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| Chapter 1 |
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**Legal and Constitutional**

**Foundations of Business**

**Introduction**

The first chapters provide the background for the entire course. Chapter 1 sets the stage. At this point, it is important to establish goals and objectives. For your students to benefit from this course, they must understand that (1) the law is a set of general rules, (2) that, in applying these general rules, a judge cannot always fit a case to suit a rule, so must fit (or find) a rule to suit the case, (3) that, in fitting (or finding) a rule, a judge must also supply reasons for the decision.

Law consists of enforceable rules governing relationships among individuals and between individuals and their society. The tension in the law between the need for stability and the need for change is one of the concepts introduced in this chapter. How common law courts originated, and the rationale for the doctrine of *stare decisis* are also covered in this chapter.

Another major concept in the chapter involves the distinctions among today’s sources of law and distinctions in its different classifications. The sources include the federal constitution and federal laws, state constitutions and statutes (including the UCC), local ordinances, administrative agency regulations, and case law. The classifications include substantive and procedural, national and international, public and private, civil and criminal, and law and equity. These sources and categories give students a framework on which to hang the mass of principles known as the law.

**Chapter Outline**

**I. Sources of American Law**

**A. Constitutional Law**

The federal constitution is a general document that distributes power among the branches of the government. It is the supreme law of the land. Any law that conflicts with it is invalid. The states also have constitutions, but the federal constitution prevails if their provisions conflict.

**B. Statutory Law**

Congress and state legislatures enact statutes, and local legislative bodies enact ordinances. Much of the work of courts is interpreting what lawmakers meant when a law was enacted and apply­ing that law to a set of facts (a case).

**1. Uniform Laws**

Panels of experts and scholars create uniform laws that any state’s legislature can adopt.

**2. The Uniform Commercial Code**

The Uniform Commercial Code (UCC) provides a uniform flexible set of rules that govern most commercial transactions. The UCC has been adopted by all the states (only in part in Louisiana), the District of Columbia, and the Virgin Islands.

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| **Additional Background—** |
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| **National Conference of Commissioners on Uniform State Laws** |
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| As explained in the text, the Uniform Commercial Code (UCC) is an ambitious codification of commercial common law principles. The UCC has been the most widely adopted, and thus the most successful, of the many uniform and model acts that have been drafted. |
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| The **National Conference of Commissioners on Uniform State Laws** is responsible for many of these acts. The National Conference of Commissioners on Uniform State Laws is an organization of state commissioners appointed by the governor of each state, the District of Columbia, and Puerto Rico. Their goal is to promote uniformity in state law where uniformity is desirable. The purpose is to alleviate problems that arise in an increasingly interdependent society in which a single transaction may cross many states. Financial support comes from state grants. The members meet annually to consider drafts of proposed legislation. |
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| The American Law Institute works with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. |
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**C. Administrative Law**

• Administrative law consists of the rules, orders, and decisions of administrative agencies.

• Congress creates an agency through enabling legislation to perform certain functions with respect to specific subjects. The functions may include legislative powers (rulemaking), executive capabilities (investigation and enforcement), and judicial authority (adjudication).

**1. Rulemaking**

**a. The Administrative Procedure Act**

An agency’s creation and changing of its rules is subject to the requirements of the Administrative Procedure Act of 1946.

**b. Legislative Rules**

Legislative rules implement federal laws and are legally binding. Creating a legislative rule typically involves—

• Public notice through the publication of a proposed rule in the *Federal Register.*

• Receipt and review of public comments.

• Drafting and publication of the final rule in the *Federal Register*.

*Interpretive rules* declare policy—how an agency will interpret and apply its regulations. These informal guidelines are not legally binding.

**2. Enforcement and Investigation**

An agency can request an individual’s or a business’s records. An agency can conduct an on-site inspection, which may require a search warrant. The purpose is to uncover regulatory violations against which an agency may issue a formal complaint.

**3. Adjudication**

On a formal complaint, an agency’s administrative law judge may conduct a trial-like hearing and render a decision, which may compel a fine or prohibit certain behavior.

**D. Case Law and Common Law Doctrines**

Another basic source of American law consists of the rules of law announced in court decisions. These rules include judicial interpretations of constitutional provisions, of statutes enacted by legislatures, and of regulations created by administrative agencies.

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| **Additional Background—**  Restatement (Second) of Contracts |
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| The American Law Institute (ALI), a group of American legal scholars, is responsible for the *Restatements.* These scholars also work with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. Members include law educators, judges, and attorneys. Their goal is to promote uniformity in state law to encourage the fair administration of justice. |
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| The ALI publishes summaries of common law rules on selected topics. Intended to clarify the rules, the summaries are published as the *Restatements*. Each *Restatement* is further divided into chapters and sections. Accompanying the sections are explanatory comments, examples illustrating the principles, relevant case citations, and other materials. The following is ***Restatement (Second) of Contracts***, Section 1 (that is, Section 1 of the second edition of the *Restatement of Contracts*) with excerpts from the Introductory Note to Chapter 1 and Comments accompanying the section. |
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| **Chapter 1** |
| **MEANING OF TERMS** |
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| Introductory Note: A persistent source of difficulty in the law of contracts is the fact that words often have different meanings to the speaker and to the hearer. Most words are commonly used in more than one sense, and the words used in this *Restatement* are no exception. It is arguable that the difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined. But where usage varies widely, definition makes it possible to avoid circumlocution in the statement of rules and to hold ambiguity to a minimum. |
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| In the *Restatement,* an effort has been made to use only words with connotations familiar to the legal profession, and not to use two or more words to express the same legal concept. Where a word frequently used has a variety of distinct meanings, one meaning has been selected and indicated by definition. But it is obviously impossible to capture in a definition an entire complex institution such as “contract” or “promise.” The operative facts necessary or sufficient to create legal relations and the legal relations created by those facts will appear with greater fullness in the succeeding chapters. |
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| **§ 1. Contract Defined** |
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| A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. |
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| **Comment:** |
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| **c. Set of promises.** A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a “set,” promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court. |
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**II. Common Law Tradition**

American law is based on the English common law legal system. Knowledge of this tradition is necessary to students’ understanding of the nature of our legal system.

**A. Early English Courts**

The English system unified its local courts after 1066. This unified system, based on the decisions judges make in individual cases, is the common law system. The common law system involves the consistent application of principles applied in earlier cases with similar facts.

**B. *Stare Decisis***

The use of precedent forms the basis for the doctrine of *stare decisis*.

**1. The Importance of Precedents in Judicial Decision Making**

A court’s application of a specific principle to a certain set of facts is binding on that court and lower courts, which must then apply it in future cases. A controlling precedent is binding authority. Other binding authorities include constitutions, statutes, and rules.

**2. *Stare Decisis* and Legal Stability**

This doctrine permits a predictable, quick, and fair resolution of cases, which makes the application of law more stable.

**3. Departures from Precedent**

A judge may decide that a precedent is incorrect, however, if there may have been changes in technology, for example, business practices, or society’s attitudes.

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| Enhancing Your Lecture— |
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|  Is an 1875 Case Precedent Still Binding?  |
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| In a suit against the U.S. government for breach of contract, Boris Korczak sought compensation for services that he had allegedly performed for the Central Intelligence Agency (CIA) from 1973 to 1980. Korczak claimed that the government had failed to pay him an annuity and other compensation required by a secret *oral* agreement he had made with the CIA. The federal trial court dismissed Korczak’s claim, and Korczak appealed the decision to the U.S. Court of Appeals for the Federal Circuit. |
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| At issue on appeal was whether a U.S. Supreme Court case decided in 1875, *Totten v. United States***,a** remained the controlling precedent in this area. In *Totten*, the plaintiff alleged that he had formed a secret contract with President Lincoln to collect information on the Confederate Army during the Civil War. When the plaintiff sued the government for compensation for his services, the Court held that the agreement was unenforceable. According to the Court, to enforce such agreements could result in the disclosure of information that “might compromise or embarrass our government” or cause other “serious detriment” to the public. In Korczak’s case, the federal appellate court held that the *Totten* case precedent was still “good law,” and therefore Korczak, like the plaintiff in *Totten,* could not recover compensation for his services. Said the court, “*Totten*, despite its age, is the last pronouncement on this issue by the Supreme Court. .  .  . We are duty bound to follow the law given us by the Supreme Court unless and until it is changed.”**b** |
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| The Bottom Line |
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| Supreme Court precedents, 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. |
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| a. 92 U.S. 105 (1875). |
| b. *Korczak v. United States*, 124 F.3d 227 (Fed.Cir. 1997). |
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**4. When There Is No Precedent**

When determining which rules and policies to apply in a given case, and in applying them, a judge may examine: prior case law, the principles and policies behind the decisions, and their historical setting; statutes and the policies behind a legislature’s passing a specific statute; society’s values and custom; and data and principles from other disciplines.

**C. Equitable Remedies and Courts of Equity**

A court of law is limited to awarding payments of money or property as compensation.

**1. Remedies in Equity**

Equity is a branch of unwritten law founded in justice and fair dealing and seeking to supply a fairer and more adequate remedy than a remedy at law. A court of equity can order specific performance, an injunction, or rescission of a contract.

**2. The Merging of Law and Equity**

Today, in most states, a plaintiff may request both legal and equitable remedies in the same action, and the trial court judge may grant either form—or both forms—of relief.

