edition 10

Introduction to Law and the Legal System

Frank August Schubert

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Introduction to Law and the Legal System

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Introduction to Law and the Legal System

TENTH EDITION

FRANK AUGUST SCHUBERT
Professor Emeritus
Northeastern University

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

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To Barbara Macintosh
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Preface

Welcome to the tenth edition of *Introduction to Law and the Legal System*! The first edition was published thirty-five years ago. In recognition of this publication milestone, the publisher has produced a special cover; tribute is given to the original author, Harold J. Grilliot; and a Short Chronicle, which discusses the evolution of the book from 1975 to 2010, has been included in the Appendix.

Suited for undergraduate or graduate programs, this text is a survey of the American legal system and can be used in a variety of courses such as Survey of Law, Introduction to Law and the Legal System, Law and Society, Legal Environment and Business, and Legal Process. This text could be an integral part of business, criminal justice, political science, interdisciplinary, paralegal, or other similar courses in an institution of higher learning.

From its first edition to the present, the goal has been to provide readers with a general understanding of American substantive and procedural law. The premise is that this kind of knowledge is basic to a well-rounded education. Because this book is used in a wide variety of academic settings and disciplines it is expected that instructors will select topics and cases that are appropriate to the course and students. The length and complexity of cases varies from case to case because it is difficult to reduce a fifty-page opinion to three or four pages and still include all the fodder for class discussion. While it is true that many topics included in the text are fundamental to the typical law school's curriculum, this is not a textbook for law students. This book explains in a few pages fundamental principles that law students study for an entire semester. Law students study law so that they can become practitioners. Undergraduate students study law in order to obtain a basic understanding of law. This presentation's strength is that it provides readers with a brief peek at what are inherently complex concepts without getting students in over their heads.

Because this is an undergraduate/graduate level text, it also tries to show readers connections between law and topics typically covered in more detail in

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undergraduate/graduate courses taught in history, philosophy, political science, sociology/anthropology, and business departments. Thus, the text includes some legal and cultural history, jurisprudence, ethics, etc. in the hope that students will get a taste of the bigger picture and perhaps enroll in a corresponding course. Showing these connections helps to promote a better understanding of the role law plays in a complex, modern society. From this understanding, students can decide for themselves whether lawmaking institutions—the legislative, judicial, and administrative agencies—are adequately addressing our society's problems.

By reading cases and studying statutes in this text, students will learn to exercise their own powers of reasoning. Because the cases are continuously updated in every edition, students read about real-world problems and study appellate court discussions about how the problems should be resolved. This promotes class discussions about the relative strengths and weaknesses of the competing arguments made by the parties.

New to the Tenth Edition

The tenth edition has been updated with thirty-two new cases including many recent, controversial cases such as *Video Software Dealers Association v. Schwarzenegger*, *Caperton v. Massey*, *Herring v. U.S.,* and *Cable Connection Inc. v. DIRECTV*. Comments from reviewers and users have been carefully considered as decisions were made with respect to the replacement or retention of particular cases. As always, the goal has been to select cases that are interesting, teachable, and controversial, and that illustrate the theory being discussed in the corresponding chapter section. Some of the retained cases are classics and have proven to be useful for many years. *Katko v. Briney*, *Strunk v. Strunk*, and *Campbell Soup Company v. Wentz*, for example, have appeared in all ten editions. Other older cases have been included because they better illustrate the legal principle being addressed in the text than did the removed case.

Readers can find on the website other long-standing favorite cases that have been "retired" from the textbook such as *Du Pont v. Christopher* as well as additional cases, statutes, and materials that could not be included in the textbook because of space limitations. This website will be updated periodically with new and relevant cases, and often will include concurring and dissenting opinions that would be too lengthy to be included in the textbook. Additionally, students will find open access to learning objectives, tutorial quizzes, chapter glossaries, flashcards, and crossword puzzles, all correlated by chapter, as well as additional cases on the website. Instructors also have access to the Instructor's Manual.

For the first time, this edition offers an Instructor's Resource CD-ROM. This CD contains test banks in Microsoft® Word and ExamView® computerized testing and offers a large array of well-crafted true–false, multiple-choice, and essay questions, along with their answers and page references. An Instructor's Manual includes chapter objectives, court cases, and answers to chapter questions.

