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FUNDAMENTALS OF BUSINESS LAW TODAY



Roger LeRoy Miller

10th EDITION



BUSINESS LAW TODAY SERIES

10th EDITION

Fundamentals of Business Law Today

SUMMARIZED CASES



Roger LeRoy Miller

Institute for University Studies, Arlington, Texas



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Fundamentals of Business Law Today: Summarized Cases

TENTH EDITION

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Preface to the Instructor

A fundamental knowledge of the tenets of business law is crucial for anyone contemplating a career in business. A derivative of my best-selling **Business Law Today Series**, *Fundamentals of Business Law Today: Summarized Cases*, Tenth Edition, was written with this goal in mind: to present a clear, comprehensive, and concise treatment of what every student should know about commercial law. While some of this may change, the fundamentals rarely do—and that is what students reading this text will acquire.

What's New in the Tenth Edition

Instructors have come to rely on my Business Law Today Series for its accuracy and contemporary approach. Users of *Fundamentals of Business Law Today: Summarized Cases* will find that this edition combines those aspects with comprehensive coverage. To make sure that the text engages students' interest, solidifies their understanding of the legal concepts presented, and provides the best teaching tools available, I now offer the following new items in the text.

New Chapter on *Internet Law, Social Media, and Privacy*

This new chapter discusses legal issues that are unique to the Internet, such as spam, online defamation, domain name disputes, cybersquatting, digital copyright laws, and file-sharing. In addition, it examines how social media has affected business. In particular, it focuses on how companies are using social media to communicate with customers and employees, as well as state legislation and recent court decisions that address social media issues. With the advent of the Internet and social media, protecting privacy is another important area that students need to recognize. Thus, the chapter covers topics such as data collection, online cookies, and a proposed Consumer Privacy Bill of Rights.

New *Spotlight Cases* and *Spotlight Case Problems*

Certain cases and case problems have been carefully chosen to spotlight as good teaching cases. *Spotlight Cases* and *Spotlight Case Problems* are labeled either by the name of one of the parties or by the subject involved. Some examples include Spotlight on Amazon.com, Spotlight on the Seattle Mariners, Spotlight on Commercial Speech, and Spotlight on Internet Porn. Instructors will find these *Spotlight Cases* useful to illustrate the legal concepts under discussion, and students will enjoy studying these cases because they involve interesting and memorable facts.

Suggested answers to all case-ending questions and case problems are included in the *Solutions Manual* for this text.

New *Debate This* Feature

To encourage student participation and motivate them to think critically about the rationale underlying the law on a particular topic, a new feature has been created for the Tenth Edition. Entitled *Debate This*, this feature consists of a brief statement or question concerning the chapter material that can be used to spur lively classroom or small group discussions. It can also be used as a written assignment. This feature follows the *Reviewing . . .* feature at the end of each chapter.

Suggested pro and con responses to the *Debate This* features can be found in the *Solutions Manual* for this text.

New Cases and Case Problems

The Tenth Edition of *Fundamentals of Business Law Today: Summarized Cases* is filled with new cases. New cases from 2013 or 2014 are included in every chapter. That means more than 80 percent of the cases are new to this edition. I have carefully selected the new cases using the following criteria:

1. They illustrate important points of law.
2. They are of high interest to students and instructors.
3. They are simple enough factually for business law students to understand.

Additionally, nearly every chapter features at least one new 2013 or 2014 case problem.

Unique Digital Learning Systems

Before discussing the many aspects of this text, I wish to point out the exciting digital products offered in conjunction with *Fundamentals of Business Law Today: Summarized Cases*.

MindTap Business Law for Fundamentals of Business Law Today: Summarized Cases, Tenth Edition

MindTap™ is a fully online, highly personalized learning experience built upon 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.

Business law instructors have told me it is important to help students Prepare for class, Engage with the course concepts to reinforce learning, Apply these concepts in real-world scenarios, and use legal reasoning and critical thinking to Analyze business law content.

Accordingly, the *MindTap Business Law* product provides a four-step Learning Path designed to meet these critical needs while also allowing instructors to measure skills and outcomes with ease.

1. **Prepare**—Chapter review activities are designed to prepare students for classroom discussion by ensuring reading and comprehension.
2. **Engage**—Real-world videos with related questions help engage students by displaying the relevance of business law in everyday life.
3. **Apply**—Brief hypotheticals help students practice spotting issues and applying the law in the context of short, factual scenarios.
4. **Analyze**—Legal reasoning activities promote deeper critical thinking and legal reasoning by building on acquired knowledge to truly assess students' understanding of legal principles.

Each and every item in the Learning Path is assignable and gradable. This gives instructors the knowledge of class standings and concepts that may be difficult. Additionally, students gain knowledge about where they stand—both individually and compared to the highest performers in class.

To view a demo video and learn more about *MindTap*, please visit www.cengage.com/mindtap.

Cengage Learning Testing Powered by Cognero

Cengage Learning Testing Powered by Cognero is a flexible, online system that allows instructors to do the following:

- Author, edit, and manage *Test Bank* content from multiple Cengage Learning solutions.
- Create multiple test versions in an instant.
- Deliver tests from the Learning Management System, the classroom, or wherever an instructor wants.

Cengage Learning Testing Powered by Cognero works on any operating system or browser.

- No special installs or downloads are needed.
- Create tests from school, home, the coffee shop—anywhere with Internet access.

Additionally, instructors will find:

- *Simplicity at every step.* A desktop-inspired interface features drop-down menus and familiar intuitive tools that take instructors through content creation and management with ease.
- *Full-featured test generator.* Create ideal assessments with an instructor's choice of fifteen question types—including true-false, multiple choice, opinion scale/Likert, and essay. Multi-language support, an equation editor, and unlimited metadata help ensure that tests are complete and compliant.
- *Cross-compatible capability.* Import and export content into other systems.

A Complete Supplements Package

Fundamentals of Business Law Today: Summarized Cases, Tenth Edition, is accompanied by many teaching and learning supplements, which are available on the password-protected portion of the Instructor's Companion Web Site. The complete teaching/learning package offers numerous other supplements, including those listed below.

For further information on this text's teaching/learning package, contact a local sales representative.

Instructor's Companion Web Site

The Instructor's Companion Web Site includes the following supplements:

- **Instructor's Manual.** Contains 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 questions in each case, feature, and all unit-ending pedagogy.
- **Test Bank.** A comprehensive test bank that contains multiple-choice, true-false, and short essay questions.
- **Case-Problem Cases.**
- **Case Printouts.**
- **PowerPoint Slides.**
- **Lecture Outlines.**
- **Business Law Digital Video Library**—Provides access to ninety videos, including the *Drama of the Law* videos and video clips from actual Hollywood movies. Access to the digital library is available in an optional package with each new text at no additional cost. Instructors can access the *Business Law Digital Video Library*—along with corresponding *Video Questions* that are related to specific chapters in the text—at www.cengagebrain.com.

Practical and Effective Learning Tools

Today's business leaders must often think “outside the box” when making business decisions. For this reason, I have included numerous critical thinking elements in the Tenth Edition that are designed to challenge students' understanding of the materials beyond simple retention. In addition, I have retained and improved the many practical features of this text to help students learn how the law applies to business.

Highlighted and Numbered Examples

The Tenth Edition features even more highlighted numbered *Examples* and *Case Examples* to illustrate the legal principles under discussion. Because many instructors use cases to illustrate how the law applies to business, I have added several new *Case Examples* to expand this coverage, including ones about medical malpractice, employment law, and business organizations. Students can read through the *Examples* and *Case Examples* and quickly apply legal concepts and principles to real-world, practical scenarios.

Critical Thinking and Legal Reasoning

Every case presented in this text concludes with one critical thinking question titled **For Critical Analysis** or **What If the Facts Were Different?** This critical thinking emphasis is reiterated in the chapter-ending materials of selected chapters, which present special *Critical Thinking Legal Questions*.

Adapting the Law to the Online Environment

The Tenth Edition contains more than a dozen new **Adapting the Law to the Online Environment** features, which examine cutting-edge cyberlaw issues coming before today's courts. Here are some examples:

- Facebook Uses Privacy Concerns to “Smear” Google (Chapter 4)
- Smartphone-Based Payment Systems (Chapter 18)
- What Happens When an Agent Breaches Company Policy on the Use of Electronic Data? (Chapter 21)
- The Exploding World of Virtual and Digital Property (Chapter 27)
- Social Media Estate Planning (Chapter 29)

Each feature concludes with a *For Critical Analysis* section that asks the student to think critically about some facet of the issues discussed in the feature.

Management Perspective

Each **Management Perspective** feature begins with a section titled *Management Faces a Legal Issue* that describes a practical issue facing management—such as whether to include arbitration clauses in employment contracts. A section titled *What the Courts Say* comes next and discusses what the courts have concluded with respect to the specific issue. The feature concludes with *Implications for Managers*, a section indicating the importance of the courts' decisions for business management and offering some practical guidance.

Sample Answers

For those instructors who would like students to have sample answers available for some of the chapter-ending questions, I have included three appendices of sample answers. Appendix E provides answers to each of the *Issue Spotters*, which are featured in every chapter of the Tenth Edition. Next, students can access sample answers to the even-numbered *For Review* questions in Appendix F. This is a new appendix for this edition. Every chapter includes a *Case Problem with Sample Answer* that is based on an actual case and answered in Appendix G.

Students can compare their own answers to the answers provided to determine whether they have applied the law correctly and to learn what needs to be included when answering the end-of-chapter questions and case problems.

Reviewing . . . Features

Reviewing . . . features present a hypothetical scenario and ask a series of questions that require students to identify the

issues and apply the legal concepts discussed in the chapter. Each chapter concludes with one of these features, which are intended to help students review the chapter materials in a simple and an interesting way.

Special Features and Pedagogy

The *Fundamentals of Business Law Today: Summarized Cases*, Tenth Edition, offers a number of special features and pedagogical devices, including those described next.

Case Presentation and Format

The cases are numbered sequentially for easy referencing in class discussions, homework assignments, and examinations. Each case is presented in a special format, beginning with the case title and citation (including parallel citations).

After briefly outlining the **Facts** of the case, I present the legal **Issue** and the court's **Decision**. To enhance student understanding, I then paraphrase the **Reason** for the court's decision. Each case normally concludes with a **For Critical Analysis** question or a **What If the Facts Were Different?** question.

Special emphasis is given to *Classic Cases* by setting them off with a special heading and logo. These cases also include a section titled **Impact of This Case on Today's Law** that explains the significance of that particular decision for the evolution of the law in that area.

