1 Introduction To Law

KEY OBJECTIVES:

- Understand the various sources of laws regulating business and business transactions.
- Understand how to read important legal case decisions, and how they affect business dealings.
- Gain familiarity with the ethical standards governing business transactions.

CHAPTER OVERVIEW

Before you can meaningfully engage in the study of business, you must understand the laws that govern business activities and relationships. This chapter gives you a broad overview of the United States legal system and its impact on business transactions. This will serve as a foundation to the rest of the chapters in this book.

INTRODUCTION

When Lao Tzu philosophized that "a journey of a thousand miles begins with a single step," he certainly did not have the United States legal system in mind. But the quote is as applicable to the U.S. legal system as it was to any facet of ancient Chinese culture.

COMMON LAW:
Law developed through court decisions over time rather than through constitutions or codes.

SEPARATION OF POWERS:
Giving legislative, executive, and judicial powers of government to separate bodies of the government.

FEDERALISM:
Governmental system that shares power between national and state governments.

The journey to the American legal system as we know it today began with the implementation of the English common law by the 13 original colonies. It continued with the ratification of the United States Constitution in 1789. Ratification of the Constitution put our legal system on the path to where we are today. And while the path includes many twists and turns, the beginning of that path is our Constitution.

The U.S. Constitution is divided into seven articles. Articles I, II, and III establish three branches of the federal government: the legislative, executive, and judicial branches. Each branch is powerful in its own way, but power is checked by the other branches. This system helps prevent one person or branch of government from dominating the American people, and allows each branch of government to operate as a balance on the powers of the others. This concept is referred to as the separation of powers. Next, in Articles IV and V, the Constitution identifies specific matters over which the federal government has exclusive control,

leaving all other matters to the discretion of the individual state governments. Dividing power between the national and state governments is a concept referred to as federalism. But the U.S. Constitution makes clear in Article VI that federal law is superior to state law, in what is referred to as the "Supremacy Clause."

While the U.S. Constitution is helpful for understanding the structure of the federal government, it is important to note that each state has its own governmental structure. While many state structures are similar to the federal structure, there are differences from state-to-state. The differences are often minor. The overview in this chapter pertains in largest part to the federal government structure.

ENUMERATED POWERS:

Specific identified powers reserved only for the federal government.

I. The United States Legal Structure

The United States is governed through the cooperation of three distinct branches: the legislative branch, which makes the laws; the executive branch, which enforces the laws; and the judicial branch, which interprets the laws. These are, of course, very broad descriptions. Each branch is discussed in more detail below.

Legislative Branch

Article I of the Constitution grants legislative powers to Congress, and lists the specific matters over which Congress can legislate. These enumerated powers include matters that pertain to the United States as a whole, such as issuing money, collecting tax, spending for the general welfare, regulating trade between states and between the U.S. and foreign countries, issuing patents and copyrights, and immigration.

While Congress makes liberal use of its power over these matters, the taxing and spending clause is used often. The following case brief, National Association of Independent Business v. Sebelius, focuses on the Affordable Care Act, commonly called Obamacare. In this summary of the longer case, you will see that the Court determined that the law is permitted under the taxation clause of the U.S. Constitution.

The United States Legislature, or Congress, has 535 members and numerous additional employees who provide support services to the members. Congress is divided into two parts, the Senate and the House of Representatives.

Each state elects two senators; thus, the Senate has 100 members. The number of senators changes only if a new state is added or one is removed. Senators are elected to six-year terms, in even years, with approximately one-third of Senate seats up for election in any even year. There is no limit to the number of six-year terms a senator may serve.

The House of Representatives currently has 435 voting members and six non-voting members

THE PATIENT PROTECTION AND AFFORDABLE CARE ACT'S INDIVIDUAL MANDATE IS CONSTITUTIONAL, BUT THE MEDICAID EXPANSION IS NOT.

National Federation of Independent Business v. Sebelius (Business Group) v. (Secretary of Health and Human Services) 131 S. Ct. 2566 (2012)

INSTANT FACTS:

The National Federation of Independent Business (P) brought suit against Sebelius (D) as a representative of the government, claiming that (1) the mandate in the Patient Protection and Affordable Care Act that individuals purchase health insurance exceeded Congress's power under the Constitution, and (2) the requirement that states expand their Medicaid programs or lose all federal funding was also unconstitutional. The Act was enacted under the Spending Clause of the Constitution

BLACK LETTER RULE:

The legitimacy of Spending Clause legislation depends on whether a state voluntarily and knowingly accepts the terms of such programs, and when Congress threatens to terminate other grants as a means of pressuring the states to accept a Spending Clause program, the legislation runs counter to this nation's system of federalism.

PROCEDURAL BASIS:

Appeal from an order of the Eleventh Circuit Court of Appeals holding the Patient Protection and Affordable Care Act unconstitutional in part.

FACTS:

Congress enacted the Patient Protection and Affordable Care Act in 2010. The Act aimed to increase the number of Americans covered by health insurance and decrease the cost of health care. The mandate of the Act requires most Americans to maintain at least minimal health care coverage or be charged a penalty—a "shared responsibility" payment. The Act also expanded the scope of the Medicaid program, increasing the number of low-income individuals to whom states must provide health insurance coverage. A consortium of businesses took legal action against the government opposing these provisions.

ISSUE:

Did Congress have the power under the Constitution to enact the challenged provisions of the Patient Protection and Affordable Care Act of 2010?

DECISION AND RATIONALE:

(Roberts, C.J.) Yes and no. With regard to the individual mandate, the power of Congress to regulate interstate commerce does not include the power to compel individuals to become active in commerce by purchasing a product. In our system, Congress has limited powers, and other powers are reserved to the states. The facets of governing that touch on citizens' daily lives are normally administered by the states. The Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." This Congressional power to regulate commerce presupposes the existence of some commercial activity to be regulated. Cases dealing with Commerce Clause powers have always described those powers as reaching an "activity."

The individual mandate does not regulate existing activity; instead, it compels individuals to become active in commerce by purchasing a product. Construing the Commerce Clause to permit Congress to regulate individuals precisely because they are doing nothing would open a new and potentially vast domain to congressional authority. The Government (D) argues that sickness and injury are unpredictable but unavoidable, and so the uninsured as a class are active in the market for health care. The mandate merely regulates how individuals pay for that active participation. The phrase "active in the market for health care" has no constitutional significance. An individual who bought a car two years ago and who may buy another in the future is not "active in the car market."

The Government (D) also argues that Congress has the power under the Necessary and Proper

Clause to enact the individual mandate because it is an integral part of a comprehensive scheme of economic regulation. The Necessary and Proper Clause gives Congress the power to enact provisions incidental to an enumerated power, and conducive to its beneficial exercise. The Clause is merely a declaration that the means of carrying into execution the enumerated powers of Congress are included in the grant. We have been very deferential to Congress's determination that a regulation is "necessary." But we have also carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution.

Applying these principles, the individual mandate cannot be sustained under the Necessary and Proper Clause as an essential component of the insurance reforms. Each of our prior cases upholding laws under that Clause involved exercises of authority derived from a granted power. The individual mandate vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power. Such a conception of the Necessary and Proper Clause would allow Congress to reach beyond the natural limit of its authority and draw within its regulatory scope those who otherwise would be outside of it.

Having concluded that the individual mandate is invalid under the Commerce Clause, we must next consider the Government's (D) argument that the individual mandate is a valid exercise of Congress's taxing powers. Here, we agree with the Government (D). Congress has broad authority to levy taxes, and there is no constitutional basis to hold that an individual is exempt from taxation due to his or her inactivity. Although the Commerce Clause does not give Congress the authority to regulate inactivity that burdens commerce, the Constitution does not provide the same guarantee with regard to taxation.

The power to tax is limited to the power to require an individual to pay money into the Federal Treasury. The shared responsibility payment has the functional characteristics of a tax, rather than a penalty. For most Americans, the amount that will be due will be far less than the price of insurance. The payment is collected by the Internal Revenue Service through the normal means of collecting revenue, except that the Service may not use criminal prosecutions to collect payments. The payments here will collect revenue, but they are also intended to influence conduct, by expanding health insurance coverage. Taxes that encourage conduct are nothing new. Every tax is in some measure regulatory, in that a tax interposes an economic impediment to the activity taxed. The fact that the law requiring the payments seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

Turning to the Medicaid issue, the legitimacy of Spending Clause legislation depends on whether a state voluntarily and knowingly accepts the terms of such programs. When Congress threatens to terminate other grants as a means of pressuring the states to accept a Spending Clause program, the legislation runs counter to this nation's system of federalism. The Medicaid expansion fails to pass muster under this principle.

Congress may use its spending power to create incentives for States to act in accordance with federal policies, but when pressure turns into compulsion the legislation runs contrary to our system of federalism. Permitting the federal government (D) to force the states to implement a federal program threatens the political accountability key to our federal system. State officials will bear the brunt of public disapproval, while the federal officials who devised the program may remain insulated from the ramifications of their decision. This is not a danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds.

The federal government (D) claims that the Medicaid expansion is merely a modification of the existing program because the states agreed that Congress could change the terms of Medicaid when they signed on in the first place. Although Congress's power to legislate under the Spending Clause is broad, it does not include surprising participating states with post-acceptance or "retroactive" conditions. We have no need to fix a line where persuasion gives way to coercion. It is enough that wherever that line may be, the Act is surely beyond it.

Affirmed in part, reversed in part.

ANALYSIS:

The Commerce Clause portion of this opinion generated much debate about its implications for Congress's legislative authority. Some commentators see it as a substantial limitation, if not a roll-

back, of Congressional authority. Others have noted that the Court ultimately upheld this unusual method of regulating the market, albeit on other grounds.

The shared responsibility payments are called "penalties" in the Act. It is not clear why Congress, which so carefully framed the payments to have the attributes of a tax, refused to call them a tax. It has been suggested that this was a failure of political courage. Congress simply did not want to open itself to the criticism that it was levying new taxes.

The dissenters (not included here) argued that the payments cannot be upheld as a tax because Congress did not "frame" them as such. This argument says that the law must be struck down even if the Constitution permitted Congress to enact it, because Congress used the wrong labels.

CASE VOCABULARY:

CAPITATION:
A tax levy that is a fixed sum per person, without regard to any other factors.

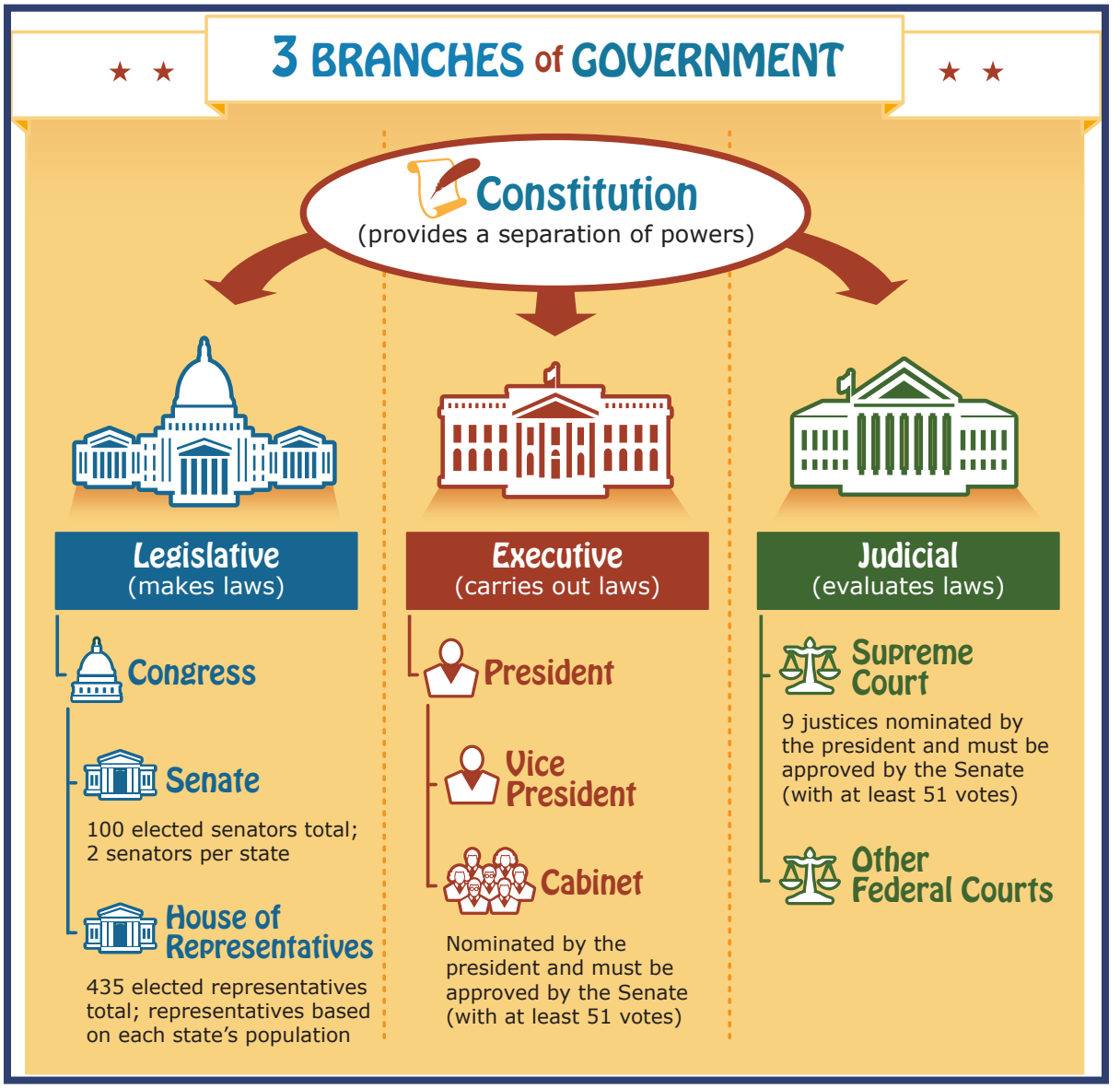
MEDICAID:
A federal-state cooperative program providing medical care to low-income individuals. The program is administered by the states in compliance with federal criteria, and is funded jointly by the state and federal governments.

QUESTIONS FOR DISCUSSION:
Why would legislators use words other than "tax" in legislation? Do you agree with the dissent that labels are critical to understanding and applying the law?

(non-voting members are from the District of Columbia and U.S. territories). The number of members is based on population, with roughly one representative seat for every 710,000 individuals. Therefore, states have differing numbers of representatives in the House. For example, California, with a population of nearly 38 million, has 53 members representing it in the House. North Dakota, in contrast, has only one member representing it in the House, due to its population of roughly 723,000. Representatives are elected to two-year terms, in even years. This means that the composition of the House can change drastically during each even-year election, as every seat is up for election. There is no limit to the number of terms a representative may serve.

The Legislature's primary duty is to make laws, but it has additional powers. For example, declarations of war must be passed in both the House and Senate. Congress determines how many seats there are in the United States Supreme Court. Presidential appointments of federal judges must be confirmed through a simple majority vote of the Senate.

Another important congressional power is its implicit power to conduct investigations. Although investigatory powers are not set out explicitly in the Constitution, Congress has regarded investigations as a part of its general governmental oversight powers. The courts have generally not interfered with investigations, saying that Congress may investigate if "clear legislation" could result from the investigation. Since the first congressional investigation in 1792, Congress has looked into interstate commerce, Ku Klux Klan activities, the sinking of the R.M.S. *Titanic*, Wall Street banking practices, organized crime, the sale of cotton, the Vietnam War, presidential campaign practices, and television game shows.