**3. Equitable Principles and Maxims**

These guide the application of equitable remedies.

**III. Classifications of Law**

• Substantive law defines, describes, regulates, and creates rights and duties. Procedural law includes rules for enforcing those rights.

• Other classifications include splitting law into federal and state divisions or private and public categories.

• Cyberlaw is an informal term that describes the body of case and statutory law dealing specifically with issues raised by Internet transactions.

**A. Civil Law and Criminal Law**

Civil law regulates relationships between persons and between persons and their governments, and the relief available when their rights are violated. Criminal law regulates relationships between individuals and society, and prescribes punishment for proscribed acts.

**B. National and International Law**

**1. National Law**

National law is the law of a particular nation. Laws vary from country to country, but generally each nation has either a common law or civil law system. A common law system, like ours, is based on case law. A civil law system is based on codified law (statutes).

**2. International Law**

International law includes written and unwritten laws that independent nations observe. Sources include treaties and international organizations.

**IV. The Constitutional Powers of Government**

• The U.S. Constitution is the supreme law of the United States. Neither Congress nor any state can enact a law that conflicts with the Constitution.

• The U.S. Constitution delegates certain powers to the national government. The states retain all other powers.

**A. The Separation of Powers**

Deriving power from the Constitution, each of the three governmental branches (the executive, the legislative, and the judicial) performs a separate function. No branch may exercise the authority of another, but each has some power to limit the actions of the others. This is the system of *checks and balances*.

**B. The Commerce Clause**

The Constitution expressly provides that Congress can regulate commerce with foreign nations, interstate commerce, and commerce that affects interstate commerce. This provision—the commerce clause—has had a greater impact on business than any other provision in the Constitution. This power was delegated to the federal government to ensure a uniformity of rules governing the movement of goods through the states.

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| **Case Synopsis—** |
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| **Case 1.1: *Heart of Atlanta Motel v. United States*** |
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| A motel owner, who refused to rent rooms to African Americans despite the Civil Rights Act of 1964, brought an action to have the Civil Rights Act of 1964 declared unconstitutional. The owner alleged that, in passing the act, Congress had exceeded its power to regulate commerce because his motel was not engaged in interstate commerce. The motel was accessible to state and interstate highways. The owner advertised nationally, maintained billboards throughout the state, and accepted convention trade from outside the state (75 percent of the guests were residents of other states). The district court sustained the constitutionality of the act and enjoined the owner from discriminating on the basis of race. The owner appealed. The case went to the United States Supreme Court. |
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| The United States Supreme Court upheld the constitutionality of the Civil Rights Act of 1964. The Court noted that it was passed to correct “the deprivation of personal dignity” accompanying the denial of equal access to “public establishments.” Congressional testimony leading to the passage of the act indicated that African Americans in particular experienced substantial discrimination in attempting to secure lodging. This discrimination impeded interstate travel, thus impeding interstate commerce. As for the owner’s argument that his motel was “of a purely local character,” the Court said, “[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze.” Therefore, under the commerce clause, Congress has the power to regulate any local activity that has a harmful effect interstate commerce. |
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| Notes and Questions |
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| ***Does the Civil Rights Act of 1964 actually regulate commerce or was it designed to end the practice of race (and other forms of) discrimination?*** In this case, the Supreme Court said, “[T]hat Congress was legislating against moral wrongs .  .  . rendered its enactments no less valid.” |
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| ***Are there any businesses in today’s economy that are “purely local in character”?*** An individual who contracts to perform manual labor such as lawn mowing or timber cutting within a small geographic area might qualify, as long as the activity has no effect on interstate commerce. But in most circumstances it would be difficult if not impossible to do business “purely local in character” in today’s U.S. economy. Federal statutes that derive their authority from the commerce clause often include requirements or limits to exempt small or arguably local businesses. |
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| ***Which constitutional clause empowers the federal government to regulate commercial activities among the states?*** 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. The commerce clause—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.” |
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**1. The Commerce Clause Today**

The United States Supreme Court has recently limited the clause in its reach, in decisions that significantly enhanced the sovereign power of the states within the federal system. Some of these decisions are detailed in the text. Essentially, the holdings of these cases state that the clause does not support the national regulation of non-economic conduct.

**2. The Regulatory Powers of the States**

A state can regulate matters within its own borders under its police power.

**3. The “Dormant” Commerce Clause**

States do not have the authority to regulate interstate commerce. When state regulations impinge on interstate commerce, the state’s interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce. It is difficult to predict the outcome in a particular case.

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| Enhancing Your Lecture— |
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|  Does State Regulation of Internet Prescription |
| Transactions Violate the Commerce Clause?  |
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| Every year, about 30 percent of American households purchase at least some prescription drugs online. There is nothing inherently unlawful in such a transaction. Consider that Article X of the Constitution gives the states the authority to regulate activities affecting the safety and welfare of their citizens. In the late 1800s, the states developed systems granting physicians the exclusive rights to prescribe drugs and pharmacists the exclusive right to dispense prescriptions. The courts routinely upheld these state laws.a All states use their police power authority to regulate the licensing of pharmacists and the physicians who prescribe drugs. |
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| An Extension of State Licensing Laws |
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| About 40 percent of the states have attempted to regulate Internet prescription transactions by supplementing their licensure rules in such a way to define a “safe” consulting relationship between the physician prescribing and the pharmacists dispensing prescription drugs. For example, certain states allow an electronic diagnosis. This consists of a patient filling out an online questionnaire that is then “approved” by a physician before an Internet prescription is filled and shipped. In contrast, other states specifically prohibit a physician from creating a prescription if there is no physical contact between the patient and the physician providing the prescription. |
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| Some States Are Attempting to Regulate Interstate Commerce |
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| Recently, the New York State Narcotic Bureau of Enforcement started investigating all companies in New Jersey and Mississippi that had been involved in Internet prescription medicine transactions with residents of New York. None of the companies under investigation has New York offices. The legal question immediately raised is whether the New York State investigations are violating the commerce clause. Moreover, it is the Food and Drug Administration (FDA) that enforces the regulation of prescription drugs, including their distributors. |
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| Are New York and Other States Violating the Dormant Commerce Clause? |
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| As you learned in this chapter, the federal government regulates all commerce not specifically granted to the states. This is called the dormant commerce clause. As such, this clause prohibits state regulations that discriminate against interstate commerce. Additionally, this clause prohibits state regulations that impose an undo burden on interstate commerce. The dormant commerce clause has been used in cases that deal with state regulation of pharmacy activities.b |
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| In this decade, there is an opposing view based on a line of cases that suggest that state regulation of Internet activities do *not* violate the dormant commerce clause. In one case, a New York state law that banned the sale of cigarettes to its residents over the Internet was found not to violate the dormant commerce clause because of public health concerns.d In another case, a Texas statute that prohibited automobile manufacturers from selling vehicles on its Web site was upheld.e Whether the reasoning in these cases will be extended to cases involving Internet pharmacies remains to be seen. There exist state laws limiting Internet prescriptions. For example, in Nevada, no resident can obtain a prescription from an Internet pharmacy unless that pharmacy is licensed and certified under the laws of Nevada. Because this statute applies equally to in-state and out-of-state Internet pharmacies, it is undoubtedly nondiscriminatory. Additionally, the requirement that Internet pharmacies obtain a Nevada license prior to doing business in the state will probably be viewed as not imposing an undo burden on interstate commerce |
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| Where Do You Stand? |
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| ***Clearly, there are two sides to this debate. Many states contend that they must regulate the provision of prescription drugs via the Internet in order to ensure the safety and well-being of their citizens. In some instances, however, the states may be imposing such regulations at the behest of traditional pharmacies, which do not like online competition. What is your stand on whether state regulation of Internet prescription drug transactions violates the dormant commerce clause of the Constitution? Realize that if you agree that it does, then you probably favor less state regulation. If you believe that it does not, then you probably favor more state regulation.*** |
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| a. See, for example, *Dent v. West Virginia,* 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889). |
| b. See, for example, *Pharmaceutical Manufacturers’ Association v. New Mexico Board of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (N.M. App. 1974); *State v. Rasmussen*, 213 N.W.2d 661 (Iowa 1973). |
| c. See *American Libraries Association v. Pataki,* 969 F.Supp.160 (S.D.N.Y. 1997). |
| d. *Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200 (2nd Cir. 2003). |
| e. *Ford Motor Company v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001). |
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**C. The Supremacy Clause**

The Constitution, laws, and treaties of the United States are the supreme law of the land. When there is a direct conflict between a federal law and a state law, the state law is held to be invalid.

**1. Preemption**

When Congress chooses to act exclusively in an area of concurrent federal and state powers, it is said to preempt the area, and a valid federal law will take precedence over a conflicting state or local law.

**2. Congressional Intent**

Generally, congressional intent to preempt will be found if a federal law is so pervasive, comprehensive, or detailed that the states have no room to supplement it. Also, when a federal statute creates an agency to enforce the law, matters that may come within the agency’s jurisdiction will likely preempt state laws.

**V. Business and the Bill of Rights**

The first ten amendments to the Constitution embody protections against various types of interference by the federal government. These are listed in the text.

**A. Limits on Federal and State Governmental Actions**

Most of the rights and liberties in the Bill of Rights apply to the states under the due process clause of the Fourteenth Amendment. The United States Supreme Court determines the parameters.