Other Pedagogical Devices

- **Learning Objectives** (a series of brief questions at the beginning of each chapter designed to provide a framework for the student as he or she reads through the chapter).
- **Exhibits and end-of-chapter appendices**.

Chapter-Ending Pedagogy

- **Reviewing . . . features** (in every chapter).
- **Debate This features** (in every chapter).
- **Terms and Concepts** (with appropriate page references).
- **Chapter Summary** (in graphic format).
- **Issue Spotters** (in every chapter).
- **For Review** (the questions set forth in the chapter-opening *Learning Objectives* section are presented again to aid the student in reviewing the chapter).
- **Business Scenarios and Case Problems** (a compilation of hypothetical scenarios and case-based problems).
- **Case Problem with Sample Answer** (in every chapter).
- **A Question of Ethics** (in every chapter).
- **Critical Thinking Legal Question** (in selected chapters).

Business Case Study with Dissenting Opinion

At the end of each unit is a feature entitled **Business Case Study with Dissenting Opinion**. This feature focuses on a recent court case relating to a topic covered in the unit. Each feature opens with an introductory section, which discusses the background and significance of the case being presented.

Then, excerpts from the court's majority opinion and from a dissenting opinion in the case are presented. The feature concludes with **Questions for Analysis**—a series of questions that prompt the student to think critically about the legal, ethical, economic, global, or general business implications of the case.

Suggested answers to all chapter-ending and unit-ending questions are included in the *Solutions Manual*.

Significantly Revised Chapters

Every chapter of the Tenth Edition has been revised as necessary to incorporate new developments in the law or to streamline the presentations. A sample of some of the major changes include the following:

- **Chapter 1: The Legal and Constitutional Environment of Business**—This chapter discusses the constitutional issue raised by the Obama administration's Patient Protection and Affordable Care Act and considers how the United States Supreme Court's decision in the matter will affect business.

The privacy concerns raised by social networking Web sites are also discussed. A feature examines the legal issues presented by same-sex marriage and marriage equality laws.

- **Chapter 5: Intellectual Property**—The materials on intellectual property rights have been thoroughly revised and updated. The chapter incorporates the major changes to patent law made by the America Invents Act, which makes the first person to file for a patent application the holder. A new subsection addresses patent infringement lawsuits and high-tech companies, and the suit filed by Apple, Inc., against Samsung over iPhones, iPads, and Android software is discussed.

A new *Management Perspective* feature examines the ongoing controversy over the use of derogatory trademarks, specifically, the trademark for the Washington Redskins football team.

- **Chapter 7: Criminal Law and Cyber Crime**—The chapter incorporates recent United States Supreme Court decisions on whether police can attach a GPS tracking device to a suspect's vehicle and whether police officers can be held personally liable for performing an illegal

search. In addition, there is a new section on the reasonable expectation of privacy, including a new case on this point of law.

- **Chapters 8 through 13: The Contracts Unit**—The discussion of online contracting and electronic signatures has been merged with the coverage of traditional contracts. More examples and case examples have been added. Numerous *Spotlight Cases* have been added to this unit, including *Spotlight Cases* on Amazon, Columbia Pictures, and Nike.
- **Chapter 22: Employment Law**—This chapter has been thoroughly revised and updated to include discussions of legal issues facing employers today. One feature covers whether a person who is not a member of a protected class can still sue for employment discrimination.

The chapter also includes a section on immigration law—a topic of increasing importance to employers—and discusses the United States Supreme Court's decision on whether federal law preempts state immigration laws. Additionally, the chapter has an updated discussion of the Family and Medical Leave Act, employee privacy rights and electronic monitoring of employees—including social media communications—drug testing, rights of union workers, and strikes.

- **Chapters 23 through 26: The Business Organizations Unit**—This unit has been reworked to simplify and streamline the presentation of the materials and to focus on diversity. Chapter 24 includes a new discussion on crowdfunding and the *Citizens United* case. Features in Chapter 25 cover shareholder access rules and software designed to help corporate officers spot potential embezzlers.
- **Chapters 27 through 29: The Property and Its Protection Unit**—These three chapters have been updated to deal with issues surrounding virtual and digital property and social media estate planning. Chapter 27 has been substantially reworked to simplify complex materials into basic concepts. The materials on insider trading, Ponzi schemes, and fraud have been updated, and new examples have been added. A *Spotlight Case on Sales of Haunted Houses* appears in Chapter 28.

Acknowledgments

The staff at Cengage Learning went out of its way to make sure that this edition came out early and in accurate form. In particular, I wish to thank Michael Worls and Vicky True-Baker for their countless new ideas, many of which have been incorporated into the Tenth Edition. I wish to give special thanks to Rebecca von Gillern, my managing content developer, for her many useful suggestions and for her efforts in

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My senior content project manager, Ann Borman, made sure that this textbook came out accurate and visually attractive. I will always be in her debt. I am also indebted to the staff at Lachina, the compositor. Their ability to generate pages for this text quickly and professionally made it possible to meet an ambitious printing schedule. I must especially thank Vickie Reiersen for her management of the project. I also wish to thank William Eric Hollowell, co-author of the *Instructor's Manual*, *Solutions Manual*, and *Test Bank*, for his excellent research efforts. The proofreading services by Beverly Peavler will not go unnoticed. My appreciation also extends to Suzanne Jasin and Roxanna Lee for their many special efforts on this project.

In addition, numerous careful and conscientious users of *Fundamentals of Business Law Today: Summarized Cases* were kind enough to help me revise this Tenth Edition, as well as previous editions. I would like to specifically recognize the following individuals for their assistance:

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Lastly, I know that I am not perfect. If you or your students find something you don't like or want me to change, let me know via e-mail, using the "Contact Us" feature on this text's Web site. That is how I can make *Fundamentals of Business Law Today: Summarized Cases* an even better book in the future.

Roger LeRoy Miller

Dedication

To Judy Kreeger,

Always happy.

Always wise.

Always looking for new challenges.

Always a good friend.

Thanks,

R.L.M.

10th EDITION

Fundamentals of Business Law Today

SUMMARIZED CASES

UNIT 1



(© iStock.com/BakariProduction)

The Legal Environment of Business

UNIT CONTENTS

1. The Legal and Constitutional Environment of Business

2. Courts and Alternative Dispute Resolution

3. Ethics and Business Decision Making

The Legal and Constitutional Environment of Business

LEARNING OBJECTIVES

The five Learning Objectives below are designed to help improve your understanding of the chapter. 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 the common law tradition?
- 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 various states?
- 5 What is the Bill of Rights? What freedoms does the First Amendment guarantee?

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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, they all 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, while in other societies they are set forth in ancient or contemporary 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 chapter, we look first at an important question for any student reading this text: How do business law and the legal environment affect business decision making? Next, we describe the basic sources of American law, the common law tradition, and some general classifications of law. We conclude the chapter with a discussion of the U.S. Constitution as it affects business.

Business Activities

As those entering the business world will learn, laws and government regulations affect all business activities—hiring and firing decisions, workplace safety, the manufacturing and marketing of products, and business financing, to name just a few.

To make good business decisions, a basic understanding of the laws and regulations governing these activities is essential.

Moreover, in today's setting, simply being aware of what conduct can lead to legal **liability** is not enough. Businesspersons must develop critical thinking and legal reasoning skills so that they can evaluate how various laws might apply to a given situation and determine the potential result of their course of action. Businesspersons are also under increasing pressure to make ethical decisions and to consider the consequences of their decisions.

As you will note, each chapter in this text covers a specific area of the law and shows how the legal rules in that area affect business activities. Although compartmentalizing the law in this fashion facilitates learning, it does not indicate the extent to which many different laws may apply to just one transaction. This is where the critical thinking skills that you will learn throughout this book become important. You need to be able to identify the various legal issues, apply the laws that you learn about, and arrive at a conclusion on the best course of action.

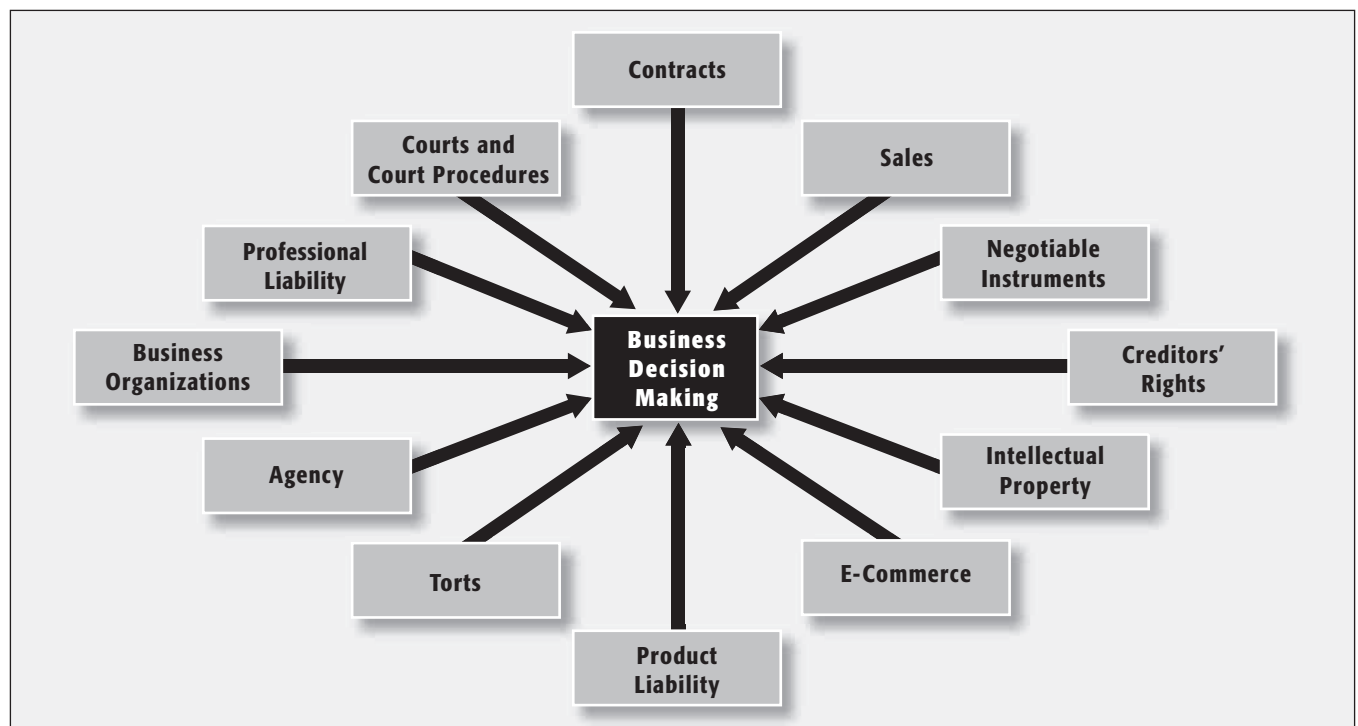
● **EXAMPLE 1.1** Suppose that you are the president of NetSys, Inc., a company that creates and maintains computer network systems for other business firms. NetSys also markets software for internal computer networks. One day, Janet Hernandez, an operations officer for Southwest Distribution (SD), contacts you by e-mail about a possible contract involving

SD's computer network. In deciding whether to enter into a contract with SD, you need to consider, among other things, the legal requirements for an enforceable contract. Are the requirements different for a contract for services and a contract for products? What are your options if SD **breaches** (breaks, or fails to perform) the contract? The answers to these questions are part of contract law and sales law.