With so much power over laws resting with the legislative branch, it is easy to understand why corporations and lobby groups representing business and industry interact so closely with elected members. While corporations and unions are banned from contributing directly to candidates for federal office, many corporations find individuals within the organization to donate and then present those donations together through "bundling." Meanwhile, lobbyists are often active in forming political action committees (PACs) to contribute to the campaigns of candidates they favor and in coordinating fundraisers where like-minded individual donors are assembled.

While lobbyists are, rightly or wrongly, blamed for much of what is wrong with government today, proposals to limit lobbying raise constitutional issues. The First Amendment protects the

"right of the people to . . . petition the Government for the redress of grievances." Lobbying is considered a form of "petitioning." While some restrictions may be placed on lobbying activities (for example, lobbyists may be required to register), an outright ban on lobbying probably would be unconstitutional.

Executive Branch

Article II of the Constitution calls for a president to serve as chief executive for the country and to enforce the laws passed by Congress. The president is elected every four years in even years. The president is limited to two full terms in office. The Constitution requires the president to be at least 35 years old, to be a natural born citizen of the United States, and to have resided in the United States for at least 14 years.

The Constitution leaves great discretion to the president to assemble a team, or cabinet, to assist in enforcing the laws of the land. In general terms, that cabinet includes the vice president and the heads of 15 executive departments:

- Secretary of Agriculture
- Secretary of Commerce
- Secretary of Defense
- Secretary of Education
- Secretary of Energy
- Secretary of Health and Human Services
- Secretary of Homeland Security
- Secretary of Housing and Urban Development
- Secretary of the Interior
- Secretary of Labor
- Secretary of State
- Secretary of Transportation
- Secretary of Treasury
- Secretary of Veterans Affairs
- Attorney General

CABINET:
The most senior appointed officers of the executive branch of government, nominated by the President and confirmed by the Senate.

Over the years, this team has grown to include large executive departments, agencies, boards, commissions, and committees. As a result, there are now more than four million employees working under the executive branch. These governmental representatives are charged with enforcing laws on a day-to-day basis.

Lest it appear that the president, then, is only an administrator working for Congress to carry out their laws, remember that the president also holds a very important veto power. The president has ten days to sign or veto any bill passed in the Legislature. However, to prevent the president from using the veto power to effectively "take over" the government, Congress may override presidential vetoes with a two-thirds majority vote from both the House and the Senate. The presidential veto and legislative override are just two examples of the checks and balances built into the Constitution.

Another presidential power is the power to recognize (or not recognize) foreign governments. The president can enter into agreements with foreign governments through official treaties that require Senate approval or through executive orders. An executive order is an order issued by the president, or by an official acting on his behalf, to direct executive agencies, or to set policy for the executive branch. Because they are not approved through the Senate, executive orders are inferior to treaties.

This power to manage relations with foreign power is reserved to the federal government. Thinking broadly, giving the president and the federal government the power to manage relations with foreign powers, rather than allowing individual states to strike international deals, helps to protect secrets and strategies involved in managing foreign relations.

Foreign relations are also best handled at the federal level because of their impact on national security, the national economy, and other national concerns. For example, in 1996, Massachusetts adopted a law that barred state entities from buying goods or services from entities on a "restricted purchase list." The list was made up of those who did business with the government of Myanmar, or those who were headquartered in Myanmar. Three months later, the U.S. Congress passed a law imposing economic sanctions on Myanmar. One provision of the federal law stated that the President was authorized to issue an order barring new investment in that country by "United States persons" if certain events happened. The President issued such an order a few months Congress passed the law. The U.S. Supreme Court held that the federal law pre-empted the Massachusetts law. The Massachusetts law undermined the President's capacity for effective diplomacy, and "compromise[d] the very capacity of the President to speak for the Nation with one voice in dealing with foreign governments." This is just one example how foreign relations are left in the hands of the federal government.

Judicial Branch

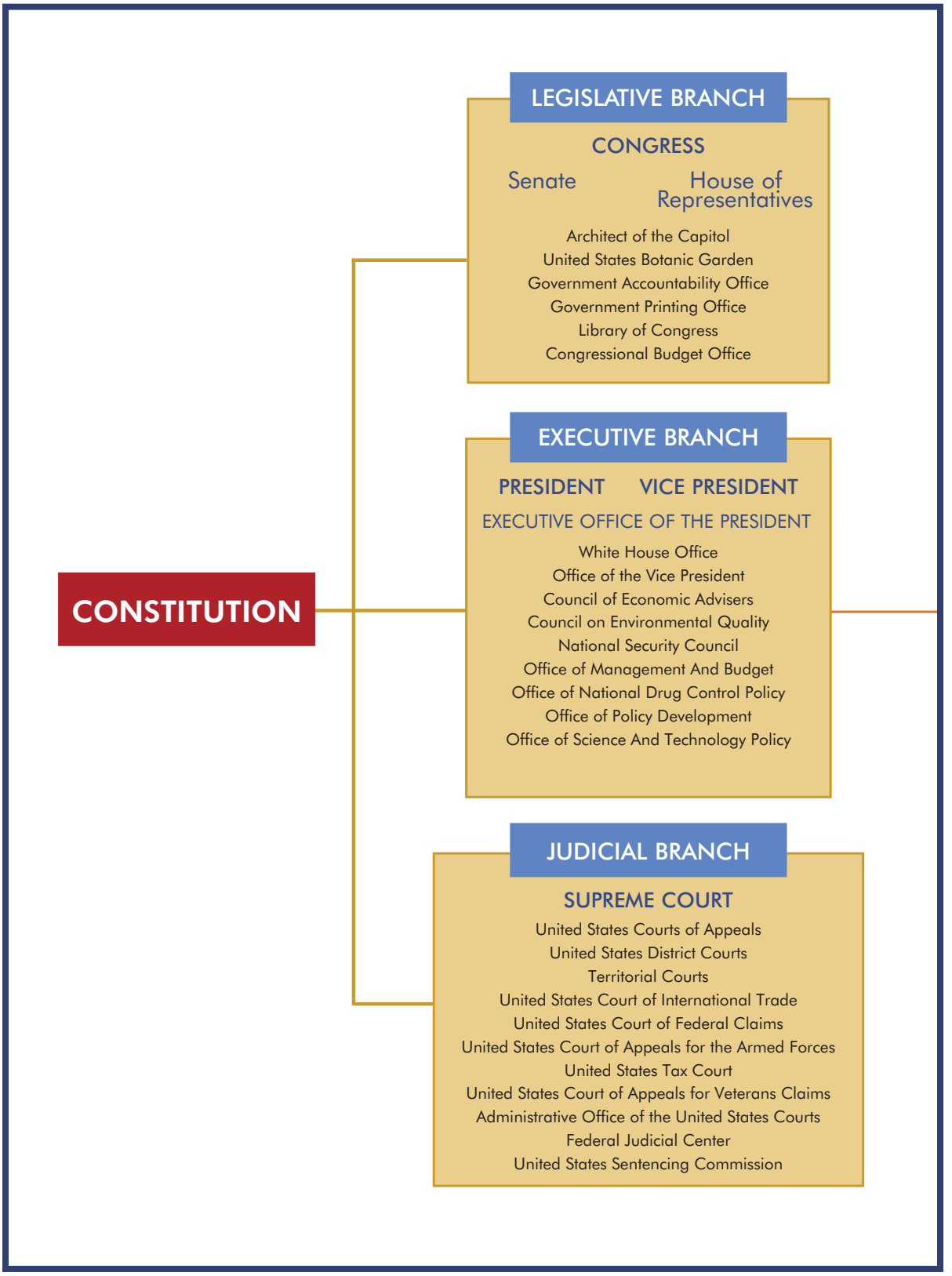
Article III of the Constitution establishes a Supreme Court of the United States and allows Congress to establish lower federal courts. Each federal (and state) court has its own specific jurisdiction. Jurisdiction is the legal power to hear a case.

JURISDICTION:
The legal power of a court to hear a case.

FEDERAL QUESTION JURISDICTION:
Case with alleged violations of the U.S. Constitution, federal laws, or federal treaties.

CONSTITUTIONALITY:
Whether a law or government action agrees with the Constitution.

As one example of an executive order, on August 12, 2016, President Obama signed Executive Order 13735, setting out who would serve as acting Secretary of the Treasury if the Secretary and Deputy Secretary were unable to serve.


CONSTITUTION
LEGISLATIVE BRANCH
CONGRESS
Senate
House of Representatives
Architect of the Capitol
United States Botanic Garden
Government Accountability Office
Government Printing Office
Library of Congress
Congressional Budget Office
EXECUTIVE BRANCH
PRESIDENT
VICE PRESIDENT
EXECUTIVE OFFICE OF THE PRESIDENT
White House Office
Office of the Vice President
Council of Economic Advisers
Council on Environmental Quality
National Security Council
Office of Management And Budget
Office of National Drug Control Policy
Office of Policy Development
Office of Science And Technology Policy
JUDICIAL BRANCH
SUPREME COURT
United States Courts of Appeals
United States District Courts
Territorial Courts
United States Court of International Trade
United States Court of Federal Claims
United States Court of Appeals for the Armed Forces
United States Tax Court
United States Court of Appeals for Veterans Claims
Administrative Office of the United States Courts
Federal Judicial Center
United States Sentencing Commission


EXECUTIVE CABINET
Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Health and Human Services
Department of Homeland Security
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Labor
Department of State
Department of Transportation
Department of the Treasury
Department of Veterans Affairs
INDEPENDENT AGENCIES
African Development Foundation
Central Intelligence Agency
Commodity Futures Trading Commission
Consumer Product Safety Commission
Corporation For National and Community Service
Defense Nuclear Facilities Safety Board
Environmental Protection Agency
Equal Employment Opportunity Commission
Export-import Bank of the United States
Farm Credit Administration
Federal Communications Commission
Federal Deposit Insurance Corporation
Federal Election Commission
Federal Housing Finance Agency
Federal Labor Relations Authority
Federal Maritime Commission
Federal Mediation and Conciliation Service
Federal Mine Safety and Health Review Commission
Federal Reserve System
Federal Retirement Thrift Investment Board
Federal Trade Commission
General Services Administration
Inter-american Foundation
Merit Systems Protection Board
National Aeronautics and Space Administration
National Archives and Records Administration
National Capital Planning Commission
National Credit Union Administration
National Foundation On the Arts and the Humanities
National Labor Relations Board
National Mediation Board
National Railroad Passenger Corporation (Amtrak)
National Science Foundation
National Transportation Safety Board
Nuclear Regulatory Commission
Occupational Safety and Health Review Commission
Office of Government Ethics
Office of Personnel Management
Office Of Special Counsel
Peace Corps
Pension Benefit Guaranty Corporation
Postal Regulatory Commission
National Railroad Retirement Board
Selective Service System
Small Business Administration
Social Security Administration
Tennessee Valley Authority
Trade And Development Agency
United States Agency for International Development
United States Commission on Civil Rights
United States International Trade Commission
United States Postal Service

The Supreme Court and federal courts have jurisdiction over disputes between citizens of different states and disputes involving non-U.S. citizens. The federal courts also decide cases where a party claims their Constitutional rights or protections have been withheld. These matters are said to involve a federal question.

In addition to these issues, the Supreme Court established another important power early in its history. In Marbury v. Madison, a landmark case from 1803, the Supreme Court established that it held the power to decide the constitutionality of newer laws.

Initially, this decision appears to limit the Supreme Court's power by stating the Court cannot order a government official to take a specific action. However, looking forward, the decision made the Supreme Court more powerful. The decision established that the Court has the power to determine what laws mean and to eliminate laws that conflict with the U.S. Constitution.

Federal judges are appointed by the president, and confirmed with a simple majority vote of the Senate. A federal judge enjoys a life-long appointment, which generally ends only on the judge's death or retirement. But Congress may also impeach and remove a federal judge in extreme circumstances.

In addition to the courts established under Article III, Congress has established other tribunals that have some judicial functions. These tribunals, known as Article I courts after the Article of the Constitution setting out the authority of Congress, have a circumscribed authority. They are sometimes set up to review federal agency decisions. They may also be ancillary courts, attached to federal district courts. Judges or judicial officers of Article I courts do not have life tenure, and their salaries may be reduced during their terms of office. Decisions of an Article I court that may deprive a person of life, liberty, or a property interest are subject to review by an Article III court.

Examples of Article I tribunals include:

- Bankruptcy Courts
- Court of Appeals for the Armed Forces
- Court of Appeals for Veterans Claims
- Court of Federal Claims
- U.S. Tax Court

II. Sources of Law

Laws come from constitutions, statutes, treaties, regulations, and court decisions. There are federal and state versions of each, except that treaties are found only at the federal level. Constitutions, statutes, treaties, and regulations form a body of enacted laws, while court decisions either interpret enacted laws or create new laws. Each type of law carries weight based on its source.

THE COURTS MAY OVERTURN LEGISLATION THAT IS UNCONSTITUTIONAL

Marbury v. Madison
(Appointee) vs. (Secretary of State)
5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)

At the December term 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel severally moved the court for a rule to James Madison, secretary of state of the United States, to show cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia.

This motion was supported by affidavits of the following facts: that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state, or any officer in the department of state; that application has been made to the secretary of the senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was made to show cause on the fourth day of this term.

[…]

The questions argued by the counsel for the relators were, 1. Whether the supreme court can award the writ of mandamus in any case. 2. Whether it will lie to a secretary of state, in any case whatever. 3. Whether in the present case the court may award a mandamus to James Madison, secretary of state.

[…]

The act to establish the judicial courts of the United States authorizes the supreme court 'to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.'

The secretary of state, being a person, holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.

The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that 'the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction.'

It has been insisted at the bar, that as the original grant of jurisdiction to the supreme and inferior courts is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

If it had been intended to leave it in the discretion of the legislature to apportion the judicial power between the supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction made in the constitution, is form without substance.

Affirmative words are often, in their operation, negative of other objects than those affirmed; and in this case, a negative or exclusive sense must be given to them or they have no operation at all.

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such construction is inadmissible, unless the words require it. If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system, divides it into one supreme, and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to the obvious meaning.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the supreme court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction, so conferred, can be exercised.

The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature repugnant to the constitution is void.

This theory is essentially attached to a written constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If then the courts are to regard the constitution; and he constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions-a written constitution, would of itself be sufficient, in America where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution. Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that 'no bill of attainder or ex post facto law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it, must the court condemn to death those victims whom the constitution endeavours to preserve?

'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent, that the framers of the constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: 'I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States.'

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him and cannot be inspected by him.

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

VESTED RIGHT:
A right that is unconditional, that cannot be taken away from a party.

WRIT OF MANDAMUS:
A writ requiring a lower court or government official to perform some duty or act.

COMMENT:

Although Marbury is said to have established the idea of judicial review in the United States, the practice was not unknown before that case, and was well-established in state courts. Marbury is significant as being the first time the Supreme Court struck down an act of Congress as unconstitutional. The Court first ruled on the constitutionality of a federal statute seven years earlier, when it held that a tax on carriages was not unconstitutional. Hylton v. U.S., 3 U.S. 171 (1796). The Court did not strike down another statute as unconstitutional until the infamous case of Dred Scott v. Sanford, 60 U.S. 393 (1857), in which the Missouri Compromise was declared to be unconstitutional.