**B. The First Amendment—Freedom of Speech**

The freedoms guaranteed by the First Amendment cover *symbolic* speech (gestures, clothing, and so on) if a reasonable person would interpret the conduct as conveying a message.

**1. Reasonable Restrictions**

A balance must be struck between the government’s obligation to protect its citizens and those citizens’ exercise of their rights.

**a. Content-Neutral Laws**

If a restriction imposed by the government is content neutral (aimed at combating a societal problem such as crime, not aimed at suppressing expressive conduct or its message), then a court may allow it.

**b. Laws That Restrict the Content of Speech**

To regulate the content of speech, a law must serve a compelling state interest and be narrowly written to achieve that interest.

**2. Corporate Political Speech**

Speech that otherwise would be protected does not lose that protection simply because its source is a corporation. For example, corporations cannot be entirely prohibited from making political contributions that individuals are permitted to make.

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| **Case Synopsis—** |
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| **Case 1.2: *Bad Frog Brewery, Inc. v. New York State Liquor Authority*** |
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| Bad Frog Brewery, Inc., sells alcoholic beverages with labels that display a frog making a gesture known as “giving the finger.” Bad Frog’s distributor, Renaissance Beer Co., applied to the New York State Liquor Authority (NYSLA) for label approval, required before the beer could be sold in New York. The NYSLA denied the application, in part because children might see the labels in grocery and convenience stores. Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against this denial. The court granted a summary judgment in favor of the NYSLA. Bad Frog appealed. |
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| The U.S. Court of Appeals for the Second Circuit reversed. The NYSLA’s 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. “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.” Also, there were “numerous less intrusive alternatives.” |
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| **Notes and Questions** |
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| The free flow of commercial information is essential to a free enterprise system. Individually and as a society, we have an interest in receiving information on the availability, nature, and prices of products and services. Only since 1976, however, have the courts held that communication of this information (“commercial speech”) is protected by the First Amendment. |
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| Because some methods of commercial speech can be misleading, this protection has been limited, particularly in cases involving in-person solicitation. For example, the United States Supreme Court has upheld state bans on personal solicitation of clients by attorneys. Currently, the Supreme Court allows each state to determine whether or not in-person solicitation as a method of commercial speech is misleading and to restrict it appropriately. |
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| ***Whose interests are advanced by banning certain ads****?* The government’s interests are advanced when certain ads are banned. For example, in the *Bad Frog* case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of “vulgar and profane” advertising from children’s sight arguably advanced the state’s interest in protecting children from those ads. |
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**3. Commercial Speech**

Commercial speech is not protected as extensively as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial government interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective.

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| **Additional Cases Addressing this Issue—** |
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| **Commercial Speech** |
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| Cases involving the **constitutionality of government restrictions on advertising under the commerce clause** include the following. |
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| • Cases in which restrictions on advertising were held unconstitutional include *Thompson v. Western States Medical Center,* \_\_ U.S. \_\_, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (restrictions on advertising of compounded drugs); and *This That and Other Gift and Tobacco, Inc. v. Cobb County,* 285 F.3d 1319 (11th Cir. 2002) (restrictions on advertising of sexual devices). |
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| • Cases in which restrictions on advertising were held not unconstitutional include *Long Island Board of Realtors, Inc. v. Inc. Village of Massapequa Park,* 277 F.3d 622 (2d Cir. 2002) (restrictions on signs in residential areas); *Borgner v. Brooks,* 284 F.3d 1204 (11th Cir. 2002) (restrictions on dentists’ ads*); Genesis Outdoor, Inc. v. Village of Cuyahoga Heights,* \_\_ Ohio App.3d \_\_, \_\_ N.E.2d \_\_ (8 Dist. 2002) (re­strictions on billboard construction); and *Johnson v. Collins Entertainment Co.,* 349 S.C. 613, 564 S.E.2d 653 (2002) (restrictions on offering special inducements in video gambling ads). |
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**4. Unprotected Speech**

Constitutional protection has never been afforded to certain classes of speech—defamatory speech, threats, child pornography, “fighting” words, and statements of fact, for example.

**C. The First Amendment—Freedom of Religion**

**1. The Establishment Clause**

Under the establishment clause, the government cannot establish a religion nor promote, endorse, or show a preference for any religion.

**a. Applicable Standards**

Federal or state law that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion.

**b. Religious Displays**

Public displays that include nonreligious symbols or symbols of different religions, or that have historical, as well as religious, significance do not necessarily violate the establishment clause.

**2. The Free Exercise Clause**

• Under the free exercise clause, the government cannot prohibit the free exercise of religious practices. In other words, a person cannot be compelled to do something contrary to his or her religious practices unless the practices contravene public policy or public welfare.

• The government must have a compelling state interest for restricting the free exercise of religion, and the restriction must be the only way to further that interest.

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| **Case Synopsis—** |
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| **Case 1.3: *Holt v. Hobbs*** |
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| Gregory Holt, an inmate in an Arkansas state prison, is a devout Muslim who wished to grow a beard in accord with his religious beliefs. The Arkansas Department of Correction prohibited inmates from growing beards (except for medical reasons). Holt asked for an exemption on religious grounds. Prison officials denied his request. Holt filed a suit in a federal district court against Ray Hobbs, the director of the department, and others, claiming a violation of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), which governs religious exercise by institutionalized persons. The court dismissed the suit. The U.S. Court of Appeals for the Eighth Circuit affirmed**.** Hobbs appealed. |
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| The United States Supreme Court reversed and remanded The prohibition against the beard did not likely further the department’s compelling interest in stopping the flow of contraband—the beard was too short. And the policy was not shown to be the least restrictive means of furthering this interest. The department could simply search an inmate’s beard when it searched his hair and clothing. And the department could photograph all inmates periodically to record changes in their appearances. |
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| **Notes and Questions** |
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| ***Suppose that instead of a state prison regulation and an inmate, the facts of this case had involved a private employer and an employee who wished to grow a beard for religious reasons in contravention of the employer’s dress code. Would the result have been the same?*** The result might have been the same, but the judgment and reasoning would have been based on federal statutory employment discrimination law instead of the U.S. Constitution. The Bill of Rights protects against interference with certain rights by the government, not private businesses. But under the Civil Rights Act of 1964, discrimination on the basis of religion is prohibited, and private businesses are required to reasonably accommodate the religious beliefs of their employees, unless that would cause the employer undue hardship. |
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**VI. Due Process and Equal Protection**

**A. Due Process**

Both the Fifth and the Fourteenth Amendments provide that no person shall be deprived “of life, liberty, or property, without due process of law.”

**1. Procedural Due Process**

A government decision to take life, liberty, or property must be made fairly. 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).

**2. 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, and all First Amendment rights. Compelling state interests could include, for example, public safety. In all other situations, a law or action does not violate substantive due process if it rationally re­lates to any legitimate governmental end.

**B. Equal Protection**

Under the Fourteenth Amendment, a state may not “deny to any person within its jurisdiction the equal protection of the laws.” The equal protection clause applies to the federal government through the due process clause of the Fifth Amendment. Equal protection means that the government must treat similarly situated individuals in a similar manner. When a law or action distinguishes between or among individuals, the basis for the distinction (the classification) is examined.

**1. Strict Scrutiny**

If the law or action inhibits some persons’ exercise of a fundamental right or if the classification is based on a race, national origin, or citizenship status, the classification is subject to strict scrutiny—it must be necessary to promote a compelling interest.

**2. Intermediate Scrutiny**

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.

**3. The “Rational Basis” Test**

In matters of economic or social welfare, a classification will be considered valid if there is any conceivable rational basis on which the classification might relate to any legitimate government interest.

**VII. Privacy Rights**

A personal right to privacy is held to be so fundamental as to apply at both the state and the federal level. Although there is no specific guarantee of a right to privacy in the Constitution, such a right has been derived from guarantees found in the First, Third, Fourth, Fifth, and Ninth Amendments.

**A. Federal Privacy Legislation**

Federal laws relating to privacy include, among others—

• The Freedom of Information Act of 1966

• The Privacy Act of 1974

• The Electronic Communications Privacy Act of 1986

• The Health Insurance Portability and Accountability Act (HIPAA) of 1996

**B. The USA Patriot Act**

The USA Patriot Act of 2001 gave officials the authority to monitor Internet activities and access personal information without proof of any wrongdoing.