Other questions might concern payment under the contract. How can you guarantee that NetSys will be paid? For example, if SD pays with a check that is returned for insufficient funds, what are your options? Answers to these questions can be found in the laws that relate to negotiable instruments (such as checks) and creditors' rights. Also, a dispute may arise over the rights to NetSys's software, or there may be a question of liability if the software is defective. There may even be an issue as to whether you and Hernandez had the authority to make the deal in the first place. Resolutions of these questions may be found in the laws that relate to intellectual property, e-commerce, torts, product liability, agency, business organizations, or professional liability. ●

Finally, if any dispute cannot be resolved amicably, then the laws and the rules concerning courts and court procedures spell out the steps of a lawsuit. Exhibit 1.1 that follows illustrates the various areas of the law that may influence business decision making.

Exhibit 1.1 Areas of the Law That May Affect Business Decision Making



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.
- Statutes, or laws, passed by Congress and by state legislatures.
- 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. (See the appendix at the end of this chapter for a discussion of how to find statutes, regulations, and case law.)

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.

Constitutional Law

The federal government and the states have separate written constitutions that set forth the general organization, powers, and limits of their respective governments. **Constitutional law** is the law as expressed in these constitutions.

The U.S. Constitution is the supreme law of the land. As such, it is the basis of all law in the United States. 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. Because of its paramount importance in the American legal system, we discuss the U.S. Constitution later in this chapter and present the complete text of the U.S. Constitution in Appendix B.

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.

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**—statutes (laws, rules, or orders) passed by municipal or county governing units to administer 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.

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.

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) 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: it has issued more than two hundred uniform acts since its inception.

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.¹ The UCC was first issued in 1952 and has been adopted in all fifty states,² 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

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.

law, we cite the UCC frequently in this text. We also present excerpts of the UCC in Appendix C.

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. Rules issued by various administrative agencies now affect almost every aspect of a business's operations, including the firm'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.

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 some detail in the pages that follow.

The Common Law Tradition

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

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 entire 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**—that is, 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.)

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**³ (“to stand on decided cases”).

The Importance of Precedents in Judicial Decision Making Under the doctrine of *stare decisis*, once a court has set forth a principle of law as being applicable to a certain set of facts, that court and courts of lower rank must adhere to that principle. In addition, the courts must apply it in future cases involving similar fact patterns. *Stare decisis* has two aspects: (1) decisions made by a higher court are binding on lower courts, and (2) a court should not overturn its own precedents unless there is a strong reason to do so.

Controlling precedents in a *jurisdiction* (an area in which a court or courts have the power to apply the law) are referred to as 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.

3. Pronounced *stahree dih-sis-is*.

Stare Decisis and Legal Stability 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. *Stare decisis* also makes the law more stable and predictable. If the law on a given subject is well settled, someone bringing a case to court can usually rely on the court to make a decision based on what the law has been.

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.

● **CASE EXAMPLE 1.2** In *Brown v. Board of Education of Topeka*,⁴ the United States Supreme Court expressly overturned precedent when it concluded that separate educational facilities for whites and blacks, which had been upheld as constitutional in numerous previous cases,⁵ 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 At times, a case may raise issues that have not been raised before in that jurisdiction, so the court has no precedents on which to base its decision. When deciding such cases, called “cases of first impression,” courts often look at precedents established in other jurisdictions for guidance. Precedents from other jurisdictions, because they are not binding on the court, are referred to as **persuasive authorities**. A court may also consider other factors, including legal principles and policies underlying previous court decisions or existing statutes, fairness, social values and customs, public policy, and data and concepts drawn from the social sciences.

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 1.3** 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 as compensation either money or property, including land. 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 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 what might be described as 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 for relief. Most of these petitions were referred to the *chancellor*, an adviser to the king who had the power to grant new and unique remedies. Eventually, formal chancery courts, or *courts of equity*, were established. Thus, two distinct court systems were created, each having its own set of judges and its own set of remedies. The remedies granted by the chancery 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. ● **EXAMPLE 1.4** A plaintiff might ask a court of equity to order the **defendant** (the person against whom a lawsuit is brought) to perform within the terms of a contract. A court of law could not issue such an order because its remedies were limited to the payment of money or property as compensation for damages. A court of equity, however, could issue a decree for *specific performance*—an order 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. ●

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 (monetary damages) 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.

4. 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

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

Classifications of Law

The law may be broken down according to several classification systems. For instance, one classification 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 1.5** 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 concerning workers' compensation may contain both substantive and procedural provisions. ●

Other classification systems divide law into (1) federal law and (2) state law or 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.

Cyberlaw is not really a classification of law, nor is it a new type of law. Rather, it is an informal term used to describe traditional legal principles that have been modified and adapted to fit situations that are unique to the online world. Of course, in some areas new statutes have been enacted, at both the federal and state levels, to cover specific types of problems stemming from online communications.

Civil Law and Criminal Law

Civil law spells out the rights and duties that exist between persons and between persons and their governments, and the relief available when a person's rights are violated.

Typically, in a civil case, a private party sues another private party (although the government can also sue a party for a civil law violation) to make sure that the other party complies with a duty or pays for the damage caused by the failure to comply with a duty. ● **EXAMPLE 1.6** If a seller fails to perform a contract with a buyer, the buyer may bring a lawsuit against the seller. The purpose of the lawsuit will be either to compel the seller to perform as promised or, more commonly, to obtain monetary damages for the seller's failure to perform. ●

Much of the law that we discuss in this text is civil law. Contract law, for example, which will be discussed in Unit Three, is civil law. The whole body of tort law (see Chapter 4) is civil law. Note that *civil law* is not the same as a **civil law system**, which is a legal system based on a written code of laws.

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 (D.A.), 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.

National and International Law

Although the focus of this book is U.S. business law, increasingly businesspersons in this country engage in transactions that extend beyond our national borders. In these situations, the laws of other nations or the laws governing relationships among nations may come into play. For this reason, those who pursue a career in business today should have an understanding of the global legal environment.

National Law The law of a particular nation, such as the United States or Sweden, 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. Even though the laws and legal systems of various countries differ substantially, broad similarities do exist.

Two types of legal systems predominate around the globe today. One is the common law system of England and the United States, which we have already discussed. The other system is based on Roman civil law, or code law. The term *civil law*, as used here, refers not to civil as opposed to criminal law but to codified law—an ordered grouping of legal principles enacted into law by a legislature or governing body.

In a civil law system, the primary source of law is a statutory code, and case precedents are not judicially binding, as they normally are in a common law system. Although the judges in a civil law system often refer to previous decisions as sources of a legal guidance, they are not bound by precedent. In other words, the doctrine of *stare decisis* does not apply.

International Law In contrast to national law, 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. Each nation is

motivated not only by the need to be the final authority over its own affairs, but also by the desire to benefit economically from trade and harmonious relations with other nations. In essence, international law is the result of centuries-old attempts to strike a balance between these competing needs.

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, as a last resort, war. We will examine the laws governing international business transactions in Chapter 31.

The Constitution as It Affects Business

Each of the sources of law discussed earlier helps to frame the legal environment of business. Because laws that govern business have their origin in the lawmaking authority granted by the U.S. Constitution, we examine that document more closely next. In particular, we focus on three areas of the Constitution of particular concern to business—the commerce clause, the supremacy clause, and the Bill of Rights.

The Commerce Clause

To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to 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, in the case of *Gibbons v. Ogden*⁶, the United States Supreme Court held 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.

The Expansion of National Powers under the Commerce Clause In *Gibbons v. Ogden*, the commerce clause was expanded to regulate activities that “substantially

affect interstate commerce.” 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. • **CASE EXAMPLE 1.7** 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. The Court reasoned that the home consumption of wheat reduced the market demand for wheat and thus could have a substantial effect on interstate commerce.⁷ •

The Commerce Clause Today 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.

In the last twenty years, the Supreme Court has on occasion curbed the national government’s regulatory authority under the commerce clause. In 1995, the Court held—for the first time in sixty years—that Congress had exceeded its regulatory authority under the commerce clause. The Court struck down an act that banned the possession of guns within one thousand feet of any school because the act attempted to regulate an area that had “nothing to do with commerce.”⁸ Subsequently, the Court invalidated key portions of two other federal acts on the ground that they exceeded Congress’s commerce clause authority.⁹

In one notable case, however, the Supreme Court did allow the federal government to regulate noncommercial activities taking place wholly within a state’s borders.

• **CASE EXAMPLE 1.8** A growing number of states, including California, have adopted laws that legalize marijuana for medical purposes (and recreational use of marijuana is legal in a few states). Marijuana possession, however, is illegal under the federal Controlled Substances Act (CSA).¹⁰ After the federal government seized the marijuana that two seriously ill California women were using on the advice of their physicians, the women filed a lawsuit. They argued that it was unconstitutional for the federal statute to prohibit them from using marijuana for medical purposes that were legal

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

8. The Court held the Gun-Free School Zones Act of 1990 to be unconstitutional in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

9. See *Printz v. United States*, 521 U.S. 898, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997), involving the Brady Handgun Violence Prevention Act of 1993; and *United States v. Morrison*, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000), concerning the federal Violence Against Women Act of 1994.

10. 21 U.S.C. Sections 801 *et seq.*

6. 22 U.S. (9 Wheat) 1, 6 L.Ed. 23 (1824).

within the state. The Supreme Court, though, held that Congress has the authority to prohibit the *intrastate* possession and noncommercial cultivation of marijuana as part of a larger regulatory scheme (the CSA).¹¹ In other words, the federal government may prosecute individuals for possession of marijuana regardless of whether they reside in a state that allows the medical (or recreational) use of marijuana. •

The Regulatory Powers of the States As part of their inherent sovereignty, state governments have the authority to regulate affairs within their borders. This authority stems in part from the Tenth Amendment to the Constitution, which reserves to the states all powers not delegated to the national government.

