion and a majority opinion.
2. Another group will outline the difference between a concurring opinion and a dissenting opinion.
3. The third group will explain why judges and justices write concurring and dissenting opinions, given that these opinions will not affect the outcome of the case at hand, which has already been decided by majority vote.



# Appendix to Chapter 1: Finding and Analyzing the Law

This text includes numerous references, or *citations*, to primary sources of law—federal and state statutes, the U.S. Constitution and state constitutions, regulations issued by administrative agencies, and court cases. A citation identifies the publication in which a legal authority—such as a statute or court decision—can be found. In this appendix, we explain how you can use citations to find primary sources of law. Note that in addition to being published in sets of books, as described next, most federal and state laws and case decisions are available online.

## Finding Statutory and Administrative Law

When Congress passes laws, they are collected in a publication titled *United States Statutes at Large*. When state legislatures pass laws, they are collected in similar state publications. Most frequently, however, laws are referred to in their codified form—that is, the form in which they appear in the federal and state codes. In these codes, laws are compiled by subject.

### United States Code

The *United States Code* (U.S.C.) arranges all existing federal laws of a public and permanent nature by subject. Each of the fifty-two subjects into which the U.S.C. arranges the laws is given a title and a title number. For example, laws relating to commerce and trade are collected in “Title 15, Commerce and Trade.” Titles are subdivided by sections.

A citation to the U.S.C. includes title and section numbers. Thus, a reference to “15 U.S.C. Section 1” means that the statute can be found in Section 1 of Title 15. (“Section” may be designated by the symbol §, and “Sections” by §§.) In addition to the print publication of the U.S.C., the federal government also provides a searchable online database of the *United States Code* at [www.gpo.gov](http://www.gpo.gov) (click on “Libraries” and then “Core Documents of Our Democracy” to find the *United States Code*).

Commercial publications of these laws are available and are widely used. For example, Thomson Reuters publishes the *United States Code Annotated* (U.S.C.A.). The U.S.C.A. contains the complete text of laws included in the U.S.C., notes of court decisions that interpret and apply specific sections of the statutes, and the text of presidential proclamations and executive orders. The U.S.C.A. also includes research aids, such as cross-references to related statutes, historical notes, and other references. A citation to the U.S.C.A. is similar to a citation to the U.S.C.: “15 U.S.C.A. Section 1.”

### State Codes

State codes follow the U.S.C. pattern of arranging laws by subject. The state codes may be called codes, revisions, compilations, consolidations, general statutes, or statutes, depending on the state.



In some codes, subjects are designated by number. In others, they are designated by name. For example, “13 Pennsylvania Consolidated Statutes Section 1101” means that the statute can be found in Title 13, Section 1101, of the Pennsylvania code. “California Commercial Code Section 1101” means the statute can be found in Section 1101 under the subject heading “Commercial Code” of the California code. Abbreviations may be used. For example, “13 Pennsylvania Consolidated Statutes Section 1101” may be abbreviated “13 Pa. C.S. § 1101,” and “California Commercial Code Section 1101” may be abbreviated “Cal. Com. Code § 1101.”

## Administrative Rules

Rules and regulations adopted by federal administrative agencies are initially published in the *Federal Register*, a daily publication of the U.S. government. Later, they are incorporated into the *Code of Federal Regulations* (C.F.R.).

Like the U.S.C., the C.F.R. is divided into titles. Rules within each title are assigned section numbers. A full citation to the C.F.R. includes title and section numbers. For example, a reference to “17 C.F.R. Section 230.504” means that the rule can be found in Section 230.504 of Title 17.

## Finding Case Law

Before discussing the case reporting system, we need to look briefly at the court system. There are two types of courts in the United States: federal courts and state courts.

Both the federal and the state court systems consist of several levels, or tiers, of courts. *Trial courts*, in which evidence is presented and testimony is given, are on the bottom tier (which also includes lower courts handling specialized issues). Decisions from a trial court can be appealed to a higher court, which commonly is an intermediate *court of appeals*, or an *appellate court*. Decisions from these intermediate courts of appeals may be appealed to an even higher court, such as a state supreme court or the United States Supreme Court.

## State Court Decisions

Most state trial court decisions are not published (except in New York and a few other states, which publish selected trial court opinions). Decisions from state trial courts are typically filed in the office of the clerk of the court, where the decisions are available for public inspection. (Increasingly, they can be found online as well.)