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| **Additional Background—** |
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| **USA PATRIOT Act Tech Provisions** |
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| The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act **(USA PATRIOT Act)** of 2001, which is mentioned in the text, touches on many topics, including immigration, money laundering, terrorism victim relief, intelligence gathering, and surveillance of Internet communications. Technology related provisions of the USA PATRIOT Act include the following, as summarized. (Some of these provisions were due to “sunset” in 2005.) |
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| **Wiretap Offenses** |
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| Sections 201 and 202—Crimes that can serve as a basis for law enforcement agencies (LEAs) to obtain a wiretap include crimes relating to terrorism and crimes relating to computer fraud and abuse. |
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| **Voice Mail** |
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| Section 209—LEAs can seize voice mail messages, with a warrant. |
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| **ESP Records** |
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| Sections 210 and 211—LEAs can obtain, with a subpoena, such information about e-communications service providers’ (ESPs) subscribers as “name,” “address,” “local and long distance telephone connection records, or records of session times and durations,” “length of service (including start date) and types of service utilized,” “telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address,” and “means and source of payment for such service (including any credit card or bank account number).” |
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| **Pen Registers, and Trap and Trace Devices** |
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| Section 216—LEAs can expand their use of pen registers and trap and trace devices (PR&TTs). A PR records the numbers that are dialed on a phone. TTs “capture the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted.” PR&TTs can be used to capture routing, addressing, and other information in e-communications, but not the contents of the communication. This is considered one of the key sections of the act. |
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| **Computer Trespassers** |
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| Section 217—LEAs can assist companies, universities, and other entities that are subject to distributed denial of service, or other, Internet attacks by intercepting “computer trespasser’s communications.” |
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| **ESP Compensation** |
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| Section 222—An ESP “who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance.” |
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| Enhancing Your Lecture— |
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|  Creating a Web Site Privacy Policy  |
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| Firms with online business operations realize that to do business effectively with their customers, they need to have some information about those customers. Yet online consumers are often reluctant to part with personal information because they do not know how that information may be used. To allay consumer fears about the privacy of their personal data, as well as to avoid liability under existing laws, most online businesses today are taking steps to create and implement Web site privacy policies. |
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| Privacy Policy Guidelines |
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| In the last several years, a number of independent, nonprofit organizations have developed model Web site privacy policies and guidelines for online businesses to use. Web site privacy guidelines are now available from a number of online privacy groups and other organizations, including the Online Privacy Alliance, the Internet Alliance, and the Direct Marketing Association. Some organizations, including the Better Business Bureau, have even developed a “seal of approval” that Web-based businesses can display at their sites if they follow the organization’s privacy guidelines. |
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| One of the best known of these organizations is TRUSTe. Web site owners that agree to TRUSTe’s privacy standards are allowed to post the TRUSTe “seal of approval” on their Web sites. The idea behind the seal, which many describe as the online equivalent of the “Good Housekeeping Seal of Approval,” is to allay users’ fears about privacy problems. |
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| Drafting a Privacy Policy |
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| Online privacy guidelines generally recommend that businesses post notices on their Web sites about the type of information being collected, how it will be used, and the parties to whom it will be disclosed. Other recommendations include allowing Web site visitors to access and correct or remove personal information and giving visitors an “opt-in” or “opt-out” choice. For example, if a user selects an “opt-out” policy, the personal data collected from that user would be kept private. |
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| In the last several years, the Federal Trade Commission (FTC) has developed privacy standards that can serve as guidelines. An online business that includes these standards in its Web site privacy policies—and makes sure that they are enforced—will be in a better position to defend its policy should consumers complain about the site’s practices to the FTC. The FTC standards are incorporated in the following checklist. |
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| Checklist for a Web Site Privacy Policy |
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| **1.** Include on your Web site a notice of your privacy policy. |
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| **2.** Give consumers a choice (such as opt-in or opt-out) with respect to any information collected. |
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| **3.** Outline the safeguards that you will employ to secure all consumer data. |
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| **4.** Let consumers know that they can correct and update any personal information collected by your business. |
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| **5.** State that parental consent is required if a child is involved. |
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| **6.** Create a mechanism to enforce the policy. |
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| **Teaching Suggestions** |
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| **1.** Emphasize that the law is not simple—there are no simple solutions to complex problems. Legal principles are presented in this course as “black letter law”—that is, in the form of basic principles generally accepted by the courts or expressed in statutes. In fact, the law is not so concrete and static. One of the purposes of this course is to acquaint students with legal problems and issues that occur in society in general and in business in particular. The limits of time and space do not allow all of the principles to be presented against the background of their development and the reasoning in their application. By the end of the course, students should be able to recognize legal problems (“spot the issues”) when they arise. In the real world, this may be enough to seek professional legal assistance. In this course, students should also be able to recognize the competing interests involved in an issue and reason through opposing points of view to a decision. |
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| **2.** Point out that the law assumes everyone knows it, or, as it’s often phrased, “Ignorance of the law is no excuse.” Of course, the volume and expanding proliferation of statutes, rules, and court decisions is beyond the ability of anyone to know it all. But pointing out the law’s presumption might encourage students to study. Also, knowing the law allows business people to make better business decisions. |
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| **3.** As Oliver Wendell Holmes noted, “The life of the law has not been logic”—that is, the law does not respond to an internal logic. It responds to social change. Emphasize that laws (and legal systems) are manmade, that they can, and do, change over time as society changes. ***To what specific social forces does law respond? Are the changes always improvements?*** (These questions can also be discussed in connection with Chapter 9.) |
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| **4.** One method of introducing the subject matter of each class is to give students a hypothetical at the beginning of the class. The hypothetical should illustrate the competing interests involved in some part of the law in the assigned reading. Students should be asked to make a decision about the case and to explain the reasons behind their decision. Once the law has been discussed, the same hypothetical can be considered from an ethical perspective. |
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| **5.** You might want to remind your students that the facts in a case should be accepted as given. For example, under some circumstances, an oral contract may be enforceable. If there is a statement in a case about the existence of oral contract, it should be accepted that there was an oral contract. Arguing with the statement (“How could you prove that there was an oral contract?” for instance) will only undercut their learning, Once they have learned the principle for which a case is presented, then they can ask, “What if the facts were different?” |
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| **6.** The concept of federalism is basic to students’ understanding of the authority of the federal and state governments to regulate business. The Constitution has a significantly different impact on the regulation of business by the federal government that it does on the regulation of business by state governments. Emphasize that the federal government was *granted* specific powers by the states in the Constitution while the states *retained* the police power. |
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| **7.** The commerce clause has become a very broad source of power for the federal government. It also restricts the power of the states to regulate activities that result in an undue burden on interstate commerce. Determining what constitutes an undue burden can be difficult. A court balances the benefit that the state derives from its regulation against the burden it imposes on commerce. The requirements for a valid state regulation under the commerce clause are (1) that it serve a legitimate end and (2) that its purpose cannot be accomplished as well by less discriminatory means. |
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| To illustrate the balance, use a hypothetical involving a statute designed to protect natural resources. (Explain that this is an area traditionally left open to state regulation; that is, it is not considered preempted by a federal scheme of regulation.) For example, imagine a statute banning the importation of baitfish. The ban is a burden on interstate commerce, but the statute’s concern is to protect the state’s fish from nonnative predators and parasites, and there is no satisfactory way to inspect imported baitfish for parasites. This statute would likely be upheld as legitimate. |
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| 8. It might be explained to your students that constitutional law is concerned primarily with the exercise of judicial review. The emphasis is on the way that the courts in general, and the United States Supreme Court in particular, interpret provisions of the Constitution. *Stare decisis* does not have as much impact in constitutional law as in other areas of the law. In this area, the courts are not reluctant to overrule statutes, regulations, precedential case law, or other law. |
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| *Cyberlaw Link* |
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| Ask your students, at this early stage in their study of business law, what they feel are the chief legal issues in developing a Web site or doing business online. ***What are the legal risks involved in transacting business over the Internet?*** As their knowledge of the law increases over the next few weeks, this question can be reconsidered. |
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| Ask your students to consider the following issue. In most circumstances, it is not constitutional for the government to open private mail. ***Why is it then sometimes considered legal for the government to open e-mail between consenting adults?*** |
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**Discussion Questions**

**1. *If justice is defined as the fair, impartial consideration of opposing interests, are law and justice the same thing?*** No. There can be law without justice—as happened in Nazi-occupied Europe, for example. There cannot be justice without law.

**2. *What is the supreme law of the land?*** The federal constitution. ***What are statutes?*** Laws enacted by Congress or a state legislative body. ***What are ordinances?*** Laws enacted by local legislative bodies. ***What are administrative rules?*** Laws issued by administrative agencies under the authority given to them in statutes.

**3. *What is the Uniform Commercial Code?*** The Uniform Commercial Code (UCC) was created through the joint efforts of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the American Law Institute. The UCC was first issued in 1952. The UCC facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions (sales of goods, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions). The UCC assures businesspersons, for example, that their contracts, if validly entered into, normally will be enforced. Uniform laws are often adopted in whole or in substantial part by the states. The UCC has been adopted in its entirety by nearly all states (except Louisiana, which has not adopted Article 2).

**4. *What is the common law?*** Students may most usefully understand common law to be case law—that is, the body of law derived from judicial decisions. The body of common law originated in England. The term common law is sometimes used to refer to the entire common law system to distinguish it from the civil law system.

**5. *Identify and describe remedies available in equity.*** Specific performance is available only when a dispute involves a contract. The court may order a party to perform what was promised. An injunction orders a person to do or refrain from doing a particular act. Rescission undoes an agreement, and the parties are returned to the positions they were in before the agreement.

**6.** ***What is the national government’s relation to the states?*** The relationship between the national and state governments is a partnership. Neither is superior to the other except as the Constitution provides. When conflicts arise as to which government should be exercising power in a particular area, the United States Supreme Court decides which governmental system is empowered to act under the Constitution.

**7.** ***What is the conflict between the states’ police power and the commerce clause?*** The term *police power* refers to the inherent right of the states to regulate private activities within their own borders to protect or promote the public order, health, safety, morals, and general welfare. When state regulation encroaches on interstate commerce—which Congress regulates under the commerce clause—the state’s interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce.