State regulatory powers are often referred to as **police powers**. The term encompasses not only the enforcement of criminal law but also the right of state governments to regulate private activities in order to protect or promote the public order, health, safety, morals, and general welfare. Fire and building codes, antidiscrimination laws, parking regulations, zoning restrictions, licensing requirements, and thousands of other state statutes have been enacted pursuant to a state's police powers. Local governments, including cities, also exercise police powers.¹²

Although a state may not directly regulate interstate commerce, it may indirectly affect interstate commerce through the reasonable exercise of its police powers. Generally, state laws enacted pursuant to a state's police powers carry a strong presumption of validity.

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 1.9** Tri-M Group, LLC, a Pennsylvania electrical contractor, was hired to work on a veteran's home in Delaware that was partially state funded. Delaware's regulations allowed contractors on state-funded projects to pay a lower wage rate to apprentices if the contractors had registered their apprenticeship programs in the state. Out-of-state contractors, however, were not eligible to pay the lower rate unless they maintained a permanent office in Delaware. Tri-M filed a suit in federal court claiming that Delaware's regulations discriminated against out-of-state contractors in violation of the dormant commerce clause. The state argued that the regulations were justified because it had a legitimate interest in safeguarding the welfare of all apprentices by requiring a permanent place of business in Delaware. But the court held that the state had not overcome the presumption of invalidity that applies to discriminatory regulations and that nondiscriminatory alternatives existed for ensuring the welfare of apprentices. Therefore, the regulations violated the dormant commerce clause.¹³ •

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. 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. 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 over a given area. No single factor is decisive as to whether a court will find preemption. 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.

The Bill of Rights

The importance of having a written declaration of the rights of individuals eventually caused the first Congress of the United

11. *Gonzales v. Raich*, 545 U.S. 1, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005).

12. Local governments derive their authority to regulate their communities from the state because they are creatures of the state. In other words, they cannot come into existence unless authorized by the state to do so.

13. *Tri-M Group, LLC v. Sharp*, 638 F.3d 406 (3d Cir. 2011). Sharp was the name of the secretary of the Delaware Department of Labor.

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 and embody a series of protections for the individual against various types of interference by the federal government.¹⁴

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 here are the protections guaranteed by these ten amendments (see the Constitution in Appendix B for the complete text of each amendment):

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.
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 (trial 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.¹⁵
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.

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. That amendment, passed in 1868 after the Civil War, 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.

We will look closely at several of the amendments in Chapter 7, in the context of criminal law and procedures. Next, we examine two important guarantees of the First Amendment—freedom of speech and freedom of religion.

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 this right 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 Supreme Court held that the burning of the American flag to protest government policies is a constitutionally protected form of expression.¹⁶ Similarly, wearing a T-shirt with a photo of a presidential candidate would be a constitutionally protected form of expression. 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, Nam 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 basis.

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

14. One of the proposed amendments was ratified more than two hundred years later (in 1992) and became the Twenty-seventh Amendment to the Constitution. See Appendix B.

15. Twenty dollars was forty days' pay for the average person when the Bill of Rights was written.

16. See *Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

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.

At issue in the following case was the constitutionality of an Indiana state law that barred most sex offenders from using social networking sites (such as Facebook), instant messaging services (such as Twitter), and chat programs that the offenders knew were accessible to minors.

Case 1.1

Doe v. Prosecutor, Marion County, Indiana

United States Court of Appeals, Seventh Circuit, 705 F.3d 694 (2013).

FACTS John Doe^a was arrested in Marion County, Indiana, and convicted of child exploitation. Although he was released from prison and was not on any form of supervised release, he was required to register as a sex offender with the state of Indiana. Under an Indiana statute that covered child exploitation and other sex offenses, Doe could not use certain Web sites and programs. Doe filed a lawsuit in a federal district court against the Marion County prosecutor, alleging that the statute violated his right to freedom of speech under the First Amendment. Doe asked the court to issue an injunction to block the enforcement of the law. The court held that “the regulation is narrowly tailored to serve a significant state interest” and entered a judgment for the defendant. Doe appealed to the U.S. Court of Appeals for the Seventh Circuit.

ISSUE Does an Indiana statute that prohibits a convicted sex offender from using social networking Web sites violate the First Amendment?

DECISION Yes. The U.S. Court of Appeals for the Seventh Circuit reversed the lower court’s judgment in favor of the county and remanded the case for the entry of a judgment for Doe.

- a. The names *John Doe* and *Jane Doe* are used as placeholders in litigation to represent a party whose true identity is either unknown or being withheld for some reason.

REASON An Indiana law prohibits sex offenders from knowingly or intentionally using a social networking Web site or an instant messaging or chat room program that “the offender knows allows a person who is less than eighteen (18) years of age to access or use the Web site or program.” The appellate court pointed out that this statute clearly implicated Doe’s First Amendment rights. “It not only precludes [prohibits] expressions through the medium of social media, it also limits his rights to receive information and ideas.”

The government of Indiana agreed that there is nothing dangerous about Doe’s use of social media “as long as he does not improperly communicate with minors.” But because illicit communication comprises a tiny part of the universe of social network activity, “the Indiana law targets substantially more activity than the evil it seeks to redress.” The appellate court further pointed out that Indiana has other methods to fight inappropriate communications between minors and sex offenders. The Indiana statute was deemed over inclusive. A law that concerns rights under the First Amendment must be narrowly tailored to accomplish its objective. The blanket ban on social media in this case did not pass this test.

FOR CRITICAL ANALYSIS—Social Consideration *Could a state effectively enforce a law that banned all communication between minors and sex offenders through social media sites? Why or why not?*

Corporate Political Speech Political speech by corporations also 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.¹⁷ The Court

has also held that a law prohibiting a corporation from using bill inserts to express its views on controversial issues violated the First Amendment.¹⁸

Corporate political speech continues to be given significant protection under the First Amendment. In 2010, the Supreme Court overturned a twenty-year-old precedent when it ruled

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

18. *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 100 S.Ct. 2326, 65 L.Ed.2d 319 (1980).

that corporations can spend freely to support or oppose candidates for president and Congress.¹⁹

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 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.

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

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



Spotlight on Beer Labels

Case 1.2

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.” Bad Frog’s authorized New York distributor, Renaissance Beer Company, 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 New York State Liquor Authority’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, and the NYSLA did not adequately consider alternatives to the ban. The court 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’s “concern could be less intrusively dealt with by placing restrictions on the permissible locations where the appellant’s products may be displayed within . . . stores.”

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, will not be protected. Speech that violates criminal laws (such as threatening speech) is not constitutionally protected. Other unprotected speech includes “fighting words,” or words that are likely to incite others to respond violently.

The First Amendment, as interpreted by the Supreme Court, also does not protect obscene speech. Establishing an objective definition of obscene speech has proved difficult, however.²⁰ Numerous state and federal statutes make it a crime to disseminate and possess obscene materials, including child pornography. But, obviously, it is even more difficult to prohibit the dissemination of obscenity and pornography online.

Most of Congress’s attempts to pass legislation protecting minors from pornographic materials on the Internet have been struck down on First Amendment grounds when challenged in court. One exception was a law that passed in 2000, which requires schools public schools and libraries to install *filtering software* on computers to keep children from accessing adult content.²¹ Such software is designed to prevent persons from viewing certain Web sites based on a site’s Internet address or its *meta tags*, or key words. The United States Supreme Court held that the act does not unconstitutionally burden free speech because it is flexible and libraries can disable the filters for any patrons who ask.²²

Another statute that passed in 2003 makes it a crime to intentionally distribute *virtual child pornography*—which uses computer-generated images, not actual people—without indicating that it is computer-generated.²³ In a case challenging its constitutionality, the Supreme Court held that the statute was valid because it does not prohibit a substantial amount of protected speech.²⁴ Nevertheless, because of the difficulties of policing the Internet, as well as the constitutional complexities of prohibiting online obscenity through legislation, it remains a problem worldwide.

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.

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. Although the establishment clause involves the separation of church and state, it does not require a complete separation.

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. 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, and the United States Supreme Court has ruled on a number of such cases. Generally, the Court has focused on the proximity of the religious display to nonreligious symbols or to symbols from different religions. The Supreme Court eventually took a slightly different approach when it held that public displays having historical, as well as religious, significance do not necessarily violate the establishment clause.²⁵

● **CASE EXAMPLE 1.11** 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.”

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, finding that the primary effect of the memorial as a whole sent a strong message of endorsement and exclusion (of non-Christian veterans). 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, was originally dedicated

20. For a leading case on this issue, see *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973).

21. Children’s Internet Protection Act (CIPA), 17 U.S.C. Sections 1701–1741.

22. *United States v. American Library Association*, 539 U.S. 194, 123 S.Ct. 2297, 156 L.Ed.2d 221 (2003).

23. The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act (Protect Act), 18 U.S.C. Section 2252A(a)(5)(B).

24. *United States v. Williams*, 553 U.S. 285, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

25. See *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005). The Court held that a six-foot-tall monument of the Ten Commandments on the Texas state capitol grounds did not violate the establishment clause because the Ten Commandments had historical significance.

to religious purposes, had a long history of religious use, and was the only portion visible to drivers on the freeway below.²⁶ •

The Free Exercise Clause The **free exercise clause** guarantees that a person can hold any religious belief that she or he wants, or a person can have no religious belief. The constitutional guarantee of personal religious freedom restricts only the actions of the government, however, and not those of individuals or private businesses.

When religious *practices* work against public policy and the public welfare, though, the government can act. For instance, the government can require a child to receive certain types of vaccinations or medical treatment when a child's life is in danger—regardless of the child's or parent's religious beliefs. When public safety is an issue, an individual's religious beliefs often have to give way to the government's interests in protecting the public.

• **CASE EXAMPLE 1.12** Members of a particular Mennonite church must use horses and buggies for transportation, but they can use tractors to take their agricultural products to market. Their religion requires that the tractors have steel cleats on the tires. Thus church members drove tractors with cleats on county roads for many years. Then the county passed an ordinance that prohibited the use of steel cleats because they damaged newly surfaced roads. When a church member received a citation for driving a tractor with cleats on a county road, he claimed that the ordinance violated the church's right to freely exercise its religion. Ultimately, the court ruled in his favor. The county had not met its burden of showing that the ordinance served a compelling government interest and was the least restrictive means of attaining that interest. There was no evidence of how much the cleats harmed the roads, other events also harmed the roads, and the county had allowed the cleats to be used for many years. Therefore, the ordinance was not carefully tailored to achieve the stated objective of road preservation.²⁷ •

Fifth Amendment—Due Process The Fifth (and the Fourteenth) Amendment provides 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—that is, the government must give a person proper notice and an opportunity to be heard. Fair procedures must be used 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 1.13** 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 cell phone, 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 legislation rather than the fairness of 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. Only when state conduct is arbitrary or shocks the conscience, however, will it rise to the level of violating substantive due process.