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Teaching and Learning Aids

The text includes a glossary that was substantially expanded in the ninth edition. Please note that it focuses on terms as they are used in the text and is not intended to be as comprehensive as a legal dictionary. The Constitution of the United States is also reprinted for easy reference.

All cases have been edited to frame issues for classroom discussion and for length and readability. Most case footnotes have been deleted. Many citations have similarly been omitted, as well as less important portions of majority opinions. Ellipses have been inserted to indicate such omissions. Academic works that were relied upon as sources within each chapter have been acknowledged with endnotes. Case citations are occasionally provided so that interested students can consult the official reports for unedited cases.

Acknowledgments

This revision would not have been possible without the valuable contributions of many people. The following reviewers were instrumental in shaping the tenth edition:

Monique Chiacchia, Edmonds Community College

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Lynnette Noblitt, Eastern Kentucky University

Susan Vik, Boston University

I am most pleased and proud that my daughter, Tracy, has prepared the index for this text. Her excellent assistance has made the tenth edition both better and more memorable.

This special edition of the textbook is dedicated to my wife, Barbara, who was there at the very beginning of this project way back in 1988 when all the legal research had to be completed the old-fashioned way—in an academic law library. She has helped me in countless ways to complete each of the seven editions I have worked on. An author's spouse makes many sacrifices so that deadlines can be met. Barbara's love, encouragement, patience, wisdom, and steadfastness have made it all possible. *Mahalo nui loa,* Barbara, *aloha au ia'oe.*

F.A.S.

A Tribute to Professor Harrold J. Grilliot

This textbook originated in the mind of its first author, the late Harold J. Grilliot. Professor Grilliot majored in accounting and received his undergraduate education at the University of Dayton (1960). He subsequently graduated from the University of Cincinnati Law School (1967). He taught briefly at the University of Detroit and then embarked on a fifteen-year academic career as a member of the University of Cincinnati College of Business, where he was an

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Assistant Professor. What eventually became the first edition of the textbook began as a collection of "teachable" cases and materials Professor Grilliot assembled for use in an introduction to law class he taught in the UC College of Business. In 1975, Houghton Mifflin Company published the first edition of the textbook, and a second edition followed in 1979. The third edition appeared just prior to Professor Grilliot's untimely death in 1983.

Harold Grilliot explained his reasoning for the book's infrastructure and perspective in his preface to the first edition.

"This book is designed to provide an introduction to what every educated citizen should know about law and the American legal system. It provides an interesting and exciting means of developing an understanding of the strengths and weaknesses of law…

"A basic understanding of the law and the legal system in one's community promotes a better understanding of the role law plays in a complex modern society. This text is designed to stimulate students to exercise their powers of reasoning.… Case analysis stimulates thinking and consideration of the extent to which the law is addressing itself to the social and business problems of the time…"

Harold Grilliot was recognized postmortem by his colleagues at the University of Cincinnati College of Business for his teaching excellence and dedication to students. They established an annual award named in his honor that is presented to a deserving UC business faculty member.

The current author has included in the Appendix a chronicle of the textbook's thirty-five year history. This Chronicle contains a narrative and two figures that explain the evolution of the text. As longtime adopters know, Harold Grilliot's founding principles for this textbook have been continued by the current author. It is the current author's hope that Grilliot's approach continues to be reflected in future editions.

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Introduction to Law and the Legal System

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I

Introduction

CHAPTER OBJECTIVES

1. *Understand each of five jurisprudential approaches to answering the question, "What is law?"*
2. *Explain the legal objectives that are common to American public and private law.*
3. *Understand how our nation's legal history and culture have contributed to law and legal institutions as we know them today.*
4. *Develop the ability to read and brief an appellate court opinion.*
5. *Explain in general terms the concepts underlying the Due Process and Equal Protection Clauses.*
6. *Understand the basic differences between civil and criminal law.*
7. *Understand the basic differences between tort and contract law.*

WHAT IS LAW?