**8.** ***What is the distinction between the degrees of regulation that may be imposed on commercial and noncommercial speech?*** Commercial speech is not as protected as noncommercial speech. Even if commercial speech concerns a lawful activity and is not misleading, a restriction on it will generally be considered valid as long as the restriction (1) seeks to implement a substantial gov­ernment interest, (2) directly advances that interest, and (3) goes no further than necessary to accomplish its objective. As for noncommercial speech, the government cannot choose what are and what are not proper subjects.

**9.** ***Would a state law imposing a fifteen-year term of imprisonment without allowing a trial on all businesspersons who appear in their own television commercials be a violation of substantive due process? Would it violate procedural due process?*** Yes, the law would violate both types of due process. The law would be unconstitutional on substantive due pro­cess grounds, because it abridges freedom of speech. The law would be unconstitutional on procedural due process grounds, because it imposes a penalty without giving an accused a chance to defend his or her actions.

**10.** ***What are the tests used to determine whether a law comports with the equal protection clause?*** Equal protection means that the government must treat similarly situated individuals in a similar manner. Equal protection requires review of the substance of a law or other government action instead of the procedures used. If the law distinguishes between or among individuals, the basis for the distinction is examined. If the law inhibits some persons’ exercise of a *fundamental right* or if the classification is based on race, national origin, or citizenship status, the classification must be necessary to promote a *compelling* interest. In matters of economic or social welfare, a classification will be upheld if there is any *rational* basis on which it might relate to any *legitimate* government interest. Laws using classifications that discriminate on the basis of gender or legitimacy must be *substantially related* to *important* government objectives. When a law or action limits the liberty of all persons, it may violate substantive due process; when a law or action limits the liberty of some persons, it may violate the equal protection clause.

**Activity and Research Assignments**

**1.** Have students research the laws of other common law jurisdictions (England, India, Canada), other legal systems (civil law systems, contemporary China, Moslem nations), and ancient civilizations (the Hebrews, the Babylonians, the Romans), and compare the laws to those of the United States. In looking at other legal systems, have students consider how international law might develop, given the differences in legal systems, laws, traditions, and customs.

**2.** Assign specific cases and statutes for students to find, either in a library or online, or assign a list of citations, including uniform resource locators (URLs), for students to decipher.

**3.** Ask students to read newspapers and magazines, listen to radio news, watch television news, and surf the World Wide Web for developments in the law—new laws passed by Congress or signed by the president, laws interpreted by the courts, proposals for changes in the law. The omnipresent effect of law on society should be easy to see.

**4.** ***Would the ten amendments in the Bill of Rights be part of the Constitution if it were introduced today?*** Have students phrase the Bill of Rights in more contemporary language and poll their friends, neighbors, and relatives as to whether they would support such amendments to the Constitution. ***If not, what rights might they be willing to guarantee?***

**Explanations of Selected Footnotes in the Text**

**Footnote 5:** In ***Brown v. Board of Education of Topeka,*** the United States Supreme Court unanimously held that the separate but equal concept had no place in education. The case involved four consolidated cases focusing on the permissibility of local governments conducting school systems that segregated students by race. In each case blacks sought admission to public schools on a non-segregated basis, and in each case the lower court based its decision on the separate but equal doctrine. The Court interpreted the principles of the U.S. Constitution’s Fourteenth Amendment as they should apply to modern society and looked at the effects of segregation. The justices found that segregation of children in public schools solely on the basis of race deprives the children of the minority group of equal educational opportunities. To separate black children “from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.”

**Footnote 6:** In ***Plessy v. Ferguson*,** the United States Supreme Court adopted the doctrine of separate but equal. A Louisiana state statute required that all railway companies provide separate but equal accommodations for black and white passengers, imposing criminal sanctions for violations. Plessy, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach for whites. The Court said that the U.S. Constitution’s Thirteenth and Fourteenth Amendments (the Civil War Amendments) “could not have been intended to abolish distinctions based on color, or to enforce social .  .  . equality, or a commingling of the two races upon terms unsatisfactory to either.” According to the Court, laws requiring racial separation did not necessarily imply the inferiority of either race. In a lone dissent, Justice Harlan expressed the opinion that the Civil War Amendments had removed “the race line from our governmental systems,” and the Constitution was thus “color-blind.”

**Footnote 18:** At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a banner conveying a message that she regarded as promoting illegal drug use. Consistent with school policy, which prohibited such messages at school events, the principal told the students to take down the banner. One student refused. The principal confiscated the banner and suspended the student. The student filed a suit in a federal district court against the principal and others, alleging a violation of his rights under the U.S. Constitution. The court issued a judgment in the defendants’ favor. On the student’s appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The defendants appealed. In ***Morse v. Frederick,*** the United States Supreme Court reversed the lower court’s judgment and remanded the case. The Supreme Court viewed this set of facts as a “school speech case.” The Court acknowledged that the message on Frederick’s banner was “cryptic,” but interpreted it as advocating the use of illegal drugs. Congress requires schools to teach students that this use is “wrong and harmful.” Thus it was reasonable for the principal in this case to order the banner struck.

***Did—or should—the Court rule that Frederick's speech can be proscribed because it is “plainly offensive”?*** The petitioners (Morse and the school board) argued for this rule. The Court, however, stated, “We think this stretches [previous case law] too far; that case [law] should not be read to encompass any speech that could fit under some definition of ‘offensive.’ After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.”

**Footnote 24:** Mount Soledad is in San Diego, California. There has been a forty-foot cross atop the peak since 1913. Since the 1990s, a war memorial has surrounded the cross. The site was privately owned until 2006 when the federal government acquired it to preserve the war memorial. Steve Trunk and others filed a suit in a federal district court against San Diego, claiming a violation of the establishment clause. The court determined that the government acted with a secular purpose and the memorial did not advance religion, and issued a summary judgment in its favor. The plaintiffs appealed. In ***Trunk v. City of San Diego,*** the U.S. Court of Appeals for the Ninth Circuit reversed and remanded. The government’s purpose may have been nonreligious, but the memorial can be perceived as endorsing Christianity. Not all crosses at war memorials violate the Constitution. The context and setting must be examined. This cross physically dominates its site, was originally dedicated to religious purposes, and had a long history of religious use. From a distance, the cross was the only visible element. The court reasoned that “the use of a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion.”

***If the forty-foot cross were replaced with a smaller, less visible symbol of the Christian religion and the symbols of other religions were added to the display, does it seem likely that any parties would object?*** Yes. Those who are offended by the association of any religion with their state would likely object to the inclusion of any religious symbols. And there are those who might object to the inclusion of symbols for religions other than their own—Christians who take offense at Wiccan symbols, Muslims who protest Stars of David, and so on. These objections are among the reasons that some would argue the Constitution’s proscriptions on a mix of government and religion should be honored to the fullest.

***If the cross in this case had been only six feet tall and had not had a long history of religious use, would the outcome of this case have been different? Why or why not?*** A main reason that the court in this case found an establishment clause violation was because the cross was so large that it physically dominated the entire memorial site. The government could not avoid the appearance of promoting Christianity because the religious elements of the memorial overshadowed the nonreligious elements. In addition, the cross had a long history of religious use by the community. The court’s decision might well have been different if the cross had not dominated the landscape and the memorial, and had not had a history of religious use.

***Can a religious display that is located on private property violate the establishment clause?*** Explain. Probably not. Individuals can erect religious displays on their own private property without constitutional implications. It makes sense that the only way the government can be accused of sponsoring or endorsing religion is for the display in question to appear on public property.

***Should religious displays on public property be held to violate the establishment clause?***It might be argued that if a religious symbol is only one part of a larger display that features secular symbols, such as reindeer and candy canes in a winter holiday display, the display of the religious symbol does not violate the establishment clause. The symbols’ acceptability may depend on such factors as size, number, and how close the symbols are to each other.

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| Appendix to Chapter 1 |
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**Finding and Analyzing the Law**

**Introduction**

Laws pertaining to business consist of both statutory law and case law. The statutes, agency regulations, and case law referred to in this text establish the rights and duties of businesspersons. The cases in this book provide students with concise, real-life illustrations of the interpretation and application of the law by the courts. The importance of knowing how to find statutory and case law is the reason for this appendix.

**Appendix Outline**

**I. Finding Statutory and Administrative Law**

Publications collecting statutes and administrative regulations are discussed in the text.

**II. Finding Case Law**

A brief introduction to case reporting systems and legal citations is also included.

**III. Reading and Understanding Case Law**

To assist students in reading and analyzing court opinions, the formats of cases in the text are di­gested, terms are defined, and a sample case is annotated.