QUESTIONS FOR DISCUSSION:

The law struck down in Marbury was passed by a majority of votes in Congress, and duly approved by President Adams. Does the practice of judicial review violate democratic principles? Or does the refinement of laws through judicial review improve the law over time?

Constitution

Article VI of the Constitution establishes that the U.S. Constitution is the supreme law of the land. This means that the laws stemming from it carry the most weight. Moreover, no other law, regardless the source, may conflict with the U.S. Constitution.

ENACTED LAWS:

Laws adopted by a legislative or administrative body.

The Constitution not only provides laws regarding the federal government's structure and powers, it also lists specific rights for individuals. These rights were introduced through the Bill of Rights, which was added to the U.S. Constitution in 1791. The Bill of Rights includes 10 amendments that, among other protections, guarantee freedom of speech and religion, the right to peacefully assemble, the right to bear arms, protection from unreasonable searches and seizures, and the right to fair proceedings in civil and criminal cases. Later amendments added more rights and protections. The Fourteenth Amendment, for example, provides equal protection under the law. When a person, group, or even a corporation believes constitutional

The Hierarchy of Laws:

Sometimes different laws are in conflict. In those cases, laws generally give way to more fundamental provisions. This list starts with the Constitution as the supreme law of the land, and continues through to state common law, which usually applies only to matters within that state.

- U.S. Constitution
- Federal statutes and treaties
- Federal administrative agency regulations
- Federal common law
- State constitutions
- State statutes
- State agency regulations
- State common law

rights or protections have been denied, a claim may be filed in a federal district court.

Each state has its own constitution as well. Most state constitutions establish the structure of the state's government, but they vary greatly beyond that starting point. State constitutions may deal with the matters that the U.S. Constitution has left for states to regulate. State constitutions may also include provisions similar to those in the U.S. Constitution. But because the U.S. Constitution is the supreme law of the land, the state constitutions cannot conflict with it.

Statutes

Statutes are laws passed by federal or state legislatures. At the federal level, members of the House or Senate begin the legislative process by introducing a proposed law as a bill. The bill is assigned to a committee, which discusses and studies the bill. If the committee finds the proposed law viable, they send it to the rest of the House or Senate, depending on where the bill started. The House or Senate debates and votes on the bill. The version voted upon may be far different than the originally proposed bill due to amendments the committee and House or Senate make.

If a simple majority of representatives or senators vote for the bill, it is passed and is sent to the other branch of Congress, where it is put through the same process of committee study, debate, amendment, and vote. Here again, a simple majority voting in favor passes the bill. Because the bill is amended separately by the House and Senate, the final versions that are passed may be different. Therefore, the two versions are sent to a committee with both House and Senate members to create a final version. The final version is again voted on by both the House and Senate, requiring a simple majority vote from each.

The Constitution requires only a majority in both houses of Congress to pass legislation. As a practical matter, however, passage of a bill in the Senate (with some exceptions) requires 60 votes in favor. Legislation in the Senate may be delayed or stopped by a procedural device known as the filibuster. The filibuster dates from 1806, and is based on a ruling by then-Vice President, and President of the Senate, Aaron Burr that the rule that allowed debate on legislation to be cut off by a simple majority vote be deleted (the Constitution grants each house of Congress the power to make its own rules). More than a century later, the Senate adopted rules for cloture, or a vote to end debate. Cloture rules require a supermajority vote to end debate.

STATUTES:
Written laws passed by a legislative body.

State constitutions may, however, give their residents additional rights and protections, beyond those guaranteed by the federal Constitution. For example, some state constitutions provide a right to education within the state—a right that does not appear in the supreme law of the land.

The traditional image of the filibuster is of a few Senators taking to the floor of the Senate chamber and talking at great length. The modern-day filibuster is nowhere near that dramatic. Instead of lengthy speeches, a filibuster now consists of offering numerous amendments to legislation, and demanding a time-consuming roll-call vote on each one.

Once Congress has approved a bill, the president has ten days to either approve the bill or veto it. The process is time-consuming, and often spills from one election cycle to the next, where a previously passed bill may not win final approval due to changes in members.

States pass laws using procedures that are usually defined in the state constitution and are often similar to the federal procedures for passing laws. In addition, counties, cities, towns, and villages enact laws. These laws are generally called ordinances, and they carry less weight than any federal or state law. Local governments derive their authority to pass ordinances from state law.

As previously discussed, neither federal nor state statutes may conflict with the U.S. Constitution. State statutes cannot conflict with federal statutes, either. But that still leaves plenty for state statutes to cover. States develop their own criminal laws for activities not regulated at the federal level. Additionally, state statutes can enhance protections offered by federal statutes, just as state constitutions can offer more protection than the U.S. Constitution.

One example of this can be seen by comparing the United States Civil Rights Act of 1964 with similar state statutes. The federal Civil Rights Act makes it illegal to discriminate against someone based on race, color, religion, national origin, or sex. But in 1976, for example, Michigan passed the Elliott-Larsen Civil Rights Act, which prohibits discrimination based on religion, race, color, national origin, sex, age, height, weight, or marital status. Thus, Michigan is just one state that guarantees protection for all the groups protected by the federal law, plus additional groups based on age, height, weight, and marital status.

Regulations

At the federal level, it is up to the executive, the president, to uphold the laws. Because the president cannot personally enforce the thousands of laws enacted by Congress, the president relies, in part, on administrative agencies to enforce laws. For example, if Congress passes a new law limiting the amount of pollution manufacturing plants can put into the air, then the Environmental Protection Agency (EPA) generally acts on the president's behalf to enforce the law. To do so, the EPA has been given the power to write procedures and guidelines for enforcing

Question: If a Michigan employee believes he was discriminated against at work because of his weight, does he sue based on the U.S. Civil Rights Act or the Michigan Civil Rights Act?
Answer: Michigan.

Question: If the employee believes he was discriminated against based on religion, does he sue based on the federal or state act?

Answer: Both!

the law, so long as they do not conflict with the law. For example, the EPA may set a schedule for routine testing that the manufacturing plants must follow, and the EPA may determine that suspected violators will be tried first in an administrative hearing rather than in a federal district court. The case of Chevron v. Natural Resources Defense Council, Inc., provides an excellent example.

State regulatory agencies work in much the same way. Building on the previous example, California may enact even stricter air pollution limits. In other words, all states must follow the federal law, but each state is free to give its citizens more protection than the federal law. In our example, the chief executive of California (the governor) will likely task California's state environmental protection agency with developing procedures and guidelines to enforce the state's air pollution restrictions.

Administrative agencies do not have unlimited discretion when making regulations. Congress may not delegate its legislative authority to an executive branch agency. When an agency is directed to make regulations, Congress must give the agency an "intelligible principle" on which to base the regulations. This standard is applied loosely, and it is rare that a regulation is struck down because does not follow an agency's intelligible principle.

Common/Case Law

Courts have a dual role in creating the law: creating and interpreting common law, and

SUPREME COURT DEMANDS DEFERENCE TO AGENCIES' STATUTORY CONSTRUCTION

Chevron v. Natural Resources Defense Council
(Environmental Protection Agency [and Polluters]) v. (Environmentalists)
467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)

INSTANT FACTS:
When the EPA interpreted the Clean Air Act to allow polluting factories to add new equipment while keeping pollution levels constant, environmentalists claim the Act should be interpreted to reduce pollution.

BLACK LETTER RULE:
If an agency's interpretation of its enabling statute is challenged, (i) reviewing courts must first independently determine if the statute clearly requires or forbids the agency's interpretation, then, (ii) if the statute is ambiguous, courts must uphold the agency's interpretation if it is a permissible construction of the statute.

PROCEDURAL BASIS:
In suit challenging agency's interpretation of statute, appeal from declaration for plaintiffs.

FACTS:
The Clean Air Act's (CAA) 1977 Amendments required polluters to obtain a state permit before constructing any "new or modified stationary sources" of air pollution. Obtaining the permit required abating new pollution stringently. The Environmental Protection Agency (EPA) (D) promulgated a rule interpreting the statutory phrase "stationary source" to include all polluting devices within a single plant. Thus, under EPA's (D) "bubble policy," factories could add a new pollutant, or increase emissions from an existing one, without obtaining a permit, if the addition/

increase did not increase the factory's total emissions, e.g., by replacing a broken polluting machine with a new one, or increasing emissions from one machine but reducing emissions from another.

Environmental lobby Natural Resources Defense Council (NRDC) (P) challenged EPA's (D) interpretation as unlawful, contending "source" means each polluting device. At trial, the Court of Appeals held for NRDC (P), finding the CAA indicated no Congressional opinion about the EPA's (D) "bubble policy," and finding NRDC's (P) interpretation served the CAA's goals better. EPA (D) appealed.

ISSUE:

If an agency's statutory mandate is ambiguous, may a court overturn the agency's construction of that statute upon finding it is not the best interpretation?

DECISION AND RATIONALE:

(Stevens, J.) No. If an agency's interpretation of its enabling statute is challenged, (i) reviewing courts must first independently determine if the statute clearly requires or forbids the agency's interpretation. Then, (ii) if the statute is ambiguous, courts must uphold the agency's interpretation if it is a permissible construction of the statute.

When courts review an agency's construction of the statute it administers, they must do so in two stages. First, if the court determines Congress spoke directly on the precise issue, then it must follow Congress' intent. But if the court determines the statute is silent or ambiguous on the issue, then it must determine whether the agency's interpretation is a permissible construction of the statute. If so, the court must uphold that interpretation, even if the court feels the agency's interpretation is not the only one, or not the best one.

Courts, upon finding Congressional ambiguity, cannot simply impose their own construction of the statute. Congress delegated to agencies the right to interpret the statutes they administer, and courts must give considerable deference to agencies' interpretation. This is because (i) judges are not experts, (ii) statutes' language often reflects a political choice or compromise, which courts should not upset, and (iii) when Congress delegates policymaking to Executive agencies, that is a political choice by elected officials, which should not be disturbed by the (unelected) judiciary.

Here, the Court of Appeals erred. First, it found, correctly, that the statutory language was ambiguous and the legislative history was unilluminating. Next, however, it failed to consider whether the EPA's (D) construction was permissible, and instead improperly imposed its own reading. Reversed.

ANALYSIS:

In Chevron, the Supreme Court sets the standard for courts' review of agencies' interpretations of their enabling statutes. It is a landmark case, and the most-cited decision in administrative law. Chevron requires courts to analyze agencies' statutory interpretations very deferentially; not surprisingly, in practice agencies prevail seventy-one percent of the time.

Chevron reconciles the longstanding Marbury v. Madison doctrine—that courts are the final interpreters of statutes—with more recent concerns about judges trampling Congress's delegation and overriding administrators' expertise, by its "Chevron two-step" approach. First, the courts may interpret the statute using their independent judgment, to decide whether the statute clearly demands one construction. But if the court decides it does not, then it must review the agency's interpretation with great deference.

CASE VOCABULARY:

ABATEMENT:

Reduction.

QUESTIONS FOR DISCUSSION:

How far should courts go in deferring to agency decisions? Many regulations involve complex scientific or technical principles. Does that make deference more or less appropriate?

interpreting and applying enacted, or codified, laws. Common law is law developed only through court decisions. It is said to be uncodified, meaning there is no statute or code that formally establishes the law.

The doctrine of stare decisis means that lower courts must apply the law decided by higher courts of appeal or the Supreme Court. Once a legal principle is established in a court decision, it is said to be a precedent. Courts generally follow or build on their own precedents in later cases involving the same types of issues, as well as following precedents set by higher courts.

Stare decisis is not an absolute rule, however. Courts may overturn their own precedents (although not those of higher courts). This will happen for many reasons. A court may determine that a rule set out in an older case no longer serves a purpose, or society has changed so much that a rule no longer makes sense. For example, the traditional common law rule regarding leases of residential property was that a landlord had no obligation to maintain the rented premises, or ensure that the property was fit for habitation. A lease was regarded as being akin to a sale of the property, with the difference between the two being that the landlord would, eventually, be allowed to retake possession of the leased premises. Courts began to revisit that rule in the 1960s and 1970s. It

COMMON LAW:
Judicial decisions that create a body of law over time.

UNCODIFIED LAW:
Rules taken from custom and precedent rather than statutes.

STARE DECISIS:
Legal principle that directs courts to follow precedents.

PRECEDENT:
An earlier court decision regarded as a guide to be considered in similar, subsequent cases.

When first learning about the common law, some people dismiss it as "made up." But many of our most well-known legal rules were developed through court decisions. For example, if you were arrested, you would expect that the police would "read" your rights, starting with "You have the right to remain silent. Anything you say can and will be used against you in a court of law." The rights that the police recite when they arrest a suspect are granted by the Constitution, but the requirement that an arrested person is informed of those rights was set by the U.S. Supreme Court in a 1966 case entitled Miranda v. Arizona, 384 U.S. 436. The case name is used when people refer to "Miranda warnings" or ask if a person was "Mirandized"—meaning that they were told their rights. While Miranda rights are widely recognized because of film and television (or personal experience), the common law also includes much older legal standards, such as contract interpretation rules and business liabilities. Some of today's common law has its origins in court decisions from hundreds of years in the past.

was noted by those courts that the common law rule was developed at a time when a lease of real property was a lease of agricultural property for a term that could stretch out for many years. The modern residential lease, on the other hand, is typically for an apartment or a house only—no agricultural or commercial property is involved. Given the change in the purpose of the transaction, it made sense for courts to begin requiring landlords to keep their premises in a habitable condition.

Over the decades, most common law rules have been codified. In other words, legislatures have enacted statutes to either take the place of common law or supplement it in some way. But even where common law has been codified, courts will still use it as a resource in interpreting those codes.

Constitutions and legal codes, by their very nature, can often be vague or incomplete. This is even desirable, as no one can predict every situation that might come up in the future. For example, the U.S. Constitution guarantees free speech. But does that mean individuals may say anything? May you claim a product you sell will cure cancer if it does not really cure cancer? May you publish an article stating that your neighbor is a murderer if she has not murdered anyone? The answer, of course, is no. Those statements go too far, and may injure others. But who decides exactly what you may say, and which statements go too far?

Sometimes constitutional provisions or statutes are further defined by regulatory agencies or by other statutes, for example, and this helps. But other times, the codes remain unclear to some extent or another. This lack of clarity may be intentional. For example, "fair use" of a copyrighted work is not an exception to infringement, even though it involves using another person's work without their permission. The term "fair use" is not defined in the law. This omission was by design: when Congress amended the Copyright Act to include the common law created doctrine of an explicit statement about fair use, there was concern that a precise definition of the term would be too restrictive, and would hamper the way the law responds to new, unforeseen uses. In such instances, a case can be filed in court so the court can determine precisely what the legislature intended or what the law should be concerning new technology or uses.

When a court decides these issues, it sets a standard for future, similar cases. This standard is called precedent. If the decision is made in a federal appeals court, for example, then the trial courts in that district must apply the law as set out in that decision when hearing future

In 1976, the U.S. Supreme Court decided that the Fair Labor Standards Act could not apply to state or local government employers. National League of Cities v. Usery, 426 U.S. 833. The Act established a minimum wage, among other protections, so state and local governments were exempted from those rules. Nine years later, the Supreme Court reversed its position in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528. The Court set forth sound reasons for the departure from precedent (too long to set forth here), but a reversal in such a short timeframe is still unusual.

cases. Likewise, if the U.S. Supreme Court decides a matter, then all federal courts below it must follow that decision when deciding future cases (as well as state courts that need to apply federal law). Because they help to define the enacted laws, these types of decisions carry the same weight as the laws they define.