If a law or other governmental action limits a fundamental right, it will be held to violate substantive due process unless it promotes a compelling or overriding state interest. Fundamental rights include interstate travel, privacy, voting, marriage and family, and all First Amendment rights. Thus, 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.

Fourteenth Amendment—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.

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

27. *Mitchell County v. Zimmerman*, 810 N.W.2d 1 (Iowa 2012).

Both substantive due process and equal protection require review of the substance of the law or other governmental action rather than review of the procedures used. 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. 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.

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. Under the **compelling government interest** test, the government’s interest

is balanced against the individual’s constitutional right to be free of law. The government must have convincing reasons for passing any law that restricts fundamental rights, such as free speech, or distinguishes between people based on a suspect trait. A compelling government interest would include remedying past illegal discrimination, for example. 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*. For example, an important government objective is preventing illegitimate teenage pregnancies. Because males and females are not similarly situated in this regard—only females can become pregnant—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.

In the following case, the court applied the rational basis test to a statute that prohibits certain businesses from applying for a license to sell wine and liquor.

Case 1.3

Maxwell’s Pic-Pac, Inc. v. Dehner

United States Court of Appeals, Sixth Circuit, 739 F.3d 936 (2014).

FACTS A Kentucky statute prohibits businesses that sell substantial amounts of staple groceries or gasoline from applying for a license to sell wine and liquor. This provision applies to retailers that sell those items at a rate of at least 10 percent of gross monthly sales. Maxwell’s Pic-Pac (a grocer) and Food with Wine Coalition (a group of grocers) filed a suit in a federal district court against Tony Dehner, the commissioner of the Kentucky Department of Alcoholic Beverage Control, and Danny Reed, the distilled spirits administrator of the Kentucky Department of Alcoholic Beverage Control. The plaintiffs alleged that the statute and the regulation were unconstitutional under the equal protection clause. The court ruled in the plaintiffs’ favor, and the defendants appealed.

ISSUE Are the statute and regulation rationally related to a legitimate government interest so that they can withstand a challenge under the equal protection clause?

DECISION Yes. The U.S. Court of Appeals for the Sixth Circuit reversed the judgment of the lower court. The appellate court held that the statute and the regulation were rationally related to a legitimate government interest in reducing access to products with high alcohol content.

REASON The court cited the problems caused by alcohol, including drunk driving, and noted that products with high alcohol content can make these problems worse. The state’s

Case 1.3 Continues

Case 1.3 Continued

interest in limiting access to such products extends to the general public, including “abstinent citizens” who “wish to avoid retailers that sell such drinks” and “inexperienced and impressionable” minors. Grocery stores and gas stations pose a greater risk of exposing members of the public to alcohol—the average person spends more time in grocery stores and gas stations than in other retail establishments. In addition, more minors work in grocery stores and gas stations than in other retail stores. For these and other reasons, the state

can restrict these places from selling wine and liquor—“just as a parent can reduce a child’s access to liquor by keeping smaller amounts in the house *and* by locking it in the liquor cabinet.”

WHAT IF THE FACTS WERE DIFFERENT? Suppose that the state restricted packaged beer sales by bars but not breweries. Would this pass the rational basis test under the equal protection clause? Why or why not?

Privacy Rights

The U.S. Constitution does not explicitly mention a general right to privacy. In a 1928 Supreme Court case, *Olmstead v. United States*,²⁸ 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*,²⁹ 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.

Today, privacy rights receive protection under various federal statutes as well the U.S. Constitution. State constitutions and statutes also secure individuals’ privacy rights, often to a significant degree. Privacy rights are also protected to an extent under tort law, consumer law, and employment law. One current topic relating to privacy rights is the debate over marriage equality laws, as discussed in this chapter’s *Management Perspective* feature that follows.

Federal Statutes Protecting Privacy Rights

In the 1960s, Americans were sufficiently alarmed by the accumulation of personal information in government files that they pressured Congress to pass laws permitting individuals to access their files. Congress responded in 1966 with the Freedom of Information Act, which allows any person to request copies of any information on her or him contained in federal government files.

In 1974, Congress passed the Privacy Act, which also gives persons the right to access such information. Since then,

Congress has passed numerous other laws protecting individuals’ privacy rights with respect to financial transactions, electronic communications, and other activities in which personal information may be gathered and stored by organizations.

Since the 1990s, one of the major concerns of individuals has been how to protect privacy rights in cyberspace and to safeguard private information that may be revealed online. The increasing value of personal information for online marketers has exacerbated the situation. Chapter 6 discusses online privacy in more detail.

Pretexting A *pretext* is a false motive put forth to hide the real motive, and *pretexting* is the process of obtaining information by false means. Pretexters may try to obtain personal data by claiming that they are taking a survey for a research firm, a political party, or even a charity. The Gramm-Leach-Bliley Act³⁰ makes pretexting to obtain financial information illegal, but it does not mention lying to obtain *nonfinancial* information (for purposes other than identity theft).

To clarify the law on pretexting to gain access to phone records, Congress enacted the Telephone Records and Privacy Protection Act.³¹ This act makes it a federal crime to pretend to be someone else or to make false representations for the purpose of obtaining another person’s confidential phone records. The Federal Trade Commission investigates and prosecutes violators.

Medical Information Responding to the growing need to protect the privacy of individuals’ health records—particularly computerized records—Congress passed the Health Insurance Portability and Accountability Act (HIPAA).³² This act defines and limits the circumstances in which an individual’s “protected health information” may be used or disclosed.

28. 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928).

29. 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

30. Also known as the Financial Services Modernization Act, Pub. L. No. 106-102 (1999), 113 Stat. 1338, codified in numerous sections of 12 U.S.C.A.

31. 18 U.S.C. Section 1039.

32. HIPAA was enacted as Pub. L. No. 104-191 (1996) and is codified in 29 U.S.C.A. Sections 1181 *et seq.*



MANAGEMENT PERSPECTIVE

MARRIAGE EQUALITY AND THE CONSTITUTION

Management Faces a Legal Issue The debate over whether to allow same-sex marriage has been raging across the country for years. The legal issues raised by marriage equality involve both the privacy rights protected by state and federal constitutions and the full faith and credit clause of the U.S. Constitution, which requires states to enforce judicial decisions (and marriage decrees) issued in other states.

Although marriage equality may not appear at first glance to be business related, it is a pertinent legal issue for managers. For example, Target Corporation once contributed \$150,000 to a group backing a Republican candidate in Minnesota who had taken a stand against same-sex marriage. As a result, boycotts of Target stores sprang up across the country. In 2013, Guido Barilla, the head of the world's largest pasta manufacturer, stated in an interview that he would never use homosexuals in Barilla Pasta advertising. His statements sparked anger and resulted in a boycott of the company's products, despite his prompt apology on Twitter and Facebook. Other businesses, such as Chick-fil-A and Exxon Mobil, have also lost business for supporting anti-gay organizations and legislation.

What the Courts Say Before 1996, federal law did not define marriage, and the U.S. government recognized any marriage that was recognized by a state. Then Congress passed the Defense of Marriage Act (DOMA), which explicitly defined marriage as a union of one man and one woman. DOMA was later challenged in the federal court system. Eight federal courts found it to be unconstitutional in a variety of contexts, including bankruptcy, public employee benefits, estate taxes, and immigration. In 2013, in a review of several of these cases, the United States Supreme Court struck down part of DOMA as unconstitutional.^a In 2014, the U.S. government went one step further and recognized that same-sex couples had equal rights in federal legal matters such as bankruptcies, prison visits, and survivor benefits. These federal benefits are available to same-sex couples even in states that do not recognize same-sex marriages. Today, once again, no federal law defines marriage, and marriage law is determined at the state level.

Twenty-seven states prohibit same-sex marriages in their constitutions. Another four states forbid such marriages through state statutes that define marriage as a union between a man and a woman. Marriage laws that do not permit or recognize same-sex marriage have increasingly led to court challenges. For example, in California, same-sex couples could obtain marriage certificates before 2008. That year, voters enacted Proposition 8 to restrict marriage to one man and one woman. In 2012, a federal appellate court struck down Proposition 8 as a violation of the equal protection clause, reasoning that it was not rationally related to a legitimate government interest. The court noted that the U.S. Constitution "requires that there be at least a legitimate reason for the passage of a law that treats different classes of people differently." In the court's view, Proposition 8 served no legitimate purpose other than to "lessen the status and human dignity of gay men and lesbians in California."^b

Federal courts have become increasingly likely to invalidate state bans on same-sex marriage. In 2013, for instance, a federal district court held that Utah's same-sex marriage ban was unconstitutional.^c In 2014, a federal district court in Oklahoma struck down that state's constitutional prohibition against same-sex marriage.^d Moreover, public sentiment on the issue has shifted, and more states are recognizing the rights of same-sex couples. As of 2014, seventeen states, as well as the District of Columbia, had legalized same-sex marriage.

Implications for Managers *In this era of social networking, a company's policies can become public almost instantly—the boycotts of Target and Barilla were largely organized via Facebook. Consequently, businesspersons must carefully consider their policies toward employees and others who have different sexual orientations, taking into account such factors as their firms' size, location, composition, and client base. At a minimum, company policies should clearly specify how same-sex partners would be treated in terms of family and medical leave, health insurance coverage, pensions, and other benefits.*

a. *United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013).

b. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012).

c. *Kitchen v. Herbert*, 961 F.Supp.2d 1181 (D.Utah 2013).

d. *Bishop v. U.S. ex rel. Holder*, 962 F.Supp.2d 1252 (N.D.Okla. 2013).

HIPAA also requires health-care providers and health-care plans, including certain employers who sponsor health plans, to inform patients of their privacy rights and of how their personal medical information may be used. The act also states that a person’s medical records generally may not be used for purposes unrelated to health care—such as marketing, for example—or disclosed to others without the individual’s permission. Congress later expanded HIPAA’s provisions to apply to vendors (those who maintain personal health records for health-care providers) and to electronic records shared by multiple medical providers. Congress also authorized the Federal Trade Commission to enforce HIPAA and pursue violators.

The USA Patriot Act The USA Patriot Act was passed by Congress in the wake of the terrorist attacks of September

11, 2001.³³ The Patriot Act has given government officials increased authority to monitor Internet activities and to gain access to personal financial information and student information. Law enforcement officials can now track the telephone and e-mail communications of one party to find out the identity of the other party or parties. Privacy advocates argue that this law adversely affects the constitutional rights of all Americans, and it has been widely criticized in the media.