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| **Additional Background—** |
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| **The *Federal Reporter*** |
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| Federal court decisions are published unofficially in a variety of publications. These reports are organized by court level and issued chronologically. Opinions from the United States Court of Appeals, for example, are reported in the *Federal Reporter*. Thomson Reuters publishes these decisions with headnotes condensing important legal points in the cases. The headnotes are assigned key numbers that cross-reference the points to similar points in cases reported in other publications. The following are excerpts from *Ferguson v. Commissioner of Internal Revenue,* as published with headnotes in the *Federal Reporter*. |
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| **Betty Ann FERGUSON, Petitioner-Appellant,** |
| **v.** |
| **COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.** |
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| **No. 90-4430** |
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| Summary Calendar. |
| United States Court of Appeals, |
| Fifth Circuit. |
|  |
| Jan. 22, 1991. |
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| Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm. |
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| Reversed and remanded. |
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| **1. Constitutional Law 92K84(2)** |
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| Protection of free exercise clause extends to all sincere religious beliefs; courts may not evaluate reli­gious truth. U.S.C.A. Const. Amend. 1. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052 |
|  |
| **2. Witnesses 410K227** |
|  |
| Court abused its discretion in refusing testimony of witness who refused, on religious grounds, to swear or affirm, and who instead offered to testify accurately and completely and to be subject to penalties for perjury. U.S.C.A. Const. Amend. 1; Fed.Rules Evid.Rule 603, 28 U.S.C.A. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052 |
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| Betty Ann Ferguson, Metairie, La., pro se. |
|  |
| Peter K. Scott, Acting Chief Counsel, I.R.S., Gary R. Allen, David I. Pincus, William S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee. |
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| Appeal from a Decision of the United States Tax Court. |
| Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges. |
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| ***PER CURIAM:*** |
| Betty Ann Ferguson appeals the Tax Court’s dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court’s failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse. |
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| I. |
| This First Amendment case ironically arose out of a hearing in Tax Court. Although the government’s brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson’s refusal to “swear” or “affirm” before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33-37 and James 5:12. \* \* \* |
|  |
| Ms. Ferguson, proceeding pro se, requested that Judge Korner consider the following statement set forth by the Supreme Court of Louisiana in *Staton v. Fought,* 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation: |
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| I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete. |
|  |
| Judge Korner abruptly denied her request, commenting that “[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had” and that he did not think affirming “violates any recognizable religious scruple.” Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court. |
| II.  **[1]** The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.” *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). *Accord Hobbie v. Unemployment Appeals Comm’n of Florida,* 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and *United States v. Ballard,* 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148 (1944). Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness “declare that [she] will testify truthfully, by oath or affirmation adminis­tered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.” As evidenced in the advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion: |
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| The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. Accord Wright and Gold, *Federal Practice and Procedure* § 6044 (West 1990). |
| The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In *Moore v. United States,* 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (*per curiam*), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word “solemnly” in their affirmations for religious reasons. |
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| \* \* \* \* |
| **[2]** The government offers only two justifications for Judge Korner’s refusal to consider the *Staton* statement. First, the government contends that the Tax Court was not bound by a Louisiana decision. This argument misses the point entirely; Ms. Ferguson offered *Staton* as an alternative to an oath or affirmation and not as a precedent. |
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| The government also claims that the *Staton* statement is insufficient because it does not acknowledge that the government may prosecute false statements for perjury. The federal perjury statute, 18 U.S.C. § 1621, makes the taking of “an oath” an element of the crime of perjury. *Accord* *Smith v. United States*, 363 F.2d 143 (5th Cir.1966). However, Ms. Ferguson has expressed her willingness to add a sentence to the Staton statement acknowledging that she is subject to penalties for perjury. The government has cited a number of cases invalidating perjury convictions where no oath was given, but none of the cases suggest that Ms. Ferguson’s proposal would not suffice as “an oath” for purposes of § 1621. See *Gordon*, 778 F.2d at 1401 n. 3 (statement by defendant that he understands he must accurately state the facts combined with acknowledgment that he is testifying under penalty of perjury would satisfy Fed.R.Civ.P. 43(d)). |
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| The parties’ briefs to this court suggest that the disagreement between Ms. Ferguson and Judge Korner might have been nothing more than an unfortunate misunderstanding. The relevant portion of their dialogue was as follows: |
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| MS. FERGUSON: I have religious objections to taking an oath. |
| THE COURT: All right. You may affirm. Then in lieu of taking an oath, you may affirm. |
| MS. FERGUSON: Sir, may I present this to you? I do not— |
| THE COURT: Just a minute. The Clerk will ask you. |
| THE CLERK: You are going to have to stand up and raise your right hand. |
| MS. FERGUSON: I do not affirm either. I have with me a certified copy of a case from the Louisiana Supreme Court. |
| THE COURT: I don’t care about a case from the Louisiana Supreme Court, Ms. Ferguson. You will either swear or you will affirm under penalties of perjury that the testimony you are about to give is true and correct, to the best of your knowledge. |
| MS. FERGUSON: In that case, Your Honor, please let the record show that I was willing to go under what has been acceptable by the State of Louisiana Supreme Court, the State versus— |
| THE COURT: We are not in the state of Louisiana, Ms. Ferguson. You are in a Federal court and you will do as I have instructed, or you will not testify. |
| MS. FERGUSON: Then let the record show that because of my religious objections, I will not be allowed to testify. |
|  |
| Ms. Ferguson contends that Judge Korner insisted that she use either the word “swear” or the word “affirm”; the government suggests instead that Judge Korner only required an affirmation which the government defines as “an alternative that encompasses all remaining forms of truth assertion that would satisfy [Rule 603].” Even Ms. Ferguson’s proposed alternative would be an “affirmation” under the government’s definition. |
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| If Judge Korner had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, Judge Korner erred not only in evaluating Ms. Ferguson’s religious belief, and concluding that it did not violate any “recognizable religious scruple,” but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief. His error is all the more apparent in light of the fact that Ms. Ferguson was proceeding pro se at the hearing. |
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| We therefore REVERSE the decision of the Tax Court and REMAND this case for further proceedings not inconsistent with this opinion. |
| **Additional Background—**  **State Codes:**  **Pennsylvania Consolidated Statutes**  State codes may have any of several names—Codes, General Statutes, Revisions, and so on—de­pending on the preference of the states. Also arranged by subject, some codes indicate subjects by numbers. Others assign names. The following is the text of one of the state statutes whose citations are explained in the textbook—Section 1101 of Title 13 of the **Pennsylvania Consolidated Statutes** (13 Pa. C.S. § 1101).  PURDON’S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED |
| TITLE 13. COMMERCIAL CODE |
| **DIVISION 1. GENERAL PROVISIONS** |
| **CHAPTER 11. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF TITLE** |
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| **§ 1101. Short title of title** |
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| This title shall be known and may be cited as the “Uniform Commercial Code.” |
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| 1984 Main Volume Credit(s) |
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| 1979, Nov. 1, P.L. 255, No. 86, § 1, effective Jan. 1, 1980. |
| **California Commercial Code**  The text of another of the state statutes whose citations are explained in the textbook follows—Section 1101 of the **California Commercial Code** (Cal. Com. Code § 1101).  WEST’S ANNOTATED CALIFORNIA CODES |
| COMMERCIAL CODE |
| **DIVISION 1. GENERAL PROVISIONS** |
| **CHAPTER 1. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE CODE** |
|  |
| **§ 1101. Short Title** |
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| This code shall be known and may be cited as Uniform Commercial Code. |
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| 1964 Main Volume Credit(s) |
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| (Stats.1963, c. 819, § 1101.) |
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| Additional Background— Corpus Juris Secundum  Because the body of American case law is huge, finding relevant precedents would be nearly im­practicable were it not for case digests, legal encyclopedias, and similar publications that classify deci­sions by subject. Like case digests, legal encyclope­dias present topics alphabetically, but encyclopedias provide more detail. The legal encyclopedia **Corpus Juris Secundum** (or C.J.S.) covers the entire field of law. It has been cited or directly quoted more than 50,000 times in federal and state appellate court opinions. The following is an excerpt from C.J.S.—Section 47 of the category “*Theaters & Shows”* (86 C.J.S. *Theaters & Shows* § 47). | | | |
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| **f. Assumption of Risk**  **A patron assumes the ordinary and natural risks of the character of the premises, devices, and form of amusement of which he has actual or imputed knowledge; but he does not assume the risk of injury from the negligence of the proprietor or third persons.**  While it has been said that, strictly speaking, the doctrine of assumed | | risk is applicable only to the relationship of master and servant,3 patrons of places of public amusement assume all natural and inherent risks pertaining to the character of the structure,4 or to the devices located therein,5 or to the form of amusement,6 which are open and visible. Patrons of places of public amusement assume such risks as are incident to their going without compulsion to some part of the premises to which patrons are not invited and where they are not expected to be, and which risks | |
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| **3.** Cal.—Potts v. Crafts, 42 P.2d 87, 5 Cal.App.2d 83.  **4.** Mo.—King v. Ringling, 130 S.W. 482, 145 Mo.App. 285.  62 C.J. p 877 note 62.  **Darkened motion picture the­ater**  Ky.—Columbia Amusement Co. v. Rye, 155 S.W.2d 727, 288 Ky. 179.  N.J.—Falk v. Stanley Fabian Corporation of Delaware, 178 A. 740, 115 N.J.Law 141.  Tenn.—Smith v. Crescent Amusement Co., 184 S.W.2d 179, 27 Tenn.App. 632.  **5.** Cal.—Chardon v. Alameda Park Co., 36 P.2d 136, 1 Cal.App.2d 18.  Fla.—Payne v. City of Clearwater, 19 So.2d 406, 155 Fla. 9.  Mass.—Beaulieu v. Lincoln Rides, Inc., 104 N.E.2d 417, 328 Mass. 427.  Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.  Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.  Ohio.—Pierce v. Gooding Amusement Co., App., 90 N.E.2d 585.  Tex.—Vance v. Obadal, Civ.App., 256 S.W.2d 139.  62 C.J. p 877 note 63  **Particular amusement devices**  (1) “Dodge Em” cars.—Connolly v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—Frazier v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—62 C.J. p 877 note 63 [b].  (2) Loop the loop.—Kemp v. Coney Island, Ohio App., 31 N.E.2d 93.  (3) Roller coaster.—Wray v. Fair-ield Amusement Co., 10 A.2d 600, 126 Conn. 221—62 C.J. p 877 note 63 [e].  **6.** Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.  Mo.—Page v. Unterreiner, App., 106 S.W.2d 528.  N.J.—Griffin v. De Geeter, 40 A.2d 579, 132 N.J.Law 381—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J.Law 385.  N.Y.—Levy v. Cascades Operating Corpora-tion, 32 N.Y.S.2d 341, 263 App.Div. 882 —Saari v. State, 119 N.Y.S.2d 507, 203 Misc. | 859—Schmidt v. State, 100 N.Y.S.2d 504, 198 Misc. 802.  Vt.—Dusckiewicz v. Carter, 52 A.2d 788, 115 Vt. 122.  62 C.J. p 877 note 63.  **Other statements of rule**  (1) A spectator at game assumes risk of such dangers inci­dent to playing of game as are known to him or should be obvious to reasonable and pru­dent person in exercise of due care under circumstances.  Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.  Neb.—Klause v. Nebraska State Board of Agriculture, 35 N.W.2d 104, 150 Neb. 466—Tite v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22.  (2) One participating in a race assumes the risk of injury from natural hazards necessarily in­ci­dent to, or which inhere in, such a race, under maxim “volenti non fit injuria,” which means that to which a person assents is not es­teemed in law an injury.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.  (3) Patrons of a place of amusement assume the risk of ordinary dangers normally atten­dant thereon and also the risks ensuing from conditions of which they now or of which, in the particular circumstances, they are charged with knowledge, and which inhere therein.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.  **Liability of proprietor of sports arena**  Generally, the proprietor of an establishment where contests of baseball, hockey, etc., are con­ducted, is not liable for injuries to its patrons.—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.  **Risks of particular sports/entertainment**  (1) Baseball.  Cal.—Quinn v. Recreation Park Ass’n, 46 P.2d 141, 3 Cal.2d 725—Brown v. San Francisco Ball Club, 222 P.2d 19, 99 Cal.App.2d 484—Ratcliff v. San Diego Baseball Club of Pacific Coast League, 81 P.2d 625, 27 Cal.App.2d 733.  Ind.—Emhardt v. Perry Stadium, 46 N.E.2d 704, 113 Ind.App. 197.  La.—Jones v. Alexandria Baseball Ass’n, App., 50 So.2d 93.  Mo.—Hudson v. Kansas City Baseball Club, 164 S.W.2d 318, 349 Mo. 1215—Grimes v. American League Baseball Co., App., 78 S.W.2d | | N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div.137—Jones v. Kane & Roach, 43 N.Y.S.2d 140, 187 Misc. 37—Blackball v. Albany Baseball & Amusement Co., 285 N.Y.S.2d 695, 157 Misc. 801—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.  N.C.—Cates v. Cincinnati Exhibition Co., 1 S.E.2d 131, 215 N.C. 64.  Ohio.—Hummel v. Columbus Baseball Club, 49 N.E.2d 773, 71 Ohio App. 321—Ivory v. Cincinnati Baseball Club Co., 24 N.e.2d 837, 62 Ohio App. 514.  Okl.—Hull v. Oklahoma City Baseball Co., 163 P.2d 982, 196 Okl. 40.  Tex.—Williams v. Houston Baseball Ass’n, Civ.App., 154 S.W.2d 874—Keys v. Alamo City Baseball Co., Civ.App., 150 S.W.2d 368.  Utah.—Hamilton v. Salt Lake City Corp., 237 P.2d 841.  62 C.J. p 877 note 63 [a].  (2) Basketball.—Paine v. Young Men’s Christian Ass’n, 13 A.2d 820, 91 N.H. 78.  (3) Golf.  Mass.—Katz v. Gow, 75 N.E.2d 438, 321 Mass. 666.  N.J.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.  (4) Diving.—Hill v. Merrick, 31 P.2d 663, 147 Or. 244.  (5) Hockey.  Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.  N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S.2d 505, 245 App.Div. 137—Hammel v. Madison Square Garden Corporation, 279 N.Y.S. 815, 156 Misc. 311.  (6) Horse racing.  Nev.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.  N.Y.—Futterer v. Saratoga Ass’n for Improvement of Breed of Horses, 31 N.Y.S.2d 108, 262 App.Div. 675.  (7) Ice skating.  Neb.—McCullough v. Omaha Coliseum Corporation, 12 N.W.2d 639, 144 Neb. 92.  N.D.—Filler v. Stenvick, 56 N.W.2d 798.  Pa.—Oberheim v. Pennsylvania Sports & Enterprises, 55 A.2d 766, 358 Pa. 62.  (8) Square dancing.—Gough v. Wadhams Mills Grange No. 1015, P. of H., 109 N.Y.S.2d 374. |