Treaties and International Law

Treaties are agreements with foreign nations. Only the federal government may enter into treaties. Official treaties are proposed by the president and confirmed by a vote of two thirds of the Senate. The Constitution provides that treaties hold the same weight as federal statutes.

When we talk about international law, we are typically referring to public international law. This refers to rules that govern the relationships between countries; certain international organizations, such as the European Union, that have the legal authority to act at an international level; and the rules governing the relationships between countries, organizations, and individuals. Generally, countries voluntarily agree to the rules, which are spelled out in treaties adopted by those countries. There is also a large body of international law that is made up of general practices, or customs, that are accepted by most nations. While international law typically applies to how governments act, some public international law significantly impacts international business.

International law is compromised in large part of public international law and supranational law. Common public international law topics are admiralty law, international criminal law, and humanitarian law. Businesses are interested in laws concerning trade and intellectual property rights. Supranational law refers to regional agreements, such as the European Union. The rules in those agreements can carry more weight than the nation's own laws.

A good example of international law that impacts international business is the International Maritime Organization (IMO). Organized by the United Nations, the IMO regulates shipping, focusing on safety, environmental impact, cooperation, and security. Currently 171 nations participate. Participating countries follow the rules in the treaty known as the Convention on the International Maritime Organization. The IMO rules affect the processes and costs of transporting goods overseas.

International law tends to be reactionary, and is often developed in response to world events. For example, the United Nations organizes many of the largest international law programs. The IMO branch of the United Nations proposed additional rules in 1967, following the Torrey Canyon Oil Spill. These rules, which finally took effect in 1983, address pollution by ships at sea, another example of international law significantly affecting business practices. On the other hand, regional trade agreements, intellectual property treaties, and other systems that have a large impact on multinational businesses tend to refine obligations and relationships to take place in the future.

Not all international law is reactionary, though. Many international agreements seek to facilitate international business. The Convention on

Contracts for the International Sale of Goods, for instance, helps businesses gain predictability and fair outcomes in their international transactions.

Civil and Criminal Law

As you can tell, the U.S. legal system is large and complex, and includes many smaller and more specialized units. Here again we break down our study of the legal system into two parts, civil and criminal law. Civil law deals with disputes between private parties, such as contract matters or personal injury cases. The government uses criminal law to punish individuals who commit crimes.

Civil and criminal cases are heard in both federal and state courts. They are similar in some ways, but there are important differences between the two.

Civil claims start when a party called the plaintiff, which can be a person, group, corporation, or government body, believes another party has injured them or will injure them in the future. The injury can be physical, financial, or even emotional in some cases. The party with the injury, usually through a lawyer, starts the process by filing a claim in court, called a complaint. This is the first step in a lawsuit. Throughout the process, parties must follow a rather extensive set of rules, called the Federal Rules of Civil Procedure (FRCP), if the complaint is filed in the federal courts. Each state court system has a similar set of rules governing how cases will proceed through the state court system. State court rules are fairly similar to the federal rules in major respects.

BURDEN OF PROOF:
Amount of proof needed to prove one's case.

CIVIL CLAIMS:
Lawsuit to remedy a private wrong.

PARTY:
Plaintiff or defendant in a court case.

Remember that the same behavior or activity can lead to civil claims, criminal claims, or both. Take, for example, the criminal case of the People of the State of California vs. Orenthal James (O.J.) Simpson. On October 3, 1995, a jury found then-famous football player O.J. Simpson not guilty for the murders of his ex-wife, Nicole Brown Simpson, and her friend, Ronald Goldman. Later, the victims' families brought civil claims against Mr. Simpson for wrongful death, a state tort action. In February 1997, long after the not-guilty criminal verdict, jurors concluded that Mr. Simpson should pay the victims' families victims $33.5 million for causing the deaths. It is unusual to have such different outcomes in civil and criminal cases based on the same activity, but it is possible. This is due, in part, to the different burden, or degree of proof, needed to win a civil case rather than a criminal case. A criminal case must be proved "beyond a reasonable doubt" while a civil matter is decided by a "preponderance of the evidence"—a much lower bar.

Under the FRCP, the complaint must include two things:

1. An explanation for why the court has the authority to decide the case, and
2. A short description telling why the injured party deserves to win.

The short description included in the original complaint must name a cause of action for the claim. A cause of action is a fact or set of facts that gives a party the legal right to seek judgment against another party. There are far too many civil causes of action to list here, but some common ones include:

- Breach of Contract
- Negligence
- Defamation
- Patent Infringement
- Trespass

A complaint may include more than one cause of action. The facts may support more than one legal theory. Suppose a company hires a marketer, and makes that person responsible for writing brochures for the business; the employment agreement includes a non-compete clause. If the marketer were to quit and go to work across town for the company's main competitor, the company might bring an action to enforce the non-compete clause. If the marketer copied the text and logos that he created for the company and re-used them in the competitor's marketing materials upon taking his new job, the original company could also sue for the marketer's violation of the company's intellectual property rights in the same lawsuit.

There is another way that a complaint could include multiple causes of action: alternative pleading. Alternative pleading means that different types of claims are listed in the same complaint, even if those claims are logically inconsistent or legally contradictory. For example, an action claiming that a defendant negligently struck the plaintiff may include another claim that the defendant struck the plaintiff intentionally, even though the defendant could only have done one or the other. This is known as alternative pleading. Different types of claims are allowed, even if they are logically inconsistent or contradictory.

There are several reasons for using alternative pleading. An event could have happened for several reasons, and the actual reason may become apparent only after further investigation and discovery. There may also be pragmatic concerns for the recovery of damages. In the previous example, the damages for a negligent act might be covered by insurance, making it more likely that a successful plaintiff would be able to recover damages or reach a satisfactory settlement. On the other hand, the damages from an intentional act would not be dischargeable in bankruptcy.

When a complaint is filed, the filing party becomes the plaintiff. The party against whom the complaint was filed is the defendant. Each cause of action has a set of elements that the plaintiff must prove to win. The elements are like pieces of a puzzle, and all of the pieces must be proven for the plaintiff to win. The burden is

on the plaintiff, who must prove each element by a preponderance of the evidence. Loosely, this means the plaintiff must show that it is more likely than not that the defendant is responsible. Essentially, 51 percent of the evidence must support the plaintiff.

Once a complaint is filed and served, the case is assigned to an impartial judge who has no personal interest in the outcome of the case. The complaint is served by handing a copy of it to the defendant, by handing it to someone designated by the defendant, or by handing it to a person living at the defendant's address. If the defendant cannot be found, court rules provide that service may be made by publishing notice in a newspaper for a period of time. The defendant has 20 days after the complaint is served to respond. Defendants, usually through a lawyer, may ask that the case be dismissed because the complaint did not adequately state a cause of action. This is referred to as filing a motion to dismiss. Or defendants might respond by stating the reasons they do not believe the plaintiff should win. This is called filing an answer.

When filing an answer, a defendant's response may also include a counterclaim, or a third-party complaint. A counterclaim alleges that the plaintiff is liable to the defendant for something that arose out of the same occurrence or trans-

COMPLAINT:
First document filed with a court by a party that claims legal rights against another party.

CAUSE OF ACTION:
Fact(s) that enable a party to bring legal action against another party.

PLAINTIFF:
Party starting legal action against another party.

DEFENDANT:
Party accused in a legal action.

ELEMENTS:
Parts of a crime or legal action that each must be proven.

PREPONDERANCE OF THE EVIDENCE:
More than half of the evidence.

MOTION TO DISMISS:
Party's request to end a legal action.

Alternative pleading is allowed in a response to a complaint. The classic example is of a hypothetical answer to a complaint alleging the plaintiff was injured when the defendant's dog bit her. Alternative pleading would allow the defendant to argue:

1. His dog doesn't bite;
2. The dog was tied up that night;
3. The plaintiff was never bitten; and
4. The defendant does not own a dog.

While this list may appear bizarre, the defenses would all be valid individually. As the lawsuit proceeds, evidence may obviate one or more of these defenses, or bolster them. Providing the possible alternative defenses in the defendant's answer preserves them for consideration down the line.

action as set out in plaintiff's complaint. For example, a person who is sued by a contractor for non-payment may make a counterclaim that the work was performed negligently. A third-party complaint alleges that someone other than the defendant is liable for the plaintiff's damages. The contractor who is sued for negligently performing construction work may allege that the damage was caused by faulty materials made or sold by a third -party not named as a defendant in the plaintiff's original complaint. Unlike a complaint, a counterclaim or third-party complaint does not have to acknowledge that the plaintiff sustained any damage, or that any damage was even partially the fault of the defendant.

Note that a counterclaim or third-party complaint does not have to acknowledge that the plaintiff sustained any damage, or that any damage was even partially the fault of the defendant.

ANSWER:
Response to a complaint.

DISCOVERY PROCESS:
The process by which the parties to a lawsuit obtain information from each other and from witnesses.

INJUNCTION:
Court order for a party to do or not to do a specific thing.

DIRECT EXAMINATION:
Examination of a witness by the party that called the witness to testify.

No two lawsuits are the same. Each side can file motions for a variety of reasons. A motion is simply a formal request to the court. For example, the defendant might think the injury was someone else's fault, and file a motion asking that another defendant be added to the case. Or one party might think the other party is not complying with the court's orders and may file a motion to "compel" compliance. This type of motion requests that the court demand the other party follow a request, such as producing documents or other evidence. The court controls this part of the process through a scheduling order, which tells the parties when certain parts of the case must be completed, including a deadline for filing motions.

An important part of the schedule is the discovery process. This is a time when the two sides can ask each other to turn over or share records and other possible evidence. For example, suppose a woman injured in a car accident sues the driver of the car that hit her vehicle. The other driver might think the accident was the woman's fault, because she was not paying attention. The driver might want to ask the woman to provide her cell phone record for that day, to see if she might have been talking on the phone or texting at the time of the accident. The driver's lawyer would make a discovery request for those records. Discovery is also the time when the two sides might interview witnesses, and even each other.

While this process sounds simple, there are often disputes over whether one side should have to provide all the things the other side is asking for. These disputes often cause delays and might require a hearing with the judge to iron out disputes. By the end of the discovery process,

it is possible that the information collected can lead the parties to want to settle their dispute. If not, the parties prepare for trial.

Whether there is a jury involved in the trial depends on what the plaintiff seeks to achieve. A plaintiff seeking money is generally entitled to a jury trial. But when a plaintiff asks for an injunction, for example, which is an order requiring the defendant to stop doing something, the judge decides the case without a jury.

Trials typically begin with the plaintiff, and then the defendant, giving opening statements. These statements are designed to set the stage for trial, in an effort to prepare the judge or jury to hear the evidence as it fits into the big picture.

Plaintiffs must then call witnesses and present evidence to prove the elements of their cases. After the plaintiff questions a witness, called direct examination, the defendant may ask follow-up questions, called cross-examination. This process might go back and forth, with the plaintiff asking additional questions (re-direct) and the defendant following up (re-cross).

CROSS EXAMINATION:
Examination of a witness that has already testified in a court proceeding, conducted by the other side.

PROSECUTOR:
Public official who starts legal proceedings against another, usually for a crime.

CONVICTION:
Declaration of guilt for a criminal charge.

When the plaintiff has called all witnesses, it is the defendant's turn to call witnesses and present evidence that supports his version of events or legal theories. The process is repeated, with defendant conducting direct examination of the witnesses and plaintiff conducting cross-examination.

When each side is done presenting evidence and testimony, each makes closing arguments, starting with the plaintiff. The case is then turned over to the judge or jury to decide. When the judge or jury gives its decision, it is deciding in favor of one party or the other.

If either party is not satisfied with the decision in the case, she may start the appeal process. In an appeal, a party is claiming that an error of law took place in the trial court. Some common reasons for appeals are that judges did not allow evidence that could have helped that party, or that the jury was given the wrong instructions for deciding the case.

Appeals are heard by appellate courts. Since appeals deal only with questions of law, there are no juries in appellate courts. In the federal court system, trials are generally held in one of the many federal district courts, and those decisions may be appealed to the circuit court of appeals. If either party remains dissatisfied after the appeal, she may ask the United States Supreme Court to correct the claimed errors. Most state court systems largely follow the same process, with a trial court and two levels of appellate courts.

With all these steps and variables, it is easy to understand why it often takes years before a lawsuit is finally over. It is also easy to under-

stand why judges tend to encourage parties to settle their disputes without a trial.

The criminal law system is similar to the civil law system in many ways, but there are also important differences:

- The party who starts a criminal proceeding is a prosecutor, not a plaintiff. The prosecutor works for the local, state, or federal government and represents the people served by that government. Crimes are wrongs against the nation, state, or municipality and its people. Civil cases involve wrongs against or between private parties. The party being charged with a crime is still called the defendant.

The trial court makes factual determinations about the case. Appeals are based on the factual record as established at the trial court level; an appeals court does not re-open factual questions. Instead, the appeals court examines how the law was applied at the trial court, and whether any errors were made in that process. The reason that only trial courts rule on the facts is that the trial court (and the jury, if a jury trial) has the benefit of directly reviewing the evidence. Witnesses are only seen at the trial and questioned through the adversarial process that is designed to reveal what actually happened. The appeals court does not have that access, and therefore does not challenge the factual record.

- When a defendant loses a criminal case, the defendant is convicted while a losing party in a civil case is ordered to pay monetary damages.
- Convictions in criminal cases can result in loss of freedom, voting privileges, and other rights, depending on the crime. Civil liability is not punishment, and carries no consequences beyond being ordered to pay money or do something the person was already responsible for doing.
- Lawyers are sometimes provided free of charge for criminal defendants, unlike in most civil cases.
- In a criminal case, the defendant cannot be forced to testify in any way that might help the prosecutor prove the case.
- The burden of proof for a criminal conviction is proof beyond a reasonable doubt, which is much more difficult to prove than the civil preponderance-of-the-evidence burden. Judges and attorneys have struggled for generations to explain reasonable doubt clearly.

Crimes are divided into misdemeanors and felonies based on how serious the possible punishment can be. Misdemeanors are crimes where the worst possible penalties are fines or up to one year in jail. Felonies are crimes with maximum possible penalties of more than a year in prison.

Usually, the criminal process starts when police or federal agents arrest a suspected criminal and accuse the suspect of committing a specific crime. Prosecutors review the police report and evidence, decide if there is enough evidence to

charge the suspect, and decide what crime or crimes the evidence supports. If charges are filed, the defendant hears the charges at a first court appearance, called an arraignment. During the arraignment, the defendant enters a plea of guilty or not guilty.

If the plea is not guilty, the judge decides whether to keep the defendant in jail while awaiting trial or let the defendant remain free while awaiting trial. The judge may decide the defendant can remain free without paying anything, or the judge might require the defendant to pay an amount of money before being released. The idea behind collecting a fee is to ensure that the defendant returns for the trial. The money paid is forfeited if the defendant does not do so. The defendant may also request a free lawyer during the arraignment.