To gain access to these communications, the government must certify that the information likely to be obtained by such monitoring is relevant to an ongoing criminal investigation. The government need not provide proof of any wrongdoing.

33. 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). While the bulk of the USA Patriot Act is permanent, the most controversial surveillance provisions must be reauthorized every four years.

Reviewing . . . The Legal and Constitutional Environment of Business

Suppose that the California legislature passes a law that severely restricts carbon dioxide emissions from automobiles in that state. A group of automobile manufacturers files a suit against the state of California to prevent the enforcement of the law. The automakers claim that a federal law already sets fuel economy standards nationwide and that these standards are essentially the same as carbon dioxide emission standards. According to the automobile manufacturers, it is unfair to allow California to impose more stringent regulations than those set by the federal law. Using the information presented in the chapter, answer the following questions.

- 1. Who are the parties (the plaintiffs and the defendant) in this lawsuit?
- 2. Are the plaintiffs seeking a legal remedy or an equitable remedy? Why?
- 3. What is the primary source of the law that is at issue here?
- 4. Read through the appendix that follows this chapter, and then answer the following question: Where would you look to find the relevant California and federal laws?

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?

Terms and Concepts

Bill of Rights 10	case law 5	civil law system 7	compelling government interest 15
binding authority 5	citation 4	commerce clause 8	concurring opinion 28
breach 3	civil law 7	common law 5	constitutional law 4

criminal law 7	international law 7	plaintiff 6	secondary source of law 4
cyberlaw 7	law 2	plurality opinion 28	<i>stare decisis</i> 5
defendant 6	liability 3	police powers 9	statutory law 4
dissenting opinion 28	majority opinion 28	precedent 5	substantive law 7
due process clause 14	national law 7	preemption 9	supremacy clause 9
equal protection clause 14	ordinance 4	primary source of law 4	symbolic speech 10
establishment clause 13	<i>per curiam</i> opinion 28	procedural law 7	uniform law 4
free exercise clause 14	persuasive authority 6	remedy 6	

Chapter Summary: The Legal and Constitutional Environment of Business

Sources of American Law	<ol style="list-style-type: none"> 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. 2. <i>Statutory law</i>—Laws or ordinances created by federal, state, and local legislatures and governing bodies. None of these laws can violate the U.S. Constitution or the relevant state constitutions. Uniform laws, when adopted by a state legislature, become statutory law in that state. 3. <i>Administrative law</i>—The rules, orders, and decisions of federal or state government administrative agencies. 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. The common law—the doctrines and principles embodied in case law—governs all areas not covered by statutory law or administrative law.
The Common Law Tradition	<ol style="list-style-type: none"> 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 (or applied in) all regions of the country. 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. 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) but may also grant equitable remedies (specific performance, injunction, or rescission) when the legal remedy is inadequate or unavailable.
Classifications of Law	The law may 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 is used for the growing body of case and statutory law that applies to Internet transactions.
The Constitution as It Affects Business	<ol style="list-style-type: none"> 1. <i>Commerce clause</i>—Expressly permits Congress to regulate commerce. That power authorizes the national government, at least theoretically, to regulate every commercial enterprise in the United States. Under their police powers, state governments may regulate private activities to protect or promote the public order, health, safety, morals, and general welfare. 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. 3. <i>Bill of Rights</i>—The first ten amendments to the U.S. Constitution. They embody a series of protections for individuals—and in some cases, business entities—against various types of interference by the federal government. One of the freedoms guaranteed by the Bill of Rights that affects businesses is the freedom of speech guaranteed by the First Amendment. Also important are the protections of the Fifth and the Fourteenth Amendments, which provide that no person shall be deprived of “life, liberty, or property, without due process of law.”
Privacy Rights	The Constitution does not contain a specific guarantee of a right to privacy, but such a right has been derived 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.

Issue Spotters

1. Under what circumstances might a judge rely on case law to determine the intent and purpose of a statute? (See *Sources of American Law*.)
2. 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 *The Constitution as It Affects Business*.)

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

For Review

1. What are four primary sources of law in the United States?
2. What is the common law tradition?
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 various states?
5. What is the Bill of Rights? What freedoms does the First Amendment guarantee?

—Answers to the even-numbered questions in this *For Review* section can be found in Appendix F 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 Tradition*.)

1-2 Sources of Law. Under a Massachusetts state statute, large wineries could sell their products through wholesalers or to consumers directly, but not both. Small wineries could use both methods. Family Winemakers of California filed a suit against the state, arguing that this restriction gave small wineries a competitive advantage in violation of the U.S. Constitution. The court agreed that the statute was in conflict with the Constitution. Which source of law takes priority, and why? [*Family Winemakers of California v. Jenkins*, 592 F.3d 1 (1st Cir. 2010)] (See *Sources of American Law*.)

1-3 Reading Citations. Assume that you want to read the court's entire opinion in the case of *McKee v. Laurion*, 825 N.W.2d 725 (2014). Explain specifically where you would find the court's opinion. (See *Finding Case Law* in the following appendix.)

1-4 Spotlight on AOL—Stare Decisis. AOL, LLC, mistakenly made public the personal information of 650,000

of its members. The members filed a suit, alleging violations of California law. AOL asked the court to dismiss the suit on the basis of a "forum-selection" clause in its member agreement that designates Virginia courts as the place where member disputes will be tried. Under a decision of the United States Supreme Court, a forum-selection clause is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." California has declared in other cases that the AOL clause contravenes a strong public policy. If the court applies the doctrine of *stare decisis*, will it dismiss the suit? Explain. [*Doe 1 v. AOL, LLC*, 552 F.3d 1077 (9th Cir. 2009)] (See *The Common Law Tradition*.)

1-5 Law around the World. Karen Goldberg's husband was killed in a terrorist bombing in Israel. She filed a suit in a U.S. federal court against UBS AG, a Switzerland-based global financial services company. She claimed that UBS aided her husband's killing because it provided services to the terrorists. UBS argued that the case should be transferred to another country. Like many nations, the United States has a common law system. Other nations have civil law systems. What are the key differences between these systems? [*Goldberg v. UBS AG*, 690 F.Supp.2d 92 (E.D.N.Y. 2010)] (See *Classifications of Law*.)

1-6 The Commerce Clause. Under the federal Sex Offender Registration and Notification Act (SORNA), sex offenders

must register and update their registration as sex offenders when they travel from one state to another. David Hall, a convicted sex offender in New York, moved to Virginia, where he did not update his registration. He was charged with violating SORNA. He claimed that the statute is unconstitutional, arguing that Congress cannot criminalize interstate travel if no commerce is involved. Is that reasonable? Why or why not? [*United States v. Guzman*, 591 F.3d 83 (2d Cir. 2010)] (See *The Constitution as It Affects Business*.)

1-7



Case Problem with Sample Answer—Establishment Clause.

Judge James DeWeese hung a poster in his courtroom showing the Ten Commandments. 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 express his view about “warring” legal philosophies—moral relativism and moral absolutism. “Our legal system is based on moral absolutes from divine law handed down by God through the Ten Commandments.” Does this poster violate the establishment clause? Why or why not? [*American Civil Liberties Union of Ohio Foundation, Inc. v. DeWeese*, 633 F.3d 424 (6th Cir. 2011)] (See *The Constitution as It Affects Business*.)

—For a sample answer to Problem 1-7, go to Appendix G at the end of this text.

1-8 Freedom of Speech. Mark Wooden sent an e-mail to an alderwoman for the city of St. Louis. Attached was a nineteen-minute audio that compared her to the biblical character Jezebel—she was a “bitch in the Sixth Ward,” spending too much time with the rich and powerful and too little time with the poor. In a menacing, maniacal tone, Wooden said that he was “dusting off a sawed-off shotgun,” called himself a “domestic terrorist,” and referred to the assassination of President John F. Kennedy, the murder of a federal judge, and the shooting of Congresswoman Gabrielle Giffords. Feeling threatened, the alderwoman called the police. Wooden was

convicted of harassment under a state criminal statute. Was this conviction unconstitutional under the First Amendment? Discuss. [*State v. Wooden*, 388 S.W.3d 522 (Mo. 2013)] (See *The Constitution as It Affects Business*.)

1-9 Equal Protection. Abbott Laboratories licensed SmithKline Beecham Corp. to market a human immunodeficiency virus (HIV) drug manufactured by Abbott 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, alleging violations of the implied covenant of good faith and fair dealing. 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 *The Constitution as It Affects Business*.)

1-10 A Question of Ethics—Free Speech. Aric Toll owns and manages the Balboa Island Village Inn, a restaurant and bar in Newport Beach, California. Anne Lemen lives across from the inn. Lemen complained to the authorities about the inn’s customers, whom she called “drunks” and “whores.” Lemen told the inn’s bartender Ewa Cook that Cook “worked for Satan.” She repeated her statements to potential customers, and the inn’s sales dropped more than 20 percent. The inn filed a suit against Lemen. [*Balboa Island Village Inn, Inc. v. Lemen*, 40 Cal.4th 1141, 156 P.3d 339 (2007)] (See *The Constitution as It Affects Business*.)

1. Are Lemen’s statements about the inn’s owners and customers protected by the U.S. Constitution? In whose favor should the court rule? Why?
2. Did Lemen behave unethically in the circumstances of this case? Explain.

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 a court decision or other source—can be found. In this section, 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 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, the federal government also provides a searchable online database of the *United States Code* at www.gpo.gov.

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 instance, “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 fifty 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 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 would be 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 in books (except in New York and a few other states, which publish selected 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 or online. As you will note, most of the state court cases presented in this textbook 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 West's *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 West's National Reporter System. The West's National Reporter System divides the states into the following geographic areas: *Atlantic* (A. or A.2d), *North Eastern* (N.E. or N.E.2d), *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 that follows, which illustrates West's National Reporter System.

Case Citations After appellate decisions have been published, they are normally referred to (cited) by the name of the case; the volume, name, and page number of the state's official reporter (if different from West's National Reporter System); the volume, name, and page number of the *National Reporter*; and the volume, name, and page number of any other selected reporter. This information is included in the *citation*. (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 Wisconsin, a Wisconsin Supreme Court decision might be designated "2014 WI 23," meaning that the decision was the twenty-third issued by the Wisconsin Supreme Court in the year 2014. Parallel citations to the *Wisconsin Reports* and West's *North Western Reporter* are still included after the public domain citation.