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| **Additional Background—**  ***United States Code*** |
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| Until 1926, federal statutes were published in one volume of the Revised Statutes of 1875 and in each subsequent volume of the Statutes at Large. In 1926, these laws were rearranged into fifty subject areas and republished as the ***United States Code***. In the *United States Code,* all federal laws of a public and permanent nature are compiled by subject. Subjects are assigned titles and title numbers. Within each title, subjects are further subdivided, and each statute is given a section number. The following is the text of Section 1 of Title 15 of the *United States Code* (15 U.S.C. § 1). |
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| TITLE 15. COMMERCE AND TRADE |
| CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE |
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| **§ 1. Trusts, etc., in restraint of trade illegal; penalty** |
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| Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by im­prisonment not exceeding three years, or by both said punishments, in the discretion of the court. |
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| (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.) |
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| (As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.) |
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| **Additional Background—**  ***Code of Federal Regulations***  Created by Congress in 1937, the ***Code of Federal Regulations*** is a set of soft cover volumes that contain the regulations of federal agencies currently in effect. Items are selected from those published in the *Federal Register* and arranged in a scheme of fifty titles, some of which are the same as those organizing the statutes in the *United States Code* (discussed above). Each title is divided into chapters, parts, and sections. The *Code of Federal Regulations* is completely revised every year. The following is the text of Section 230.504 of Title 17 of the *Code of Federal Regulations* (17 C.F.R. § 230.504).  TITLE 17—COMMODITY AND SECURITIES EXCHANGE |
| Chapter II—Securities and Exchange Commission |
| **Part 230—General Rules and Regulations, Securities Act of 1933** |
| **REGULATION B—EXEMPTION RELATING TO FRACTIONAL UNDIVIDED INTERESTS IN OIL OR GAS RIGHTS** |
| **Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933** |
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| **§ 230.504 Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000.** |
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| **(a) Exemption.** |
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| Offers and sales of securities that satisfy the conditions in paragraph (b) of this Section by an issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act. |
|  |
| **(b) Conditions to be met—** |
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| **(b)(1) General Conditions.** To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502, except that the provisions of § 230.502(c) and (d) shall not apply to offers and sales of securities under this § 230.504 that are made: |
|  |
| (b)(1)(i) Exclusively in one or more states each of which provides for the registration of the securities and requires the delivery of a disclosure document before sale and that are made in accordance with those state provisions; or |
|  |
| (b)(1)(ii) In one or more states which have no provision for the registration of the securities and the delivery of a disclosure document before sale, if the securities have been registered in at least one state which provides for such registration and delivery before sale, offers and sales are made in the state of registration in accordance with such state provisions, and such document is in fact delivered to all purchasers in the states which have no such procedure before the sale of the securities. |
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| **(b)(2) Specific condition—** |
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| (b)(2)(i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act, provided that no more than $500,000 of such aggregate offering price is attributable to offers and sales of securities without registration under a state’s securities laws. |
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| Note 1.—The calculation of the aggregate offering price is illustrated as follows: |
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| Example 1. If an issuer sells $500,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504, it would be able to sell an additional $500,000 worth of securities either pursuant to state registration or without state registration during the ensuing twelve-month period, pursuant to this § 230.504. |
|  |
| Example 2. If an issuer sold $900,000 pursuant to state registration on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months. |
|  |
| Note 2.—If a transaction under this § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale. |
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| Note 3.—In addition to the aggregation principles, issuers should be aware of the applicability of the integration principles set forth in § 230.502(a). |
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| (b)(2)(ii) Advice about the limitations on resale. Except where the provision does not apply by virtue of paragraph (b)(1) of this section, the issuer, at a reasonable time prior to the sale of securities, shall advise each purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of § 230.502. |
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| [53 FR 7869, March 10, 1988; 54 FR 11372, March 20, 1989] |
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| AUTHORITY: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; Sec. 308(a)(2), 90 Stat. 57; Secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37. |
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| Source: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless otherwise noted. |
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| Note.—In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933. |