The next step in the criminal process is a preliminary hearing. In some cases, a grand jury might be asked to listen to the prosecutor's evidence and determine whether there is enough to continue with the case. In other cases, a judge will hear the prosecutor's evidence and determine whether the case should continue. If the judge or grand jury permits it, the case moves forward and is set for a trial date. Time is given for the defendant, usually through a lawyer, to review the evidence against the defendant. The defense may interview witnesses and collect evidence that tends to show it is less likely that the defendant committed the crime. This process is very similar to discovery in civil cases, with the exception that the defendant never has to speak to the prosecutor about the case.

Another similarity to civil cases is that criminal cases often settle at this stage. In criminal cases, this is called reaching a plea agreement. If an agreement is reached, the defendant will change the plea to guilty for the crime charged or for a less serious crime if the defendant and prosecutor agree. The defendant then accepts a penalty that both sides have agreed on. The judge must approve the plea agreement and make sure the defendant understands the rights he is giving up by pleading guilty.

MISDEMEANOR:
Minor wrong-doing.

FELONY:
A crime more serious than a misdemeanor, usually punishable by more than one year's imprisonment.

ARRAIGNMENT:
Court proceeding calling a party to court to answer a criminal charge.

A common understanding of "beyond a reasonable doubt" is that the prosecution's evidence must show that no other logical explanation can be concluded from the facts except that the defendant committed the crime, thereby overcoming the presumption that a person is innocent until proven guilty. A better definition of "beyond a reasonable doubt" is that it is the evidence presented by the prosecutor in a criminal trial proves the defendant's guilt to such a degree that no reasonable doubt could exist in the mind of a rational, reasonable person.

If the case proceeds to trial, the process is similar in many ways to a civil trial. The prosecutor gives the first opening statement, followed by the defense. The prosecutor calls witnesses and presents evidence to prove each element of the alleged crime. The defense can cross-examine the witnesses and challenge the evidence the prosecutor wants to present. The defense may then call its own witnesses and offer evidence that tends to show it is less likely the defendant committed the crime, or that there were circumstances that justified the defendant's actions, such as self-defense.

The defendant may or may not take the stand to testify. In other words, a defendant is not obligated to say anything in her own defense, and the jury is instructed that this silence may not be held against the defendant. In fact, a defendant is not required to present any evidence or witnesses at his trial. The burden is completely on the prosecutor to prove that the defendant committed the crime. The jury must presume the defendant is innocent unless the prosecutor proves every element of the crime beyond a reasonable doubt.

GRAND JURY:

A panel of citizens who examine accusations in a criminal case to determine if the case should go forward.

PLEA AGREEMENT:

Agreement in a criminal case between prosecutor and defendant by which defendant agrees to plead guilty to a particular charge in return for some deal from the prosecutor.

When both sides are done presenting evidence, the prosecutor and then the defense counsel give closing arguments. The judge then gives jurors instructions about the elements of the crime and the burden of proof the prosecutor must meet (beyond a reasonable doubt). The jury then discusses the case privately and comes to a decision. If the defendant has declined the right to a jury, the judge decides whether the prosecutor has proven the case.

If the defendant is found guilty, the judge will later impose a sentence, which may include jail or prison time, and usually requires the defendant to pay a variety of costs and penalties, as well. A defendant may appeal a criminal conviction or sentence using much the same procedure as in civil cases. But with rare exceptions, a prosecutor may not appeal if the defendant is found not guilty.

As a business student, you may feel that the civil legal process is the only one that will impact your career. That is not true. Corporations can break the law, and officers or employees can be charged criminally.

III. Federal and State Court Systems

Earlier in this chapter, you learned that there are both federal and state court systems. You read that only some claims can be heard in federal courts, while others must be heard in state courts. You also saw that states may structure their court systems in a way that best meets the state's needs, although many states use structures quite similar to the federal court

structure. We will now look more closely at those federal and state court systems.

Federal Court System

The U.S. Constitution only created the U.S. Supreme Court. Congress was given the authority to create lower federal courts as needed. Today, the U.S. Supreme Court is assisted by 13 federal appellate courts and 94 federal district courts.

Cases based on federal causes of action are first filed in federal district courts. Some cases based on federal law may be filed in state courts, and proceed through the state court system. A federal lawsuit filed in state court may be removed to federal court at the option of the defendant. They may be appealed in the corresponding federal appellate court. As a last resort, the matter can be appealed again, by writ of certiorari (see sidebar) to the U.S. Supreme Court. But the U.S. Supreme Court accepts very few cases. The Court is allowed to choose which cases it will hear. It hears arguments in approximately 80 cases per year, and decides an additional 50 without hearing arguments. In an average year, 7,000 petitions are filed with the Court. Some factors that may influence whether the Supreme Court accepts a case include whether the case raises an important constitutional issue and whether the issue pertains to important current events in the country. A U.S. Supreme Court decision is the final word on the matter.

State and Federal Jurisdiction

Plaintiffs in civil actions are faced with a decision when they file a complaint: where to file the action. Most claims can be filed in state courts. But sometimes a plaintiff may prefer to file in a federal court. This decision may be because the issues are primarily based on federal law, or a plaintiff may feel he will have a better outcome in federal court.

> A party who wants the Supreme Court to hear a case submits a petition for certiorari to the Court. The petition is a request for the Court to take the matter. If the Supreme Court agrees to review the case, it grants a writ of certiorari. Some state supreme courts also use certiorari to manage the cases they accept. Federal circuit courts or appeal and some state appeals courts take appeals "as a matter of right," meaning that they do not screen out cases prior to reviewing their merits.

Other times, a plaintiff may file in state court, but the defendant might want the case to be heard in a federal court instead. In those circumstances, the defendant may ask the state court to transfer the case. But only certain claims can be heard in federal court. When bringing a claim in federal court, the plaintiff must show that the federal court has both subject matter jurisdiction over the legal claim and personal jurisdiction over the parties .

Subject matter jurisdiction is the power to hear cases only involving particular issues. A family court could hear a divorce or custody case, for instance, but could not preside over a business-to-business contract dispute. Federal courts may hear cases only if they are based on diversity jurisdiction or a federal question, including questions involving the U.S. Constitution. Diversity jurisdiction applies when the two parties to a lawsuit are from different states, or when one party is from another country and the amount in controversy exceeds $75,000. There must be complete diversity of the parties. All of the defendants must be located in states different from the plaintiff's state when the lawsuit is filed. Federal questions are those that claim federal rights or protections are being withheld. These may include claims that challenge whether a law conflicts with the U.S. Constitution. In most cases not involving diversity or federal questions, state courts may be used. Federal courts have exclusive jurisdiction over areas such as bankruptcy, patents, or claims against the U.S. government.

Personal jurisdiction means that a court has the power to make a ruling against a particular person or organization. Personal jurisdiction is usually easy to show for individual people. Any federal court in the state where a person resides has personal jurisdiction over that person. For cases involving a corporation as the defendant, there are two ways to show personal jurisdiction: (1) the business was incorporated in the state where the court is located; or (2) the corporation's primary place of business, or headquarters, is in the state where the court is located. But there are other ways to show personal jurisdiction over a defendant, as well. Laws known as "long-arm statutes" may also grant jurisdiction over a non-resident of a state who is being sued for actions related to contacts he has with that state.

CONTINUOUS, SYSTEMATIC CONTACTS WITH A STATE SUBJECT A DEFENDANT TO JURISDICTION.

International Shoe Co. v. Washington
(Delaware Corporation) v. (State Taxing Authority)
326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95 (1945)

INSTANT FACTS:

The State of Washington (P) sought to recover unemployment compensation fund contributions from International Shoe Co. (D). Even though it employed salespeople in Washington, International Shoe (D) argued that it was not subject to jurisdiction in Washington.

BLACK LETTER RULE:

A corporation is subject to jurisdiction in any state with which it has "minimum contacts," so that the exercise of jurisdiction is consistent with notions of "fair play and substantial justice."

PROCEDURAL BASIS:

Certiorari to review a decision of the Washington Supreme Court upholding jurisdiction over International Shoe (D).

FACTS:

International Shoe (D), a manufacturer and seller of shoes, was a Delaware corporation with its principal place of business in St. Louis, Missouri. International Shoe (D) had no office in Washington and made no contracts for sale or purchase of merchandise there. At one point, International

Shoe (D) employed eleven to thirteen salesmen who resided in Washington (P) but reported to sales managers in St. Louis. The salesmen solicited orders from prospective buyers, which orders were transmitted to St. Louis, where they were processed and the products were shipped.

The State of Washington (P) required employers to contribute a certain percentage of wages to its unemployment compensation fund. Because International Shoe (D) did not pay into the fund, the State (P) issued a notice of assessment. International Shoe (D) moved to set aside the assessment because it was not a Washington corporation. The workers' compensation appeal tribunal denied the motion and ruled that the Commissioner was entitled to recover unpaid workers' compensation contributions. After subsequent appeals, the decision was affirmed by the Washington Supreme Court, which held that the continuous solicitation of orders in Washington by the defendant's in-state salesmen sufficiently demonstrated that International Shoe (D) did business in the state.

ISSUE:

Is it consistent with due process to subject a nonresident defendant to jurisdiction in a state where the defendant is not present, but with which it has minimum contacts?

DECISION AND RATIONALE:

(Stone, C.J.) Yes. No longer is a party's physical presence in a state necessary to establish personal jurisdiction. Instead, a defendant may fairly be subject to personal jurisdiction, even if it is not physically present in a particular state, if it has certain "minimum contacts" with the state.

Determining whether jurisdiction is proper depends on the nature and quality of the defendant's contacts with the forum state. A defendant's single or isolated activity in a state is not enough to subject it to suits that are not connected with those activities. Conversely, if a defendant's conduct in a state is continuous and systematic, the defendant is subject to suits that are not related to those activities. To the extent a defendant exercises the privilege of conducting activities within a state, the defendant enjoys the benefits and protections of the law of that state and must accept the potential for suits to arise against them.

In this case, International Shoe's (D) activities in Washington (P) were neither irregular nor casual. They were systematic, continuous, and gave rise to a large volume of interstate business. The obligation to pay into the unemployment compensation fund arose directly from International Shoe's (D) activities in the state. These activities created sufficient ties with Washington (P) so as to make it reasonable to subject International Shoe (D) to jurisdiction there. Affirmed.

CASE VOCABULARY:

LONG-ARM STATUTE:

A statute providing for jurisdiction over a nonresident defendant who has had contacts with the territory in which the statute is in effect.

MINIMUM CONTACTS:

A nonresident defendant's forum-state connections, such as business activity or actions foreseeably leading to business activity, that are substantial enough to bring the defendant within the forum-state court's personal jurisdiction without offending traditional notions of fair play and substantial justice.

QUESTIONS FOR DISCUSSION:

Businesses depend less and less on "things." Paper records and files are nearly obsolete, and communications technology makes it possible for a person to do business in multiple locations without being physically present in any of them. Should this alter the way we consider minimum contacts for due process?

A pivotal case, International Shoe Co. v. State of Washington Office of Unemployment Compensation and Placement, introduces the concept of sufficient contacts. This is the idea that a corporation that knowingly does a great deal of business in a specific state may be sued in the federal courts in that state.

To show personal jurisdiction over a defendant, the plaintiff must show that the defendant has contact with the place where the federal court is

CERTIORARI:
A higher court's acceptance of a case from a lower court for review.

PERSONAL JURISDICTION:
Power of a court over the defendant in a case.

SUBJECT MATTER JURISDICTION:
Authority of a court to decide a case of a particular type.

SUFFICIENT CONTACTS:
Enough connection between a non-resident defendant with the location where a legal case is filed to give a court there personal jurisdiction over that defendant.

located. Contact with the forum is not enough. The court must also determine whether it is fair to require the defendant to appear in a court in that location. In Asahi Metal Industry Co., Ltd. v. Superior Court of California, Solano County, the U.S. Supreme Court determined that asking the defendant, a Japanese manufacturer, to appear in a California federal court was unreasonably inconvenient for the defendant, and that other, less burdensome options were available.

Venue

After a plaintiff has shown both personal and subject matter jurisdiction, she must show that the specific federal court is the correct venue for the case. Although the concepts are similar, they are treated separately by the courts, and they have different purposes, as well. Jurisdiction refers to a court's legal authority over parties to a lawsuit. It would not be fair for a court to

SELLING A PRODUCT INTO THE STREAM OF COMMERCE IS NOT ENOUGH TO IMPOSE JURISDICTION OVER A MANUFACTURER.

Asahi Metal Industry Co. v. Superior Court (Japanese Manufacturer) v. (California Trial Court) 480 U.S. 102, 107 S. Ct. 1026 (1987)

INSTANT FACTS:
Victim of motorcycle accident brought suit in California court against Taiwanese tire tube maker, who cross-claimed against Japanese manufacturer of the tire tube valve assembly.

BLACK LETTER RULE:
The defendant must purposefully avail himself of the forum by more than just putting a product into the stream of commerce with the expectation that it will reach the forum state; however, such conduct is enough to satisfy the minimum contacts requirement.

PROCEDURAL BASIS:
Writ of Certiorari to the Supreme Court of California for its reversal of the Court of Appeal's writ of mandate directing the Superior Court to quash service of summons on cross-complaint for indemnification in action for damages for negligence.

FACTS:
In September 1978, Gary Zurcher and his wife, Ruth Ann Moreno, were in a serious motorcycle accident that left Ruth dead and Gary seriously injured. He claimed that the accident had been

caused when the rear wheel of his motorcycle suddenly lost air and exploded, sending the motorcycle out of control and into a tractor. Zurcher filed suit in Solano County, California, where the accident had occurred, alleging that the tire, tube, and sealant of his motorcycle were defective. He named as one of the defendants Cheng Shin Rubber Industrial Co., Ltd., the tire tube's Taiwanese manufacturer. Cheng Shin in turn filed a cross-claim—for indemnification in the event it was found liable—against Asahi Metal Industry Co., Ltd. (D), the Japanese manufacturer of the tire tube's valve assembly.

Zurcher eventually settled out of court with Cheng Shin, leaving Cheng Shin's cross-claim against Asahi (D) as the sole remaining issue to be tried. Asahi (D) argued that California could not exert jurisdiction over it, since Asahi lacked sufficient contacts with the state. Asahi (D) did not do business in California and did not import any products into California itself. Rather, it sold its valve assemblies to Cheng Shin and various other tire manufacturers. The sales to Cheng Shin took place in Taiwan, and the valve assemblies were shipped to Taiwan. Cheng Shin bought valve assemblies from other manufacturers as well. Sales to Cheng Shin accounted for a very small fraction of Asahi's (D) annual income—usually less than 1–2%.

Asahi (D) claimed that it had never contemplated that it might be subject to suit in California because of sales to Cheng Shin in Taiwan, but Cheng Shin claimed that Asahi (D) had been told and definitely knew that its products were being sold in California.

The trial court found that Asahi (D) could be subjected to California's jurisdiction. The Court of Appeal disagreed. Unfortunately for Asahi (D), the Supreme Court of California overruled the Court of Appeal, finding that Asahi's (D) intentional act of putting its products into the "stream of commerce" with the awareness that they might wind up in California was enough to justify California's exercise of jurisdiction. Asahi (D) proceeded to the U.S. Supreme Court.

ISSUE:

To establish minimum contacts with a state, is it enough to put a product into the stream of commerce, with the expectation that it will reach the forum state?