Consider the following citation: *In re Glass*, 58 Cal.App. 4th 500, 316 P.3d 1199 (2014). We see that the opinion in this case can be found in Volume 58 of the official *California Appellate Court Reports*, on page 500. The parallel citation is to Volume 316 of the *Pacific Reporter, Third Series*, page 1199. When we present opinions in this text, 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* (F Supp. or F.Supp.2d), and opinions from the circuit courts of appeals (federal reviewing courts) are reported unofficially in the *Federal Reporter* (F., F.2d, or F.3d). Cases concerning federal bankruptcy law are published unofficially in West's *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 West's *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 2014 WL 211807, which means it was case number 211807 decided in the year 2014). 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 Case Law

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 because they were published in reporters that are no longer used today.

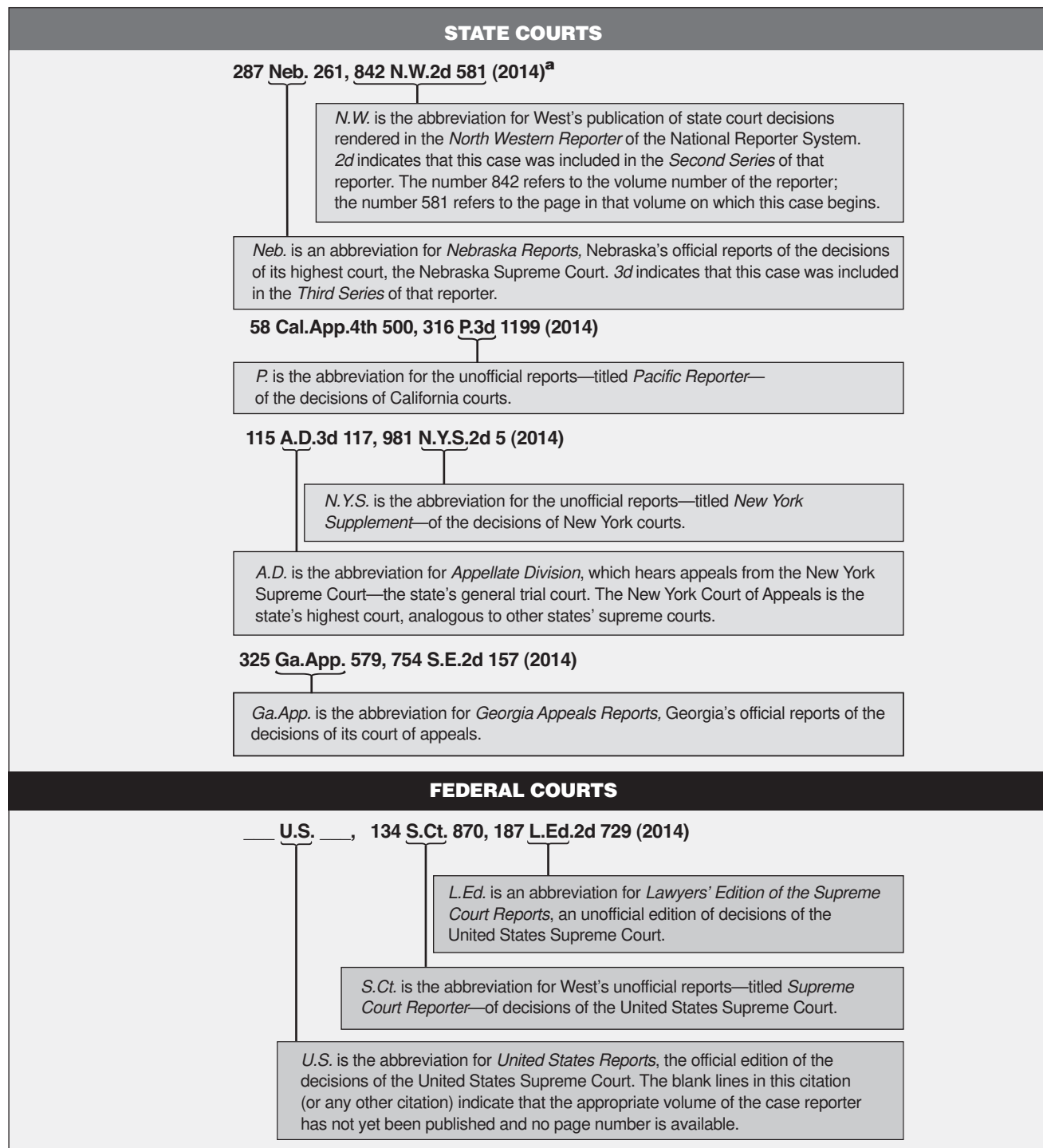
Exhibit 1A.1 West’s National Reporter System—Regional/Federal

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. or N.E.2d)	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.
Federal Reporters		
<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. or F.Supp.2d)	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

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.

Continued

Exhibit 1A.2 How to Read Citations, Continued**FEDERAL COURTS (Continued)****740 F.3d 471 (9th Cir. 2014)**

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

994 F.Supp.2d 558 (D.D.C. 2014)

D.D.C. is an abbreviation indicating that the U.S. District Court for the Southern District of Florida decided this case.

ENGLISH COURTS**9 Exch. 341, 156 Eng.Rep. 145 (1854)**

Eng.Rep. is an abbreviation for *English Reports, Full Reprint*, a series of reports containing selected decisions made in English courts between 1378 and 1865.

Exch. is an abbreviation for *English Exchequer Reports*, which includes the original reports of cases decided in England's Court of Exchequer.

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.

Exhibit 1A.2 How to Read Citations, Continued

WESTLAW® CITATIONS^b

2014 WL 280612

WL is an abbreviation for Westlaw. The number 2014 is the year of the document that can be found with this citation in the Westlaw database. The number 280612 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.

UNIFORM RESOURCE LOCATORS (URLs)

http://www.westlaw.com^c

The suffix *com* is the top level domain (TLD) for this Web site. The TLD *com* is an abbreviation for “commercial,” which usually means that a for-profit entity hosts (maintains or supports) this Web site.

westlaw is the host name—the part of the domain name selected by the organization that registered the name. In this case, West registered the name. This Internet site is the Westlaw database on the Web.

www is an abbreviation for “World Wide Web.” The Web is a system of Internet servers that support documents formatted in *HTML* (hypertext markup language) and other formats as well.

This part of a URL points to a Web page or file at a specific location within the host’s domain. This page is a menu with links to documents within the domain and to other Internet resources.

http://www.uscourts.gov

This is “The Federal Judiciary Home Page.” The host is the Administrative Office of the U.S. Courts. The TLD *gov* is an abbreviation for “government.” This Web site includes information and links from, and about, the federal courts.

http://www.law.cornell.edu/index.html

This is the host name for a Web site that contains the Internet publications of the Legal Information Institute (LII), which is a part of Cornell Law School. The LII site includes a variety of legal materials and links to other legal resources on the Internet. The TLD *edu* is an abbreviation for “educational institution” (a school or a university).

This part of the URL points to a static *news* page at this Web site, which provides links to online newspapers from around the world.

http://www.ipl2.org/div/news

div is an abbreviation for “division,” which is the way that ipl2 tags the content on its Web site as relating to a specific topic.

This part of the URL points to a static *news* page at this Web site, which provides links to online newspapers from around the world.

The site *ipl2* was formed from the merger of the Internet Public Library and the Librarians’ Internet Index. It is an online service that provides reference resources and links to other information services on the Web. The site is supported chiefly by the *iSchool* at Drexel College of Information Science and Technology. The TLD *org* is an abbreviation for “organization” (normally nonprofit).

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

c. The basic form for a URL is “service://hostname/path.” The Internet service for all of the URLs in this text is *http* (hypertext transfer protocol). Because most Web browsers add this prefix automatically when a user enters a host name or a hostname/path, we have generally omitted the *http://* from the URLs listed in this text.

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.

Case Titles and Terminology

The title of a case, such as *Adams v. Jones*, indicates the names of the parties to the lawsuit. The *v.* in the case title stands for *versus*, which means “against.” In the trial court, Adams was the plaintiff—the person who filed the suit. Jones was the defendant. If the case is appealed, however, the appellate court will sometimes place the name of the party appealing the decision first, so the case may be called *Jones v. Adams*. Because some reviewing courts retain the trial court order of names, it is often impossible to distinguish the plaintiff from the defendant in the title of a reported appellate court decision. You must carefully read the facts of each case to identify the parties.

The following terms and phrases are frequently encountered in court opinions and legal publications. Because it is important to understand what these terms and phrases mean, we define and discuss them here.

Parties to Lawsuits As mentioned in Chapter 1, the party initiating a lawsuit is referred to as the *plaintiff* or *petitioner*, depending on the nature of the action, and the party against whom a lawsuit is brought is the *defendant* or *respondent*. Lawsuits frequently involve more than one plaintiff and/or defendant. When a case is appealed from the original court or jurisdiction to another court or jurisdiction, the party appealing the case is called the *appellant*. The *appellee* is the party against whom the appeal is taken. (In some appellate courts, the party appealing a case is referred to as the *petitioner*, and the party against whom the suit is brought or appealed is called the *respondent*.)

Judges and Justices The terms *judge* and *justice* are usually synonymous and are used to refer to the judges in various courts. All members of the United States Supreme Court, for example, are referred to as justices. And justice is the formal title usually given to judges of appellate courts, although this is not always the case. In New York, a justice is a judge of the trial court (which is called the Supreme Court), and a member of the Court of Appeals (the state's highest court) is called a judge. The term *justice* is commonly abbreviated to J., and *justices* to JJ. A Supreme Court case might refer to Justice Sotomayor as Sotomayor, J., or to Chief Justice Roberts as Roberts, C.J.

Decisions and Opinions Most decisions reached by reviewing, or appellate, courts are explained in written *opinions*. The opinion contains the court's reasons for its decision, the rules of law that apply, and the judgment. When all judges or justices unanimously agree on an opinion, the opinion is written for the entire court and can be deemed a *unanimous opinion*. When there is not unanimous agreement, a **majority opinion** is written. The majority opinion outlines the views of the majority of the judges or justices deciding the case. Sometimes, the majority agrees on the result, but not the reasoning. The opinion joined by the largest number of judges or justices, but less than a majority, is called a **plurality opinion**.

Often, a judge or justice who strongly wishes to make or emphasize a point that was not made or emphasized in the unanimous or majority opinion will write a **concurring opinion**. This means the judge or justice agrees (concurs) with the judgment given in the unanimous or majority opinion but for different reasons. When there is not a unanimous opinion, a **dissenting opinion** presents the views of one or more judges who disagree with the majority's decision. (See the *Business Case Study with Dissenting Opinion* feature that follows Chapter 3 for an example of a dissenting opinion.) The dissenting opinion is important because it may form the basis of the arguments used years later in overruling the precedential majority opinion. Occasionally, a court issues a **per curiam opinion** (*per curiam* is Latin for “of the court”), which does not indicate which judge or justice authored the opinion.