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| **Additional Background—**  United States Code Annotated |
| The ***United States Code Annotated*** contains the complete text of laws enacted by Congress that are included in the *United States Code* (discussed above), together with case notes (known as annotations) of judicial decisions that interpret and apply specific sections of the statutes. Also included are the text of presidential proclamations and executive orders, specially prepared research aids, historical notes, and library references. The following are excerpts from the materials found at Section 1 of Title 15 of the *United States Code Annotated* (15 U.S.C.A. § 1), including the historical notes and selected references.  TITLE 15. COMMERCE AND TRADE |
| CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE |
|  |
| **§ 1. Trusts, etc., in restraint of trade illegal; penalty** |
|  |
| Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court. |
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| (July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.) |
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| (As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)  HISTORICAL AND STATUTORY NOTES |
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| Effective Date of 1975 Amendment. Section 4 of Pub. L. 94-145 provided that: “The amendments made by sections 2 and 3 of this Act [to this section and section 45(a) of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975].” |
|  |
| Short Title of 1984 Amendment. Pub. L. 98-544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: “That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the ‘Local Government Antitrust Act of 1984’.” |
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| Short Title of 1982 Amendment. Pub. L. 97-290, Title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that “This title [enacting section 6a of this title and section 45(a) (3) of this title] may be cited as the ‘Foreign Trade Antitrust Improvements Act of 1982’.” |
|  |
| Short Title of 1980 Amendment. Pub. L. 96-493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: “That this Act [enacting section 26a of this title] may be cited as the ‘Gasohol Competition Act of 1980’.” |
|  |
| Short Title of 1975 Amendment. Section 1 of Pub. L. 94-145 provided: “That this Act [which amended this section and section 45(a) of this title and enacted provisions set out as a note under this section] may be cited as the ‘Consumer Goods Pricing Act of 1975’.” |
|  |
| Short Title of 1974 Amendment. Section 1 of Pub. L. 93-528 provided: “That this Act [amending this section, and sections 2, 3, 16, 28, and 29 of this title, and section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and enacting provisions set out as notes under sections 1 and 29 of this title] may be cited as the ‘Antitrust Procedures and Penalties Act’.” |
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| Short Title. Pub. L. 94-435, Title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, inserted immediately after the enacting clause of Act July 2, 1890, c. 647, the following: “That this Act [sections 1 to 7 of this title] may be cited as the ‘Sherman Act’.” |
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| Legislative History. For legislative history and purpose of Act July 7, 1955, see 1955 U.S.Code Cong. and Adm.News, p. 2322. |
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| For legislative history and purpose of Pub. L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535. See, also, Pub. L. 94-145, 1975 U.S. Code Cong. and Adm. News, p. 1569. |
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| REFERENCES |
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| **CROSS REFERENCES** |
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| Antitrust laws inapplicable to labor organizations, see § 17 of this title. |
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| Carriers relieved from operation of antitrust laws, see § 5(11) of Title 49, Transportation. |
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| Combinations in restraint of import trade, see § 8 of this title. |
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| Conspiracy to commit offense or to defraud United States, see § 371 of Title 18, Crimes and Criminal Procedure. |
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| Discrimination in price, services or facilities, see § 13 of this title. |
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| Fishing industry, restraints of trade in, see § 522 of this title. |
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| Misdemeanor defined, see § 1 of Title 18, Crimes and Criminal Procedure. |
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| Monopolies prohibited, see § 2 of this title. |
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| Trusts in territories or District of Columbia prohibited, see § 3 of this title. |
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| FEDERAL PRACTICE AND PROCEDURE |
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| 1990 Pocket Part Federal Practice and Procedure |
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| Adding new parties, see Wright & Miller: Civil § 1504. |
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| Adequacy of representation of members in class actions instituted under sections 1 to 7 of this title, see Wright, Miller & Kane: Civil 2d § 1765. |
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| Answers to interrogatories with respect to justification for unlawful activity, see Wright & Miller: Civil § 2167. |
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| Applicability of rule relating to summary judgment, see Wright, Miller & Kane: Civil 2d § 2730. |
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| Applicability of standards developed by federal courts under sections 1 to 7 of this title to certain in­trastate transactions, see Wright, Miller, Cooper & Gressman: Jurisdiction § 4031. |
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| Authority of district court to award injunctive relief in actions to restrain antitrust violations, see Wright & Miller: Civil § 2942. |
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| Capacity of unincorporated association to sue and be sued, see Wright & Miller: Civil § 1564. |
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| Discretion of court in taxing costs, see Wright, Miller & Kane: Civil 2d § 2668. |
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| Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126. |
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| Joiner of claims, see Wright & Miller: Civil § 1587. |
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| *CODE OF FEDERAL REGULATIONS* |
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| 1973 Main Volume *Code of Federal Regulations* |
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| Advisory opinions and rulings of particular trade practices, see 16 CFR 15.1 *et seq*. |
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| Common sales agency, see 16 CFR 15.46. |
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| Compliance with state milk marketing orders, see 16 CFR 15.154. |
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| Guides and trade practice rules for particular industries, see 16 CFR subd. B, parts 17 to 254. |
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| LAW REVIEW COMMENTARIES |
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| Abolishing the act of state doctrine. Michael J. Bazyler, 134 U.Pa.L.Rev. 325 (1986). |
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| Affecting commerce test: The aftermath of McLain. Richard A. Mann, 24  \* \* \* \* |
| ANNOTATIONS |
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| 1. Common law |
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| Congress did not intend text of sections 1 to 7 of this title to delineate their full meaning or their application in concrete situations, but, rather, Congress expected courts to give shape to their broad mandate by drawing on common-law tradition. *National Society of Professional Engineers v. U.S.,* U.S.Dist.Col.1978, 98 S.Ct. 1355, 435 U.S. 679, 55 L.Ed.2d 637. |
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| This section has a broader application to price fixing agreements than the common law prohibitions or sanctions. *U.S. v. Socony-Vacuum Oil Co.,* Wis.1940, 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421. |
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| Effect of §§ 1 to 7 of this title was to make contracts in restraint of trade, void at common law, unlawful in positive sense and created civil action for damages in favor of injured party. *Denison Mattress Factory v. Spring-Air Co.,* C.A.Tex.1962, 308 F.2d 403. |
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| Combinations in restraint of trade or tending to create or maintain monopoly gave rise to actions at common law. *Rogers v. Douglas Tobacco Bd. of Trade, Inc.,* C.A.Ga.1957, 244 F.2d 471. |
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| Federal statutory law on monopolies did not supplant common law but incorporated it. *Mans v. Sunray DX Oil Co.,* D.C.Okl.1971, 352 F.Supp. 1095. |
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| Common-law principle that manufacturer can deal with one retailer in a community or area and refuse to sell to any other has not been modified by §§ 1 to 7 of this title or any other act of Congress. *U.S. v. Arnold, Schwinn & Co.,* D.C.Ill.1965, 237 F.Supp. 323, reversed on other grounds 87 S.Ct. 1856, 388 U.S. 365, 18 L.Ed.2d 1249, on remand 291 F.Supp. 564, 567. |
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| This section is but an exposition of common law doctrines in restraint of trade and is to be interpreted in the light of common law. *U.S. v. Greater Kansas City Chapter Nat. Elec. Contractors Ass’n,* D.C.Mo.1949, 82 F.Supp. 147. |

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| **Case Synopsis—** |
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| **A Sample Case: *Davis v. Electronic Arts, Inc.*** |
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| Electronic Arts, Inc. (EA) makes and sells the video game *Madden NFL,* which allows users to play virtual games between National Football League (NFL) teams, both current and “historic.” EA pays a fee to use the likenesses of current players, but did not obtain a license to use the likenesses of the former players on the historic teams. Those players filed a suit in a federal district court against EA, alleging a violation of their “right of publicity.” EA filed a motion to strike the complaint. The court denied the motion. EA appealed, arguing that its use of the likenesses is protected under the First Amendment as an “incidental use.” |
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| The U.S. Court of Appeals for the Ninth Circuit affirmed the lower court’s denial of EA’s motion, The appellate court held that the use is not incidental “because it is central to EA's main commercial purpose—to create a realistic virtual simulation of football games involving current and former NFL teams.” The “players' likenesses have unique value and contribute to the commercial value of *Madden NFL”* as indicated by the lengths to which EA goes to achieve realism in terms of the players. And “the former players' likenesses are featured prominently in a manner that is substantially related to the main purpose and subject of *Madden NFL*—to create an accurate virtual simulation of an NFL game.” |
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| **Notes and Questions** |
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| ***The plaintiffs in the Davis case were former professional football players. Suppose that the plaintiffs had instead been college athletes. Would the result have been different?*** No, if the plaintiffs in this case had been college football players instead of professional athletes the result would have been different. |
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| A previous case before the same court involved a series of video games—*NCAA Football*—that used the likenesses of former college players without their consent. In that case, *In re NCAA Student-Athlete Name & Likeness Licensing Litigation,* 724 F.3d 1268 (9th Cir. 2013), the court held that the games were not protected by the First Amendment. The defendant contended that the plaintiffs’ claims were barred by the transformative use defense. This defense requires that a work add significant creative elements so as to transform into something more than a “mere” likeness. The court pointed out that the game replicated the players’ physical characteristics and allowed “users to manipulate [them] in the performance of the same activity for which [they are] known in real life” in “the context in which the activity occurs.” There was nothing significantly transformative about it. |
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| In the *Davis* case, against the same defense, the same reasoning would apply. And the incidental use defense highlighted in the text would likewise not succeed against a complaint by college players because, as in the case in the text, the defendant’s use of the likenesses would not be incidental but would be “central to [the defendant’s] main commercial purpose.” |
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