DECISION AND RATIONALE:

(O'Connor, joined by Rehnquist, Powell, and Scalia) No. It is not sufficient, for purposes of establishing that the defendant has minimum contacts with the forum state, to show that the defendant has intentionally placed its products into the stream of commerce—even if the defendant had the expectation in doing so that its products would reach the forum state. Something more, in addition to placing products in the stream of commerce, is necessary to establish minimum contacts between the defendant and the forum state.

Foreseeability alone is insufficient as a basis for jurisdiction. It is not enough that Asahi (D) might have been able to guess that some one or more of its products might eventually find its way into the state of California. Asahi (D) must have performed some act showing that it deliberately intended to take advantage of that state's market or laws. This does not mean that Asahi (D) could only invoke California's jurisdiction by importing its products directly. Cheng Shin's actions in importing Asahi's (D) products could qualify, provided that Asahi (D) took additional actions indicating its intent, such as, for instance, advertising or marketing its product in California, or deliberately designing its product to conform to regulations or laws unique to California, or providing a means for California users of its products to receive technical help or advice.

Since Asahi (D) has done nothing to indicate a deliberate wish on its part to see its products in California or to exploit the California market, it cannot be said to have the requisite minimum contacts with the state.

The minimum contacts analysis is not the only reason why California cannot exercise jurisdiction. There is still the matter of "traditional notions of fair play and substantial justice." Even if minimum contacts existed between Asahi (D) and California, it would be fundamentally unfair to require Asahi (D) to defend itself there. California's interest in this matter—the welfare of its citizens—was put to rest, for the most part, when Zurcher settled. The dispute is not just between two non-residents of California, but two nonresidents of the U.S. Given the rather extreme inconvenience necessitated by defending a suit in a distant forum and a foreign legal system, it would be unreasonable and unfair for California to exercise jurisdiction over Asahi (D) in this matter. Reversed and remanded.

ANALYSIS:

The Court unanimously held in this case that the California state court could not constitutionally exercise jurisdiction over Asahi (D). The Court followed a two-step analysis it had developed in its previous decisions. First, inquiry was made into the sufficiency of Asahi's (D) contacts with the forum state, and then those contacts were examined in light of fairness considerations to determine if the exercise of jurisdiction would be reasonable. Asahi's (D) mere awareness that the valve assemblies it sold to Cheng Shin eventually would end up in California was not sufficiently purposeful to establish minimum contacts.

CASE VOCABULARY:

INDEMNIFICATION:

Reimbursing another party for financial losses or damages, or an agreement to indemnify against losses or damages.

QUESTIONS FOR DISCUSSION:

The Court notes that jurisdictional requirements are not satisfied by placing an article in the stream of commerce even with the expectation the product will end up in a given state. Further actions, such as advertising or marketing, or designing a product to conform to unique requirements, would be necessary. Does that allow manufacturers to escape liability? If a manufacturer knows that a product will be sold and used in a particular state without any special targeting of that state, should she be allowed to claim that there is no jurisdiction?

impose liability on a party who had absolutely no connection to the geographic area where the court sits. For such parties, the court has no personal jurisdiction.

Venue, on the other hand, refers to a set of rules that considers the convenience of one court over another. Generally, a case is in the proper venue if it is filed in a federal district court where either (1) the defendant resides, or (2) most of the events that led to the lawsuit took place. If neither is true, venue is proper in any district court that has personal jurisdiction over the defendant. Parties have more discretion in selecting the venue for a lawsuit than in deciding which court has jurisdiction. While parties may agree that a dispute be heard in a particular court, the court will make its own determination of its jurisdiction. A court has no authority to hear a case without jurisdiction even if the parties agree that a court may hear it.

DIVERSITY JURISDICTION:

Court case with parties from different states or with a foreign party.

VENUE:

Residence of defendant or place where most events leading to a legal claim took place.

Foreign Legal Systems

In addition to the legal systems that we have already discussed, three others are important to business students, especially considering today's international business climate. Many countries use components of more than one system. Because today's business students will interact in global markets, it is important for you to recognize that other countries have their own way of doing business. You may be accountable under another country's legal system and the domestic laws of that country if you choose to do business there.

Civil Law

Civil law is a system where formal statutory codes are the primary source of law used by judges to decide cases. (In this context, "civil law" describes a legal system in a foreign country; it has a different meaning than "civil law" disputes between private parties in the U.S. system.) Foreign civil law systems rely on comprehensive codes, as well as constitutions, as their legal authority. Customary law and opinions of other courts are secondary sources, or evidence of what the law is, but they are not binding authority. This system grew from ancient Roman law, and forms the basis for legal systems in Continental Europe, such as France, Spain, and Portugal, and areas once colonized by those countries, such as Louisiana, Mexico and Quebec.

Civil law systems are also often found in countries with historical or current socialist or communist ties. Legal codes in those countries have been revised to include principles associated with Socialism and Communism. Some examples include Russia and the Ukraine China and Japan also have civil law systems. And unlike the rest of the United States, the Louisiana legal system is based on civil law.

The primary difference between civil law and common law systems is the role of the courts. Under the common law, rules are developed in court cases in the absence of legislation. If there is legislation, a court's interpretation of the rule will affect how other courts apply that legislative rule in different cases. The different roles for the courts lead to practical differences the roles that lawyers and judges play In common law and civil law systems. In common-law countries like our own, for example, lawyers serve as advocates, building a case and presenting it to a judge, who serves as more of a referee or arbiter between legal positions. In civil law systems, judges have a more active, investigative role than judges in common law jurisdictions, but they are limited in how much they may interpret the law.

Bijuridical Systems

Some countries have legal systems that include more than one category. The Canadian system, for example, stems from English common law concepts. But Quebec uses a French civil law system in most civil matters. Therefore, Canada is referred to as a bijuridical system. In the United States, Louisiana also follows a French civil law model. India's legal system, too, is based primarily on common law, but some parts of the country use a system based on Portuguese civil law. South Africa is another significant country with a bijuridical system.

Islamic Law

Approximately 1.3 billion people practice Islam. For non-Muslims, there is a great deal of confusion around the concept of Sharia law. Sharia is a traditional legal model derived from Islamic texts and authorities. Sharia also incorporates rules that stem from scholarly interpretations of the texts, and from community consensus or custom. Sharia, which means "the path," covers daily routines, family relations, financial matters, and criminal justice.

But how much Sharia is incorporated into formal government codes varies. In some countries, there is a constitution-level bar against laws that oppose Islamic writings. Such a prohibition leaves ample room for development of a complete legal system facilitating business, contracts, and finance. In other nations, such as Nigeria, Kenya, and Tanzania, Sharia is used mainly for personal and family issues for Islamic households.

Generally speaking, however, the overall legal system in Islamic countries is usually either common law or civil law. For example, Pakistan has a strong common law system served by highly trained attorneys, while Egypt uses a civil law model. (Saudi Arabia is one example of a country that uses neither common nor civil law.)

Even though Sharia may not formally be part of the legal system, it may impact business practices and transactions. One example is the prohibition against unearned interest (riba). Turkey is constitutionally a secular nation, but if you are doing business there, you may need to plan transactions to avoid interest payments. This requirement may not be part of the national law, but it may be a requirement of your Turkish business partner.

IV. Legal Analysis

Because court decisions are so important to understanding the finer points of how businesses must operate, business people must be comfortable reading court decisions. Those decisions, however, often use challenging language and specialized terminology to present complex discussions. This section will help decode decisions.

Case Format

A court decision contains certain important parts that you should be able to recognize as you read. Although case format differs slightly from court to court, the parts are essentially the same.

Heading: The case citation (where the case is published), the name of the case, the court that issued the decision, and the date of the decision.

Syllabus: The syllabus, when it is included, gives a short summary of the case, focusing on the legal issues in dispute and how the court resolved those issues.

Procedural History: The significant steps that have happened with the case so far: which courts have heard the case and what decisions did they make? This information may be missing if the decision is from a trial court where the case started.

Facts: A summary of what happened between the parties to lead to the lawsuit; the back-story of the case. This can be very short, or it can be very complex, going on for several pages.

Issues: While many things happened, each case usually comes down to one or a few matters that are truly in dispute; the legal question the court needs to decide.

Holding: The court's answer to the issue.

Judgment: The action that must be taken, based on the court's judgment.

Rule: What the decision means for the cases that come after it.

Cases written in recent years tend to be written more clearly than cases from several decades ago. Regardless, the parts identified above provide an organizational structure to reading cases.

Reading the Law

Reading the law is not like other types of reading. Learning to read cases will help you to develop your critical thinking skills while studying the court's opinion. When you read a court's opinion, you should be looking for very specific things. Of course, you will need to determine the rule in the case, but you must examine every aspect of the case to fully understand the rule. What role do the specific facts play in the court's decision? If the facts change, will the outcome be the same? What reasons (referred to as "rationale") did the court use in reaching its decision? What statutes, if any, did the court use to support its decision? How do previous cases fit into the court's analysis?

Let's use a simple example unrelated to the law: a teenager asks her parents for permission to travel out of state with friends for the weekend. Along with their answer (especially if the answer is no), the parents are likely to give a list of reasons supporting that decision, for example, these friends have been in trouble at school, the daughter regularly ignores house rules designed to keep her safe, the daughter violated her parents' trust the last time she was allowed to travel with these friends, etc. From this very basic rationale, we can formulate a rule: A teenager may not travel out of state with friends where past experience indicates an unreasonable risk of harm. And from this rule, we can start to predict the outcome of future cases. What will the outcome be, for example, if the next request involves a different set of friends?

Cases, much like a parenting decision, are simply written explanations that help us understand the law better. It would be impossible for the legislature to draft statutes that covered every single possible situation that might arise in the future. So when each new situation arises, and the people involved disagree about what the law requires or allows, courts are asked to intervene. In this way, each case is part of a much bigger picture. And although each case is very important to the parties, it is even more important to the rest of us. In a common law system, each case in which the judge interprets law builds on previous cases. The judges consider more than just the parties to a lawsuit, as each case builds on the ones before it in defining the law.

When reading cases, then, you need to keep the bigger picture in mind: how does this case help shape the law considering everything else we know about the law?

An efficient and effective way to read cases includes writing a case brief. This is a standardized way of summarizing the most important parts of the case. So let's look at an actual court decision, identify the parts of the decision, and examine the case brief. In fact, the cases in this book are presented in the form of case briefs. You should look at some of the actual opinions, though, to gain practice in reading cases effectively.

The somewhat humorous case of Mayo v Satan includes a short discussion of a concept we covered earlier in this chapter, personal jurisdiction, as well as some other legal issues. Read the case below, and then return to this discussion.

So, what happened here? The plaintiff, Mr. Gerald Mayo, attempted to sue Satan (and his "staff") for putting obstacles in the plaintiff's way and causing him problems. In this case, though, the court was not asked to decide whether the defendant had actually done what Mayo alleged. Instead, the case addressed a preliminary procedural matter: was Mayo allowed to bring the suit at all?

Many courts include a syllabus in their decisions. And in many other cases, the publisher will include a syllabus even when the court does not. The syllabus can be an excellent starting point when reading a case because it summarizes very briefly the key issues and holdings in the case. Having this information before reading the case gives you an advantage: you know what to look for. You can read the case with an eye toward understanding the basis for the court's holding, and understanding the nuances of the court's reasoning.

The syllabus in the Mayo case does a nice job of summarizing the most relevant parts of the case: Mr. Mayo wants to bring a civil-rights suit against the devil; the court said no, for three reasons: personal jurisdiction, problems with a class-action suit, and no way to notify Satan about the suit. Now read the syllabus carefully, with this summary in mind. Do you see how this will help you as you read the rest of the case?

Moving on to the opinion itself, you can see that the court states the legal issue in the first sentence of the opinion: "Plaintiff . . . prays for leave to file a complaint . . ." Plaintiff is asking the court's permission (or "leave") to sue Satan. Unfortunately, not all courts make it this easy to find the issue! The first sentence also identifies some of the statutes that are relevant to whether the court has jurisdiction.

The rest of the first paragraph, along with the second paragraph, gives background facts. The court could have gone into detail about the specific ways in which Satan allegedly interfered with the plaintiff's life, but those details are not relevant to whether the plaintiff should be allowed to sue. Courts will often include legally irrelevant detail anyway, though, so this is something to watch out for.

In the third paragraph, the court states its holding: Mr. Mayo's request is denied. It is helpful when a court starts with the conclusion like this, but you can also skip ahead to see how the court resolved the issue. Here, of course, you already knew the answer because the syllabus provided it. Reading a case can be a bit like putting a jigsaw puzzle together. It is far easier if you can see a picture of the final product while you're working on the puzzle. In the same way, if you know the court's holding, the rest of the decision can be easier to understand.

At this point, you may be wondering what "in forma pauperis" means. The law is filled with Latin terms that lawyers have become used to and that some would call "legalese." Regardless, it is important to stop when you come across a term you do not understand and look the term

Name of the court hearing the case

Citation – the volume, reporter (book), and page where the case can be found

54 F.R.D. 282

United States District Court, W. D. Pennsylvania.

Parties to the case

UNITED STATES ex rel. Gerald MAYO

v.

SATAN AND HIS STAFF.

Misc. No. 5357.

Date the case was decided

Dec. 3, 1971.

Syllabus – a summary of the case, included by the publisher

Civil rights action against Satan and his servants who allegedly placed deliberate obstacles in plaintiff's path and caused his downfall, wherein plaintiff prayed for leave to proceed in forma pauperis. The District Court, Weber, J., held that plaintiff would not be granted leave to proceed in forma pauperis who in view of questions of personal jurisdiction over defendant, propriety of class action, and plaintiff's failure to include instructions for directions as to service of process.

Prayer denied.

Opinion

Name of the judge hearing the case

MEMORANDUM ORDER

WEBER, District Judge.

Summary of the facts, including the legal issue being raised

Plaintiff, alleging jurisdiction under 18 U.S.C. § 241, 28 U.S.C. § 1343, and 42 U.S.C. § 1983 prays for leave to file a complaint for violation of his civil rights in forma pauperis. He alleges that Satan has on numerous occasions caused plaintiff misery and unwarranted threats, against the will of plaintiff, that Satan has placed deliberate obstacles in his path and has caused plaintiff's downfall.

Plaintiff alleges that by reason of these acts Satan has deprived him of his constitutional rights.

Analysis of the legal issue – the court's rationale for its decision

We feel that the application to file and proceed in forma pauperis must be denied. Even if plaintiff's complaint reveals a prima facie recital of the infringement of the civil rights of a citizen of the United States, the Court has serious doubts that the complaint reveals a cause of action upon which relief can be granted by the court. We question whether plaintiff may obtain personal jurisdiction over the defendant in this judicial district. The complaint contains no allegation of residence in this district. While the official reports disclose no case where this defendant has appeared as defendant there is an unofficial account of a trial in New Hampshire where this defendant filed an action of mortgage foreclosure as plaintiff. The defendant in that action was represented by the preeminent advocate of that day, and raised the defense that the plaintiff was a foreign prince with no standing to sue in an American Court. This defense was overcome by overwhelming evidence to the contrary. Whether or not this would raise an estoppel in the present case we are unable to determine at this time.

If such action were to be allowed we would also face the question of whether it may be maintained as a class action. It appears to meet the requirements of Fed. R. of Civ. P. 23 that the class is so numerous that joinder of all members is impracticable, there are questions of law and fact common to the class, and the claims of the representative party is typical of the claims of the class. We cannot now determine if the representative party will fairly protect the interests of the class.