Written decisions of the appellate, or reviewing, courts, however, are published and distributed (in print and online). Many of the state court cases presented in this book are from state appellate courts. The reported appellate decisions are published in volumes called *reports* or *reporters*, which are numbered consecutively. State appellate court decisions are found in the state reporters of that particular state. Official reports are published by the state, whereas unofficial reports are published by nongovernment entities.

**Regional Reporters** State court opinions appear in regional units of the National Reporter System, published by Thomson Reuters. Most lawyers and libraries have these reporters because they report cases more quickly and are distributed more widely than the state-published reports. In fact, many states have eliminated their own reporters in favor of the National Reporter System.

The National Reporter System divides the states into the following geographic areas: Atlantic (A., A.2d, or A.3d), *North Eastern* (N.E., N.E.2d, or N.E.3d), *North Western* (N.W. or N.W.2d), *Pacific* (P., P.2d, or P.3d), *South Eastern* (S.E. or S.E.2d), *South Western* (S.W., S.W.2d, or S.W.3d), and *Southern* (So., So.2d, or So.3d). (The 2d and 3d in the abbreviations refer to *Second Series* and *Third Series*, respectively.) The states included in each of these regional divisions are indicated in Exhibit 1A–1, which illustrates the National Reporter System.



**Exhibit 1A–1 The National Reporter System—Regional/Federal**

Regional Reporters	Coverage Beginning	Coverage
<i>Atlantic Reporter</i> (A., A.2d, or A.3d)	1885	Connecticut, Delaware, District of Columbia, Maine, Maryland, New Hampshire, New Jersey, Pennsylvania, Rhode Island, and Vermont.
<i>North Eastern Reporter</i> (N.E., N.E.2d, or N.E.3d)	1885	Illinois, Indiana, Massachusetts, New York, and Ohio.
<i>North Western Reporter</i> (N.W. or N.W.2d)	1879	Iowa, Michigan, Minnesota, Nebraska, North Dakota, South Dakota, and Wisconsin.
<i>Pacific Reporter</i> (P., P.2d, or P.3d)	1883	Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nevada, New Mexico, Oklahoma, Oregon, Utah, Washington, and Wyoming.
<i>South Eastern Reporter</i> (S.E. or S.E.2d)	1887	Georgia, North Carolina, South Carolina, Virginia, and West Virginia.
<i>South Western Reporter</i> (S.W., S.W.2d, or S.W.3d)	1886	Arkansas, Kentucky, Missouri, Tennessee, and Texas.
<i>Southern Reporter</i> (So., So.2d, or So.3d)	1887	Alabama, Florida, Louisiana, and Mississippi.
<b>Federal Reporters</b>		
<i>Federal Reporter</i> (F., F.2d, or F.3d)	1880	U.S. Circuit Courts from 1880 to 1912; U.S. Commerce Court from 1911 to 1913; U.S. District Courts from 1880 to 1932; U.S. Court of Claims (now called U.S. Court of Federal Claims) from 1929 to 1932 and since 1960; U.S. Courts of Appeals since 1891; U.S. Court of Customs and Patent Appeals since 1929; U.S. Emergency Court of Appeals since 1943.
<i>Federal Supplement</i> (F.Supp., F.Supp.2d, or F.Supp.3d)	1932	U.S. Court of Claims from 1932 to 1960; U.S. District Courts since 1932; U.S. Customs Court since 1956.
<i>Federal Rules Decisions</i> (F.R.D.)	1939	U.S. District Courts involving the Federal Rules of Civil Procedure since 1939 and Federal Rules of Criminal Procedure since 1946.
<i>Supreme Court Reporter</i> (S.Ct.)	1882	United States Supreme Court since the October term of 1882.
<i>Bankruptcy Reporter</i> (Bankr.)	1980	Bankruptcy decisions of U.S. Bankruptcy Courts, U.S. District Courts, U.S. Courts of Appeals, and the United States Supreme Court.
<i>Military Justice Reporter</i> (M.J.)	1978	U.S. Court of Military Appeals and Courts of Military Review for the Army, Navy, Air Force, and Coast Guard.

**NATIONAL REPORTER SYSTEM MAP**

Legend:

- Pacific
- North Western
- South Western
- North Eastern
- Atlantic
- South Eastern
- Southern



**Case Citations** After appellate decisions have been published, they are normally referred to (cited) by the name of the case and the volume, name, and page number of the reporter(s) in which the opinion can be found. The citation first lists information from the state's official reporter (if different from the National Reporter System), then the *National Reporter*, and then any other selected reporter. (Citing a reporter by volume number, name, and page number, in that order, is common to all citations.) When more than one reporter is cited for the same case, each reference is called a *parallel citation*.