A Sample Court Case

Knowing how to read and analyze a court opinion is an essential step in undertaking accurate legal research. A further step involves “briefing,” or summarizing, the case. Legal researchers routinely brief cases by reducing the texts of the opinions to their essential elements. Briefing cases facilitates the development of critical thinking skills that are crucial for businesspersons when evaluating relevant business law. (For instructions on how to brief a case, go to Appendix A at the end of this text.)

The cases within the chapters in this text have already been analyzed and briefed by the author, and the essential aspects of each case are presented in a convenient format consisting of four sections: *Facts*, *Issue*, *Decision*, and *Reason*. This format is illustrated in the sample court case in Exhibit 1A.3, which has been annotated to explain the kind of information contained in each section.

The case we present and annotate in Exhibit 1A.3 is an actual case decided by the United States Court of Appeals for the Ninth Circuit in 2014. Experience Hendrix, LLC, the owner of the trademark “Hendrix,” filed a suit against Andrew Pitsicalis, who sold Hendrix-related merchandise. One of the issues before the court was whether the names of Pitsicalis's Web sites, hendrixlicensing.com and hendrixartwork.com, infringed on Experience Hendrix's mark.

Exhibit 1A.3 A Sample Court Case

This section contains the case citation—the name of the case, the name of the court that heard the case, the year of the court’s decision, and the reporters in which the court’s opinion can be found.	EXPERIENCE HENDRIX, LLC v. HENDRIXLICENSING.COM, LTD. United States Court of Appeals, Ninth Circuit, 742 F.3d 377 (2014).
The <i>Facts</i> section identifies the parties and describes the events leading up to the trial and its appeal. The decision of the lower court is included as well.	FACTS Experience Hendrix, LLC, a company formed by the sole heir of Jimi Hendrix, owns trademarks—including “Hendrix”—that it uses to market and license Hendrix-
In the context of this case, a <i>license</i> is an agreement permitting the license holder to use a trademark for certain limited purposes.	related merchandise. Andrew Pitsicalis owns, or has licenses to use, photos and other art depicting Hendrix. Pitsicalis does business through his Web sites, hendrixlicensing.com and hendrixartwork.com . Alleging trademark infringement, Experience Hendrix filed a suit in a
A <i>summary judgment</i> is a judgment that a court enters without beginning or continuing a trial. This judgment can be entered only if no facts are in dispute and the only question is how the law applies to the facts.	federal district court against Pitsicalis. The court issued a summary judgment in Experience Hendrix’s favor and enjoined Pitsicalis’s infringing activity. The court also awarded
To <i>enjoin</i> is to issue an injunction—a court decree ordering a person to do or refrain from doing a certain activity.	damages of \$60,000, which were reduced from the jury’s award of \$366,650. Both parties
<i>Damages</i> are money sought as a remedy for a wrongful act.	appealed. Pitsicalis argued that he had not infringed Experience Hendrix’s mark. Experience Hendrix sought to reinstate the jury’s award.
A <i>domain name</i> is the last part of an Internet address, such as hendrixlicensing.com .	ISSUE Did Pitsicalis’s domain names , hendrixlicensing.com and hendrixartwork.com , infringe Experience Hendrix’s trademark “Hendrix”? If so, was there sufficient evidence to
The <i>Issue</i> section sets out the issue that the court will decide. Most cases involve more than one issue, but many of the cases in this textbook have been edited to focus on a single issue.	support the jury’s award?
The <i>Decision</i> section summarizes the court’s decision on the issue. An appellate court’s decision is often phrased with reference to the decision of the lower court from which the case was appealed. For example, an appellate court may “affirm” or “reverse” a lower court’s ruling. To <i>affirm</i> is to validate or give legal force to. To <i>reverse</i> is to reject or overrule the court’s judgment. To <i>remand</i> is to send back to the lower court.	DECISION Yes, to both questions. The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court’s decision that Pitsicalis’s domain names infringed the “Hendrix” mark. But the appellate court reversed the lower court’s decision to reduce the amount of the award and remanded the case for a new trial on the issue of damages.
The <i>Reason</i> section contains the court’s reasoning on the issue before it. The section includes the relevant laws and legal principles, as well as the court’s reasoning that led to its conclusion.	REASON Pitsicalis defended his use of the trademark “Hendrix” in his domain names as nominative fair use . This defense applies when the defendant uses the plaintiff’s mark
<i>Nominative fair use</i> refers to the reasonable and limited use of a name without the owner’s permission. <i>Fair use</i> is a defense to an infringement claim, depending on such factors as, in this case, the purpose and character of the use.	to describe the plaintiff’s product. The lower court rejected this defense, concluding that Pitsicalis used “Hendrix” in his domain names to refer, not to Experience Hendrix’s products, but to Pitsicalis’s own products and services (licensing and marketing Hendrix-related goods). This use of another’s trademark is not protected under the nominative fair use defense. As for the amount of damages, the evidence that supported the jury’s award included a “significant” decline in Experience Hendrix’s licensing revenue during the period in which Pitsicalis was earning revenue from similar, infringing merchandise. The jury had before it financial documents that showed the decline.

Courts and Alternative Dispute Resolution

LEARNING OBJECTIVES

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

- 1 What is judicial review?
- 2 Before a court can hear a case, it must have jurisdiction. Over what must it have jurisdiction? How are the courts applying traditional jurisdictional concepts to cases involving Internet transactions?
- 3 What is the difference between a trial court and an appellate court?
- 4 What is discovery, and how does electronic discovery differ from traditional discovery?
- 5 What are three alternative methods of resolving disputes?



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Every society needs to have an established method for resolving disputes. This is particularly true in the business world—almost every businessperson will face a lawsuit at some time in his or her career. For this reason, anyone involved in business needs to have an understanding of court systems in the United States, as well as the various methods of dispute resolution that can be pursued outside the courts.

In this chapter, after examining the judiciary's overall role in the American governmental scheme, we discuss some basic requirements that must be met before a party may bring a lawsuit before a particular court. We then look at the court systems of the United States in some detail and, to clarify judicial procedures, follow a hypothetical case through a state court system.

Throughout this chapter, we indicate how court doctrines and procedures are being adapted to the needs of a cyber age. The chapter concludes with an overview of some alternative methods of settling disputes, including online dispute resolution.

The Judiciary's Role

As you learned in Chapter 1, the body of American law includes the federal and state constitutions, statutes passed by legislative bodies, administrative law, and the case decisions and legal principles that form the common law. These laws would be meaningless, however, without the courts to interpret and apply them. This is the essential role of the judiciary—the courts—in the American governmental system: to interpret and apply the law.

Judicial Review

As the branch of government entrusted with interpreting the laws, the judiciary can decide, among other things, whether the laws or actions of the other two branches are constitutional. The process for making such a determination is known as **judicial review**. The power of judicial review enables the judicial branch to act as a check on the other two branches of government, in line with the checks-and-balances system established by the U.S. Constitution. Today, nearly all nations with constitutional democracies, including Canada, France, and Germany, have some form of judicial review.

The Origins of Judicial Review in the United States

The power of judicial review is not mentioned in the U.S. Constitution (although many constitutional scholars believe that the founders intended the judiciary to have this power). The United States Supreme Court explicitly established this power in 1803 in the case of *Marbury v. Madison*.¹

In that landmark decision, the Court stated, “It is emphatically the province [authority] and duty of the Judicial Department to say what the law is. . . . If two laws conflict with each other, the courts must decide on the operation of each. . . . If both [a] law and the Constitution apply to a particular case, . . . the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.” Since the *Marbury* decision, the power of judicial review has remained unchallenged. Today, both federal and state courts exercise this power.

Basic Judicial Requirements

Before a court can hear a lawsuit, certain requirements must first be met. These requirements relate to jurisdiction, venue, and standing to sue. We examine each of these important concepts here.

Jurisdiction

In Latin, *juris* means “law,” and *diction* means “to speak.” Thus, “the power to speak the law” is the literal meaning of the term **jurisdiction**. Before any court can hear a case, it must have jurisdiction over the person (or company) against whom the suit is brought (the defendant) or over the property involved in the suit. The court must also have jurisdiction over the subject matter of the dispute.

Jurisdiction over Persons or Property Generally, a court can exercise personal jurisdiction (*in personam* jurisdiction) over any person or business that resides in a certain geographic area. A state trial court, for example, normally has jurisdictional authority over residents (including businesses) in a particular area of the state, such as a county or district. As will be discussed shortly, a state’s highest court (often called the state supreme court) has jurisdiction over all residents of that state.

A court can also exercise jurisdiction over property that is located within its boundaries. This kind of jurisdiction is known as *in rem* jurisdiction, or “jurisdiction over the thing.”

● **EXAMPLE 2.1** A dispute arises over the ownership of a boat in dry dock in Fort Lauderdale, Florida. The boat is owned by an Ohio resident, over whom a Florida court normally cannot exercise personal jurisdiction. The other party to the dispute is a resident of Nebraska. In this situation, a lawsuit concerning the boat could be brought in a Florida state court on the basis of the court’s *in rem* jurisdiction. ●

Long Arm Statutes Under the authority of a state **long arm statute**, a court can exercise personal jurisdiction over certain out-of-state defendants based on activities that took place within the state. Before exercising long arm jurisdiction over a nonresident, however, the court must be convinced that the defendant had sufficient contacts, or *minimum contacts*, with the state to justify the jurisdiction.²

Generally, this means that the defendant must have enough of a connection to the state for the judge to conclude that it is fair for the state to exercise power over the defendant. If an out-of-state defendant caused an automobile accident or sold defective goods within the state, for instance, a court will usually find that minimum contacts exist to exercise jurisdiction over that defendant.

Similarly, a state may exercise personal jurisdiction over a nonresident defendant who is sued for breaching a contract that was formed within the state, even when that contract was negotiated over the phone or through correspondence.

● **EXAMPLE 2.2** Sharon Mills, a California resident, forms a corporation to distribute a documentary film on global climate change. Brad Cole, an environmentalist who lives in Ohio, loans the corporation funds that he borrows from an Ohio bank. A year later, the film is still not completed. Mills agrees to repay Cole’s loan in a contract arranged through phone calls and correspondence between California and Ohio. When Mills does not repay the loan, Cole files a lawsuit in an Ohio court. In this situation, the Ohio court can

1. 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

2. The minimum-contacts standard was established in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945).