We note that the plaintiff has failed to include with his complaint the required form of instructions for the United States Marshal for directions as to service of process.

For the foregoing reasons we must exercise our discretion to refuse the prayer of plaintiff to proceed in forma pauperis.

Holding – whether the plaintiff wins or loses

It is ordered that the complaint be given a miscellaneous docket number and leave to proceed in forma pauperis be denied.

up. In forma pauperis mean "in the manner of a pauper." Practically speaking, it means that Mr. Mayo wants the court to waive the costs of filing his lawsuit. Although interesting, it is not relevant to the legal issue: whether Mr. Mayo will be allowed to sue.

The third paragraph next identifies and then explains the court's first reason for denying Mr. Mayo's request: even if Satan has violated Mr. Mayo's civil rights, the court cannot tell if it has personal jurisdiction over Satan. (You may want to go back and quickly review personal jurisdiction.) The court gives three reasons. First, Mr. Mayo did not include an address for Satan. Second, the court could not find any other cases in the district where Satan was a party, so that too suggests he does not live in the jurisdiction. Third, the court found an "unofficial account" of a New Hampshire case where Satan was a plaintiff (a reference to Steven Vincent Benét's short story, *The Devil and Daniel Webster*), which could affect this case. In other words, Mr. Mayo did not give the court enough information to allow it to conclude that it has personal jurisdiction over Satan.

In the next paragraph, the court theorizes that even if the court allows Mr. Mayo to file the suit, there are so many potential plaintiffs with the same claims against Satan, that the case might have to be tried as a class-action suit. The court even goes through the requirements for a class-action suit. But the last sentence of the paragraph explains why this is a problem: a class action requires someone to represent everyone else who has similar claims against the same defendant. The court does not have enough information to decide whether Mr. Mayo could do this. This is the second reason the court will not allow Mr. Mayo to file the suit.

Finally, in the fifth paragraph of the opinion, the court notes that Mr. Mayo was required to include instructions to the U.S. Marshal to be able to deliver the complaint to the defendant. He failed to include those instructions. This is the third reason the court will not allow him to file the suit.

What is the "Rule"?

Unfortunately, you will not usually find a sentence in court decision that starts with, "The rule is . . ." It often takes careful reading to find, and then to understand, the rule from a case. The rule from the case is not the same as the holding, although they are closely connected. The holding is the answer to the issue. Will Mr. Mayo be allowed to sue? No.

The rule is what judges and lawyers can take from the case to help guide future decisions and future representation of clients. Here, we can formulate a rule from the court's holding and reasoning.

The court here held that Mr. Mayo could not file suit for three reasons. It is difficult to tell, though, whether a future plaintiff could sue Satan if, for example, he overcame one of the three reasons. Consider this: what if Mr. Mayo's application to the court had made clear that he would be an excellent class-action representative? Would the other two reasons be enough to preclude that next plaintiff from filing suit? Probably, but this is the sort of question that might be argued later.

First, presume that any one of the court's reasons was enough. In that case, we could formulate three rules:

1. A plaintiff may not file a lawsuit where the record lacks enough information for the court to determine whether it has personal jurisdiction over the defendant.

2. A plaintiff may not file a lawsuit where the suit will likely be a class action and the court cannot determine whether the plaintiff will fairly represent the interests of the class.

3. A plaintiff may not file a lawsuit where the complaint does not include service-of-process instruction to the U.S. Marshall, as required.

Alternatively, we might identify a single rule: A plaintiff may not file suit where the court cannot determine whether it has personal jurisdiction over the defendant, where the suit is likely to result in a class action and the court cannot determine whether the plaintiff will adequately represent the class, and where the plaintiff fails to include the required instructions to the U.S. Marshal in his complaint.

The rule, then, helps guide the legal community, including future plaintiffs. And if Mr. Mayo wants to try again, he will need to overcome at least the three obstacles listed by the court.

Now that we have identified the important parts of the *Mayo v. Satan* case, you can see how the parts come together in the case brief. In practice, writing the case brief is an ongoing process. You will understand the case better as you try to reduce its parts to writing. As you gain a better understanding, you will be able to refine the case brief.

Is it Good Law?

A critical question when reading cases is whether the case is "good law." In other words, does anyone need to follow this case? It has been said that the law is a living, breathing thing. And while the courts try to achieve stability in

A PLAINTIFF MAY NOT PROCEED IF THE COURT CANNOT DETERMINE WHETHER IT HAS PERSONAL JURISDICTION OVER THE DEFENDANT, WHETHER THE PLAINTIFF CAN ADEQUATELY REPRESENT THE INTERESTS OF THE CLASS, AND HOW THE DEFENDANT IS TO BE SERVED.

Mayo v. Satan
(Private Individual) v. (Evil Entity)
54 F.R.D. 282 (1971)

INSTANT FACTS:
Mayo (P) attempted to sue Satan (D) for violating Mayo's (P) civil rights by interfering with his life.

BLACK LETTER RULE:
A court must have personal jurisdiction to hear a case.

PROCEDURAL BASIS:
Civil rights action

FACTS:

Mayo (P) attempted to file a civil-rights action, in forma pauperis, against Satan and his staff (D) for causing Mayo (P) misery, making threats against Mayo (P), deliberately placing obstacles in Mayo's (P) path, and causing Mayo's (P) downfall.

ISSUE:

May the court hear a case against Satan?

DECISION AND RATIONALE:

(Weber, District Judge) No. (1) A plaintiff may not proceed in a lawsuit if the court does not have personal jurisdiction over the defendant. The court noted that Mayo (P) had not provided an address for Saturn (D), and that the court was unable to find any other case in the jurisdiction in which Saturn (D) was a party. (2) A plaintiff may not proceed in a lawsuit if that suit is likely to become a class action, and the court cannot determine whether the plaintiff can adequately represent the interests of the entire class. (3) A plaintiff may not proceed in a lawsuit if he fails to give instructions in his complaint that would allow the U.S. Marshal to serve the defendant. Application denied.

CASE VOCABULARY:

IN FORMA PAUPERIS:

"In the manner of a pauper"; being excused from paying court costs and fees.

QUESTIONS FOR DISCUSSION:

Should courts be required to consider all lawsuits, however frivolous or outlandish they may seem? Attorneys are required by rules of professional ethics, as well as by statutes and court rules, to act as "gatekeepers" and to decline to bring clearly meritless claims. Who fills that role when the plaintiff is unrepresented, as Mr. Mayo was here?

In 2007, Nebraska State Senator Ernie Chambers filed a lawsuit against God, seeking an injunction against "plagues and terroristic threats." Sen. Chambers, a member of the Legislative Judiciary Committee, said he was filing his suit in protest of the requirement that even frivolous lawsuits be considered by the courts. Sen. Chambers's suit was dismissed for failure to include an address for service of process on the defendant. What do you think of this outcome in light of the Mayo case?

the law, each new case still clarifies the law a bit. A new case may expand or limit the reach of the law, create an exception, create or change the way a word or phrase is defined, or overturn the existing law all together.

Because of this, it does no good to thoroughly understand a case, only to find out that later cases (or later statutes or rules) have changed the law, and that your case no longer carries any weight.

The methods of determining whether a case is still good law are outside the scope of this book. But you should be aware of this important detail when reading cases in the future.

The common-law practice that dictates that courts follow rules set out in earlier cases is the rule of *stare decisis*. Under the doctrine of *stare decisis*, when a court has set out a principle of law, it will adhere to that principle and apply it to all future cases with facts that are substantially the same. The doctrine ensures that similarly situated individuals are treated alike, instead of in accordance with the personal view of a judge. Rules may be changed, or even abolished, when there has been a significant change in circumstances since the adoption of the legal rule, or when the legal reasoning behind a rule is faulty. Absent those circumstances, like cases should be decided alike. *Stare decisis* aims to ensure stability and predictability in court decisions.

Law and Ethics

What are ethics? Ethics are standards of behavior determining how we respond in specific situations. Simply put, ethics are a code of conduct. In business, ethics are the legal, fair, and thoughtful ways businesses interact with stakeholders.

Where do ethics come from? Just like individuals have a lot of choice in how they conduct themselves, so do businesses. Both individuals and businesses are regulated by laws. The laws create the "ground floor" for individual and business conduct. If the basic responsibilities are not met, civil or criminal legal action can follow.

You probably strive to conduct yourself somewhat better than the minimum required by law. You may try to be kind to others or to "give back" to the community. There is no law saying you must speak pleasantly, volunteer in your community, or donate to charity, but you may choose to do so. This may be because you like being nice. It might be because you hope your good behavior will cause others to like you, be nice to you, respect you, or even hire you. It may be because you have a sense of obligation to do your part for the greater good.

Businesses are also encouraged to operate with principles above the minimum required by law. Businesses may choose to offer excellent customer service, pollute less than the law allows, pay above the minimum wage, or donate a portion of profits to good causes. Some business leaders are driven toward good behavior by a sense of social responsibility, while other businesses try to appeal to investors, customers, and other stakeholders by having a track record of ethical behavior. Many ethics topics are covered in detail in the chapters that follow. This section provides a general overview of required ethical standards.

Business Ethics

In October 2001, a very large energy corporation, Enron, was caught hiding billions of dollars in business losses and debt from shareholders. After the world found out about Enron's poor financial health, the company declared bankruptcy within two months. Shareholders lost enormous amounts of money. Aside from the loss of 20,000 jobs and over $63 billion of investor money within Enron, the scandal also bankrupted Enron's auditing firm, Arthur Andersen LLP. The Enron scandal was a collection of ethical, as well as legal, failings. It was a very public and far-reaching example of the harm that can be done when a company breaks the law and is unethical in its dealing with stakeholders. Of course, Enron also violated the law.

Stakeholders: The word "stakeholders" in this context is just want it sounds like: those who hold a stake in a business's successes, failures, and conduct. Obviously, the owners and investors hold a financial stake, but a business has many other stakeholders as well. Its customers and employees stand to benefit or gain from the business's performance, and so do its suppliers and others it does business with. On a larger scale, the communities where the business conducts its trade are also stakeholders in the business's performance, not only

in terms of profits (or losses), but also in the way it conducts business.

Imagine, on a small scale, a business that owns and leases commercial property. If that business is known for its high ethical standards, it is likely to attract tenants with similar values. On the other hand, if this commercial landlord has low ethical standards, it will, over time, develop a reputation in the community and will attract tenants that may, along with the landlord, have a negative impact on the community and the surrounding businesses.

As you work through this section, consider other ways a business's ethics might impact its community, in either a positive or negative way. For example, might an ethical business hire and keep different types of employees than an unethical business? What about the businesses who buy from or sell to an ethical versus unethical business? Can you think of other contexts where a business's ethics might impact the community?

Ethical Frameworks: In response to the Enron and Arthur Andersen scandals, as well as other similar scandals that quickly followed, Congress passed a federal act to improve the state of business ethics in the United States. The act is most commonly called the Sarbanes-Oxley Act of 2002 (SOX). By legislative standards, this act was drafted, passed, and enacted very quickly, on July 30, 2002. Here are the highlights:

1. Auditors must be wholly independent and federally registered, and must use approved standards in auditing. This provision protects investors and shareholders by making sure they get accurate information about a company's financial health.
2. Senior executives are personally responsible for providing accurate financial reports. Before this provision, bad business practices did not make people worry about jail sentences because businesses could not be sent to jail. With this provision, senior executives pay close attention to following the rules because they can go to jail if they do not.
3. Corporate officers and executives must disclose stock transactions to prevent insider trading. The Securities Exchange Commission (SEC) has the power to regulate these disclosure, investigate suspected violations, and to punish violators.
4. Market analysts must disclose any conflicts or financial interests. People invest based in part on analysts' recommendations. Investors should know if the analyst stands to make money by convincing people to invest in a specific company.
5. Companies and employees face penalties if they destroy records in the face of an investigation.
6. Whistleblowers, that is, employees who report their employers of suspected SOX violations, are protected from retaliation.

SOX had a huge impact on many aspects of business ethics. You will learn more about additional legal guidelines in the following chapters. Some of those laws cover truth in advertising

and labelling; respecting the copyright, trademark, and patent materials of others; consumer protection; and embezzlement.

There is no law dictating how companies carry out their ethical obligations. Rather, companies comply in various ways based on a number of factors. Federal Sentencing Guidelines for corporations give a basis for determining if a compliance program will be effective, and whether that program should be a factor in mitigating a corporation's sentence for a crime. Many industries are heavily regulated. Businesses involved in those industries may have staff, or entire departments, specifically assigned to ensure the company follows the rules. These employees may be compliance officers, general counselors, or staff attorneys. Smaller companies may use consultants to monitor their business activities. And very small businesses may leave it up to officers or managers to ensure the rules are followed.

International Business Ethics: Individuals and businesses in the United States conduct business routinely with foreign companies and countries. It is common to order products on the Internet and buy products and supplies locally that originated or contain parts from other countries.

Just like the United States has the Sarbanes-Oxley Act, many countries have business ethics policies and laws. But the provisions are often very different, because each country has its own needs, issues, and values reflected in its ethics policies. There are also many countries with little or no regulation on business practices.

For a number of reasons, it would be nice to have universal business standards in place. Businesses and consumers around the world would know what to expect when they enter into a business transaction with a foreign company. Companies would be in similar competitive positions if they were all following the same standards. But there are two major obstacles to creating such a universal code: (1) Acceptable behavior varies greatly from country to country. No one could agree on what the standards should be. (2) No country can punish another country for violating the standards. The standards would be unenforceable.

Consider these two examples of topics that often arise when a universal business-ethics code is discussed.

1. *Employment Laws*: As recently as the 1800's, the United States exported goods that stemmed from slave labor. By that time, many other countries had banned slavery. That aspect of our business ethics offended many. Today, the United States and many other countries have labor standards related to safety, minimum wages, child labor, and work hour limits. But in other countries, the minimum pay a worker can expect can be significantly lower or higher than here, and the age when individuals might need to enter the work force might be significantly lower. Moreover, a typical work environment in another country might seem unsafe here. What could a universal code require for workplace safety in a country where few areas have running water or building codes?

2. *Bribery*: In the United States, it is illegal to bribe a government official to get business contracts with the government. Elsewhere, an offering to a public official is seen as polite. And in some countries, bribes are considered a customary part of doing business; they are expected. Historically, United States businesses have set up in foreign countries and paid bribes, as is the custom there, in an effort to be competitive. It was hard to prosecute them for activities they engaged in elsewhere, when the activities were legal in those countries, so Congress passed the Foreign Corrupt Practices Act (FCPA) in 1977. The FCPA outlaws paying bribes to foreign officials The FCPA is sometimes criticized for putting U.S. companies at a competitive disadvantage

Ethical questions relating to sourcing are a matter of ongoing debate, especially in the retail apparel industry. Garment factories in countries that produce clothes for export, such as Bangladesh, are often unsafe for workers. In response, many retailers have said that it is difficult, if not impossible, for them to monitor the conditions in factories that produce their products.

Three notable attempts to find universal standards include the United Nations International Labour Organization, the Foreign Corrupt Practices Act of 1977, and the Organisation for Economic Co-Operation and Development Anti-Bribery Convention.

First, in 1919, the United Nations (UN) launched the International Labour Organization (ILO) to promote the rights of workers by encouraging living wages, employment opportunities, social protections, protection of workers in foreign countries, and job training. Membership is open to UN member countries that accept the invitation to join the ILO. To date, 187 countries participate, which is all but six of the UN member countries.