Note that some states have adopted a “public domain citation system” that uses a somewhat different format for the citation. For example, in Ohio, an Ohio court decision might be designated “2018 -Ohio- 79,” meaning that the decision was the 79th decision issued by the Ohio Supreme Court in 2018. Parallel citations to the *Ohio Appellate Court Reporter* and the *North Eastern Reporter* are included after the public domain citation.

Consider the following citation: *Connecticut Coalition for Justice in Education Funding, Inc. v. Rell*, 327 Conn. 650, 176 A.3d 28 (2018). We see that the opinion in this case can be found in Volume 327 of the official *Connecticut Reports*, on page 650. The parallel citation is to Volume 176 of the *Atlantic Reporter, Third Series*, page 28.

When we present opinions in this text (starting in Chapter 2), in addition to the reporter, we give the name of the court hearing the case and the year of the court's decision. Sample citations to state court decisions are listed and explained in Exhibit 1A–2.

## Federal Court Decisions

Federal district (trial) court decisions are published unofficially in the *Federal Supplement* (FSupp., FSupp.2d, or FSupp.3d), and opinions from the circuit courts of appeals (federal reviewing courts) are reported unofficially in the *Federal Reporter* (F, F2d, or F3d). Cases concerning federal bankruptcy law are published unofficially in the *Bankruptcy Reporter* (Bankr. or B.R.).

The official edition of United States Supreme Court decisions is the *United States Reports* (U.S.), which is published by the federal government. Unofficial editions of Supreme Court cases include the *Supreme Court Reporter* (S.Ct.) and the *Lawyers' Edition of the Supreme Court Reports* (L.Ed. or L.Ed.2d). Sample citations for federal court decisions are also listed and explained in Exhibit 1A–2.

## Unpublished Opinions

Many court opinions that are not yet published or that are not intended for publication can be accessed through Westlaw® (abbreviated in citations as “WL”), an online legal database. When no citation to a published reporter is available for cases cited in this text, we give the WL citation (such as 2018 WL 266332, which means it was case number 266332 decided in the year 2018).

Sometimes, both in this text and in other legal sources, you will see blanks left in a citation. This occurs when the decision will be published, but the particular volume number or page number is not yet available.