The ILO has a constitution and passes declarations regarding ethical employment practices. The problem the ILO faces is enforcement. Each country participates voluntarily, and can withdraw anytime. Additionally, each country can choose to adopt or reject each declaration the ILO passes. Even when a country accepts a declaration, the ILO has little power to discipline the country if it fails to follow the guidelines in the declaration. Because enforcement is difficult, the ILO is not considered a truly effective solution to the problem of exploited workers.

In the United States, Congress was concerned that U.S. companies with foreign operations were bribing government officials to gain an unfair advantage in competing for government contracts. In response to these concerns, Congress passed the Foreign Corrupt Practices Act of 1977 (FCPA). That act gave the Securities Exchange Commission and the Department of Justice the power to prosecute U.S. businesses engaged in bribery.

The FCPA was heavily criticized. Business leaders feared it made them less competitive against foreign companies that could, and often were expected to, use bribes to land business

deals. This again led to discussions on the need for a universal solution.

The result was the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention, which took effect in 1999. Countries that joined the Convention agreed to pass legislation that outlawed bribery among businesses headquartered in their countries. To date, 41 countries have joined. But because only 20% of the countries around the world are members, the OECD Convention is not yet considered a universal solution to bribery.

Ethics Online

Compared to other technological advancements, the internet has changed the lives of average citizens in record time. In a country where legislation can take years to pass, this creates a problem for protecting internet users in the U.S. from privacy risks, scams, and having their ideas and their work used inappropriately. To a very large extent, we all use the internet at our own risk. In an ideal world, people would use the same ethical standards online that they use in other aspects of their lives. Civil society dictates we should not use hate speech, or use private information without permission. But feeling anonymous tempts some into behaving badly. Thus, the internet has created many hazards that legislators are scrambling to fix.

Among the most pressing issues related to online ethics are acceptable use and privacy concerns. Here, we examine federal attempts to protect users from these risks. You may recall reading earlier in this chapter that states may create laws that offer greater protection than federal laws provide. To that end, some states have introduced stricter laws than those discussed here.

Acceptable Use of Online Resources: Every day millions of bits of copyrighted material are used inappropriately and without permission. These ideas and work products are protected by copyright laws, but the internet makes it easy for the materials to be "lifted," and difficult for the offenders to be caught. In the United States, federal protection of these electronic materials generally falls under the Digital Millennium Copyright Act of 1998. The act serves many purposes, including (1) criminalizing the production and distribution of technologies intended to steal or use copyrighted material, (2) making "hacking" into protected material illegal, (3) imposing strict penalties for internet copyright infringement, and (4) exempting internet service providers from being prosecuted for content their customers post or distribute. Among other features, this act requires internet service providers to immediately remove material when someone claims that material is copyrighted protected.

Privacy Concerns: People are right to worry about their personal correspondence being viewed by others, including the government. One research agency estimated that in 2015, internet users around the world sent an average of 205 billion emails a day. While many of those messages go directly to trash or junk folders, many others contain the kind of personal correspondence that was once reserved for letters or notes slid across school desks. And while letters and notes in your home are protected from the prying eyes of the government through criminal

codes and constitutional rights to privacy, email in general, but particularly those in employment and personal settings are less protected.

One reason email is less protected is that the primary rules in place for protecting email correspondence were adopted in 1986, long before we used email as widely as we do today. The Electronic Communications Privacy Act of 1986, and with it the Stored Communications Act, have remained largely unchanged for 30 years. The acts require a search warrant to access email, just like the government would need to search your home. But the search-warrant requirement applies only to email that has been created in the previous 180 days. Older emails are considered abandoned, and can be accessed by the government with mere subpoenas. Therefore, emails older than six months are less protected from government searches than the letters you keep in your home.

TRAP AND TRACE DEVICE:

Means to capture the origination and routing information for email messages.

Following the discovery of widespread terrorist activity within the United States in 2001, the American Patriot Act of 2001 was passed. Some parts were reauthorized in 2005. Later, in 2015, the U.S.A. Freedom Act renewed many of the Patriot Act's provisions. Relevant here, the Patriot Act authorized the government to collect certain information from online communications using trap and trace devices. This information could be collected in the interest of national security when terrorist activity was suspected. The devices used to collect the information did not look at the message itself, but only the contact information of the senders and recipients.

In 2013, evidence was released that raised concerns about whether the government was overstepping its power by collecting bulk electronic records without specific suspicions of terrorist activity. Therefore, the 2015 Freedom Act reformed the law by requiring the government to specifically name the parties to be tracked.

Workplace Issues: Many employers take a keen interest in the online lives of employees and potential employees. Doing an internet search on a job candidate before deciding whether to interview her is common-place. Most employers report that they have declined to hire a job candidate based on what they have seen about a candidate online. This type of screening typically looks only at a person's public information. Employers make an initial judgment based on the way a person is willing to present himself to the world.

Consider the difference between what the government can do with regard to emails and what an employer can do. An individual is protected from government action by the search-warrant and subpoena requirements. An employee's emails on the employer's system, however, are generally searchable by the employer without notice or permission.

Some employers attempt to go beyond screening public information. Many employers have asked, or demanded, that employees tell them their passwords or other log-in information for social networking sites. While this is a violation of the terms of service for most sites, it is a rule that is difficult to enforce unless someone reports it. While several states have adopted laws that prohibit employers from asking for log-in information, it is a legal practice in many states. Efforts at enacting federal legislation to ban the practice have been unsuccessful.

Voluntary Standards

There have been many efforts to regulate ethics, but it remains largely a voluntary endeavor. The government would be hard-pressed to enforce mandatory community service on businesses, for example. In many instances, there is a fine line between unethical behavior and shrewd, even admirable, business dealings.

CHAPTER SUMMARY

It is crucial for everyone who engages in business to have some understanding of the law. Law and business complement each other. Business activities take place within a framework of laws. Likewise, many aspects of our legal system are put in place to reflect our business culture.

The American legal system is the product of many different factors. It is based on English common law, reflecting the early heritage of the United States. The authority of the government—and the division of powers between states and the federal government—reflects a historic commitment to federalism. Our constitutional government exists as a guard against unchecked, arbitrary power. New laws and regulations are made, and old ones repealed, reflecting changing social and political concerns. As the country and the business environment change, changes, so too will our laws change.

Review Questions

Review question 1.

What is the difference between ethics and law? If ethics are not required, why should businesses be concerned about them? Describe a scenario where ethics and law are both important to a business.

Review question 2.

What are the three branches of government in the United States? What are their different roles? Which branch does the president belong to? Which branch do government agencies belong to? The police?

Review question 3.

Is there an automatic right of appeal to the Supreme Court? To any other appellate court? What are the three levels of federal courts?

Review question 4.

How did the case of Marbury v. Madison change constitutional law in the United States?

Review question 5.

What are the parts of a court decision? What information is contained in each part?

Review question 6.

What is the difference between a bill and a law? Describe the legislative process of creating a statute.

Review question 7.

What is a plaintiff? A defendant? A prosecutor?

Review question 8.

What are the Federal Rules of Civil Procedure? When do they apply? What do they help regulate?

Review question 9.

When may a party present alternative legal theories? What is the purpose of "pleading in the alternative"?

Review question 10.

What is the difference between the holding and the rule in a published case? How can you tell the difference?

Questions for Discussion

Discussion question 1.

The following is an excerpt from a U.S. Supreme Court decision (citations are omitted). Brief the case. Does the decision raise any issues for private businesses that manage properties, such as shopping malls?

> Board of Airport Commissioners v. Jews for Jesus, Inc.
>
> 482 U.S. 569 (1987)
>
> O'CONNOR, J., delivered the opinion for a unanimous Court.
>
> The issue presented in this case is whether a resolution banning all "First Amendment activities" at Los Angeles International Airport (LAX) violates the First Amendment.
>
> On July 13, 1983, the Board of Airport Commissioners (Board) adopted Resolution No. 13787, which provides, in pertinent part:
>
> NOW, THEREFORE, BE IT RESOLVED by the Board of Airport Commissioners that the Central Terminal Area at Los Angeles International Airport is not open for First Amendment activities by any individual and/or entity[.]
>
> Respondent Jews for Jesus, Inc., is a nonprofit religious corporation. On July 6, 1984, Alan Howard Snyder, a minister of the Gospel for Jews for Jesus, was stopped by a Department of Airports peace officer while distributing free religious literature . . . The officer warned Snyder that the city would take legal action against him if he refused to leave as requested. Snyder stopped distributing the leaflets and left the airport terminal.
>
> Jews for Jesus and Snyder then filed this action in the District Court for the Central District of California[.] First, respondents contended that the resolution was facially unconstitutional under Art. I, § 2, of the California Constitution and the First Amendment to the United States Constitution because it bans all speech in a public forum. . . . [T]he Court of Appeals concluded . . . the resolution was unconstitutional on its face under the Federal Constitution. We granted certiorari[.] . . .

Under the First Amendment overbreadth doctrine, an individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face because it also threatens others not before the court -- those who desire to engage in legally protected expression but who may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid. A statute may be invalidated on its face, however, only if the overbreadth is "substantial." The requirement that the overbreadth be substantial arose from our recognition that application of the overbreadth doctrine is, "manifestly, strong medicine," and that there must be a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court for it to be facially challenged on overbreadth grounds.

On its face, the resolution at issue in this case reaches the universe of expressive activity, and, by prohibiting all protected expression, purports to create a virtual "First Amendment Free Zone" at LAX. The resolution does not merely regulate expressive activity in the Central Terminal Area that might create problems such as congestion or the disruption of the activities of those who use LAX. Instead, the resolution expansively states that LAX "is not open for First Amendment activities by any individual and/or entity" . . . The resolution therefore does not merely reach the activity of respondents at LAX; it prohibits even talking and reading, or the wearing of campaign buttons or symbolic clothing. Under such a sweeping ban, virtually every individual who enters LAX may be found to violate the resolution . . . We think it obvious that such a ban cannot be justified . . . because no conceivable governmental interest would justify such an absolute prohibition of speech.

The petitioners suggest that the resolution is not substantially overbroad, because it is intended to reach only expressive activity unrelated to airport-related purposes. Such a limiting construction, however, is of little assistance in substantially reducing the overbreadth of the resolution. Much nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—may not be "airport-related," but is still protected speech[.] . . . We conclude that the resolution is substantially overbroad, and is not fairly subject to a limiting construction. Accordingly, we hold that the resolution violates the First Amendment.

Discussion question 2.

You are a U.S. Representative. Together with partners across the aisle, you have drafted a bill to provide grocery vouchers to college students who are spending more than 50% of their individual or family income on tuition, fees, books, and school materials. The so-called "Brain Food" bill has passed the House of Representatives and is headed to the Senate. The president held a press conference today saying that he does not like the idea. "Where's the food for newly returned veterans?" he says. You understand that some senators are echoing those comments with their constituents.

> What could happen to the bill in the Senate? What must happen there for the bill to move on to the next step?
>
> What if the Senate makes amendments to the bill that are inconsistent with your original goals for the legislation?
>
> How could the bill be blocked even if the Senate passes it?
>
> If the bill becomes law, how will the provisions be put into action? How can the law be challenged? Is it possible for the challenges to kill the law?
>
> What do you think of this process? Is it too cumbersome? Too much red tape? A good way to incorporate everyone's input?
>
> What do you think of the zero-sum game argument that the president uses against the bill in this scenario?

Discussion question 3.

The U.S. court system is adversarial. The idea is that having each side represented by an attorney who will contest and challenge the position of the other side, with a neutral judge making rulings, will tend to reveal the true state of affairs and lead to a fair resolution. By contrast, alternative dispute resolution techniques tend to focus on cooperation and reaching consensus between parties in dispute. What do you think of the adversarial court system? Would a collaborative model be preferable? Why or why not?

Discussion question 4.

Larry lives in Minnesota, but works in Wisconsin. He drives to Wisconsin every day he works. One morning after he has crossed into Wisconsin, he is distracted and

collides with a Wisconsin-registered vehicle, injuring Betty, the driver. Her damages in medical expenses and other costs are $48,000. Larry does not have car insurance.

Where can Betty sue Larry?

Should she sue in state or federal court? In which level of court in the state or federal level?

Betty hears about higher damages awards being granted by juries in Iowa to car crash victims. Iowa borders both Minnesota and Wisconsin. Should Betty be able to move her case to Iowa? Why or why not?

After the litigation starts, Betty's attorney tells her that it will take over a year to go through the process and that the legal bills will be substantial. What are Betty's options if she does not want to continue the lawsuit?

Discussion question 5.

In Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), a man was arrested for loudly insulting religion and a public official in the street. The law barred intentionally insulting speech from being used in a public place. The man challenged the constitutionality of the state law under which he was arrested, arguing that it harmed the right to free speech. While noting the importance of free speech, the U.S. Supreme Court upheld the law, saying that "fighting words"—those words that tend to incite an immediate breach of the peace—are not protected by the First Amendment. They add no value to public discourse, the Court said, and any benefit they do have is outweighed by the state's interest in public order.

The Westboro Baptist Church is known nationally for its offensive protests at the funerals of soldiers and other public events. Their signs claim that "God hates" U.S. troops, Jews, Muslims, and LGBTQ people, among others. The signs also make other inflammatory claims. Are these protest signs "fighting words"? Should local communities enforce or even enact laws against that type of speech?

Charlotte is walking on the sidewalk and accidentally cuts off Bill. Bill tells her to watch where she's going. Charlotte says, "Wow, you are a major jerk!" As she walks away, Bill hits Charlotte in the back of the head. Bill says

that Charlotte's comment amounted to fighting words, so he was justified in hitting Charlotte. Is he correct? Was Charlotte's statement protected by the First Amendment?

Discussion question 6.

One oft-stated advantage of common law systems is that they are adaptable, with decisions being based or crafted according to the situations of the parties. It is also said that civil law systems, relying on written codes, have the advantage of predictability. Do you regard predictability as more important than flexibility? Is there a way of balancing the two interests?

Discussion question 7.

The following scenario applies to questions 7 through 9. Ethical questions relating to sourcing are a matter of ongoing debate. The retail apparel industry is one sector that often confronts ethical issues around sourcing. Garment factories in countries that produce clothes for export, such as Bangladesh, often do not meet American safety standards. Some facilities are actively unsafe for workers. In response, many retailers have said that it is difficult, if not impossible, for them to monitor the conditions in factories that produce their products. Moreover, many factories may be in compliance with local and national laws, regardless of ongoing risk.

If you were a buyer with a U.S. retailer, would you take these issues into consideration when sourcing? What standard would you use for deciding which producers to buy from? Would your answer change if you were unable to travel to each facility to look for yourself?

Discussion question 8.

Garment imports from the developing world allow for retailers to make higher profits on sales. The cheaper cost also makes clothes more affordable for less affluent buyers in the United States. If strict production safety rules were always applied, clothing might well become more expensive, and prices might rise beyond the ability of many consumers to pay.

Does affordability for disadvantaged customers deserve consideration in your analysis? Does the retailer's profit margin?

Discussion question 9.

While some textile production facilities pose risks to workers, the workers need the jobs. Enhanced safety standards might result in closures of some production locations, which would displace workers.

Does the workers' interest in continued local employment deserve to be considered? What about if children are employed at a garment maker, but their families need the children's income to survive?

Are there ways that the retailer can use moral imagination to resolve any or all of these issues?