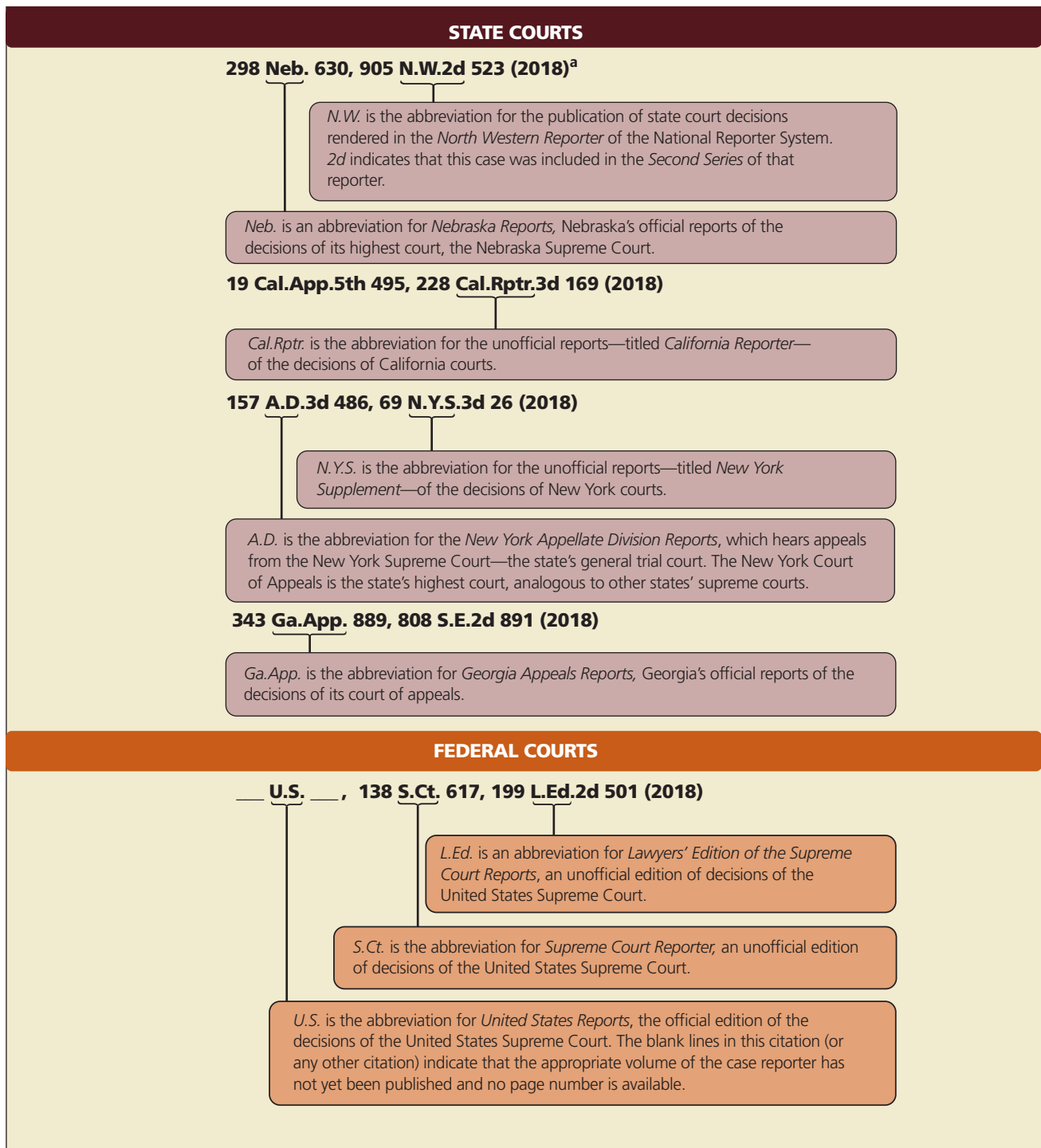
## Old Cases

On a few occasions, this text cites opinions from old, classic cases dating to the nineteenth century or earlier. Some of these cases are from the English courts. The citations to these cases may not conform to the descriptions given above.

## Reading and Understanding Case Law

The cases in this text have been condensed from the full text of the courts' opinions and paraphrased by the authors. For those wishing to review court cases for future research projects or to gain additional legal information, the following sections will provide useful insights into how to read and understand case law.



**Exhibit 1A–2 How to Read Citations**

- a. The case names have been deleted from these citations to emphasize the publications. It should be kept in mind, however, that the name of a case is as important as the specific page numbers in the volumes in which it is found. If a citation is incorrect, the correct citation may be found in a publication's index of case names. In addition to providing a check on errors in citations, the date of a case is important because the value of a recent case as an authority is likely to be greater than that of older cases from the same court.



**Exhibit 1A–2 How to Read Citations—Continued****FEDERAL COURTS (Continued)****879 F.3d 1052 (9th Cir. 2018)**

*9th Cir.* is an abbreviation denoting that this case was decided in the U.S. Court of Appeals for the Ninth Circuit.

**\_\_\_ F.Supp.3d \_\_\_, 2018 WL 388590 (W.D.Wash. 2018)**

*W.D.Wash.* is an abbreviation indicating that the U.S. District Court for the Western District of Washington decided this case.

**WESTLAW® CITATIONS<sup>b</sup>****2018 WL 416255**

*WL* is an abbreviation for Westlaw. The number 2018 is the year of the document that can be found with this citation in the Westlaw database. The number 416255 is a number assigned to a specific document. A higher number indicates that a document was added to the Westlaw database later in the year.

**STATUTORY AND OTHER CITATIONS****18 U.S.C. Section 1961(1)(A)**

*U.S.C.* denotes *United States Code*, the codification of *United States Statutes at Large*. The number 18 refers to the statute's U.S.C. title number and 1961 to its section number within that title. The number 1 in parentheses refers to a subsection within the section, and the letter A in parentheses to a subsection within the subsection.

**UCC 2-206(1)(b)**

*UCC* is an abbreviation for *Uniform Commercial Code*. The first number 2 is a reference to an article of the UCC, and 206 to a section within that article. The number 1 in parentheses refers to a subsection within the section, and the letter b in parentheses to a subsection within the subsection.

**Restatement (Third) of Torts, Section 6**

*Restatement (Third) of Torts* refers to the third edition of the American Law Institute's *Restatement of the Law of Torts*. The number 6 refers to a specific section.

**17 C.F.R. Section 230.505**

*C.F.R.* is an abbreviation for *Code of Federal Regulations*, a compilation of federal administrative regulations. The number 17 designates the regulation's title number, and 230.505 designates a specific section within that title.

<sup>b</sup>. Many court decisions that are not yet published or that are not intended for publication can be accessed through Westlaw, an online legal database.