The study of legal philosophy is called **jurisprudence.** Many of the world's greatest philosophers have theorized about the nature and meaning of law. Jurisprudential philosophers ask questions like these: What is law? Is bad law still law? Is custom law? Is law what it says in the statute books, or what really happens in practice? Philosophers have debated the essential nature of law for centuries, yet there is no single commonly accepted definition. This chapter begins by summarizing some of the schools of legal philosophy in order to introduce students to different ways of answering this fundamental question: What is law?[1]

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Law as Power

According to this view, the validity of a law does not depend on whether it is socially good or bad. It is apparent, for example, that tyrannies, monarchies, and democracies have produced socially beneficial laws. They have also produced laws that are unjust and "wrongful." What these different forms of government have in common is that each is based on power and that possessing the power to enforce its laws is central to each government's existence. This philosophy can be criticized for ignoring arbitrariness, abuses of power, and tyranny, and for producing bad law.

Natural Law

Natural law philosophers argued that law is that which reflects, or is based on, the built-in sense of right and wrong that exists within every person at birth. This moral barometer, which operates through the functioning of conscience, gives each person the capacity to discover moral truth independently. Some believed that this sense was God-given; others believed it was an intrinsic part of human nature.[2] Natural law philosophers argued that moral goodness is conceptually independent of institutional views of goodness or evil. Thus, no government can make a morally evil law good or a morally good law evil. Moral goodness exists prior to institutional lawmaking, and sets a moral standard against which positive law should be measured. Thus, even though during apartheid the all-white South African government may have had the power to enact racially discriminatory statutes, such statutes were not truly "law" because they were morally abhorrent. This natural law philosophy was very influential in seventeenth- and eighteenth-century Europe. Revolutionaries who sought to overthrow established monarchies were attracted to natural law because it established a philosophical foundation for political reform.

Natural law thinking has greatly influenced American law as well. American civil rights advocates currently use the same time-tested natural law arguments that were used thirty and forty years ago to oppose racial discrimination. They argue that discriminatory statutes should not be respected as law because they are so blatantly unfair. Constitutional provisions that require government to treat all persons fairly and impartially (the due process and Equal Protection Clauses) are other examples.

Our tort system is also a reflection of natural law thinking. It is "right" that people who intend no harm but who carelessly cause injury to other people should have to pay compensation for the damages. Similarly, if two people voluntarily enter into a contract, it is "right" that the parties comply with its terms or pay damages for the breach. (However, our law confers power in our judges to refuse to enforce contractual provisions that are too one-sided.) Finally, it is "right" to punish persons who commit crimes for those acts.

When there is no consensus in society about what is morally right and wrong, natural law loses its effectiveness as a basis for law. Current examples of this problem include issues such as abortion, physician-assisted suicide, and capital punishment.

Historical Jurisprudence

Historical jurisprudence evolved in response to the natural law philosophy. Aristocrats were attracted to this school because it provided a justification for preserving the status quo and the preferential treatment of powerful elites that was deeply rooted in cultural tradition. The historical philosophy of law integrated the notion that law is the will of the sovereign with the idea of the "spirit of the people."[3] That is, law is only valid to the extent that the will of the sovereign is compatible with long-standing social practices, customs, and values. Law, according to this view, could not be arbitrarily imposed by legislators whose legal source was "right" reasoning. Instead, the historical school insisted that only practices that have withstood the test of time could be thought of as law.[4] Further, these philosophers believed that law changes slowly and invisibly as human conduct changes.

A major advantage of historical jurisprudence is that it promotes stability in law. In fact, much law is largely grounded in judicially approved custom.

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Our contemporary American real estate law,[5] property law,[6] and contract law[7] are some of the areas in which long-standing practices continue to be recognized as law. Custom has also played an important role in determining the meaning of the Constitution. Appellate courts such as the U.S. Supreme Court trace provisions of the Bill of Rights to their historical statutory and case law antecedents. They do this because they recognize that some beliefs, practices, procedures, and relationships between people and the state have become fundamental to our culture.

Occasionally a sovereign will enact legislation that significantly contravenes long-standing custom. A few years ago, the Massachusetts legislature enacted a mandatory seat belt law. Many citizens believed that the state was infringing on a matter of personal choice. They insisted that the matter be placed on the ballot, and the law was repealed in a statewide referendum.[8]

A major problem with historical jurisprudence is determining at what point a practice has become a custom. How long must a practice have been followed, and how widely must it be accepted, before it is recognized as customary?

Utilitarian Law

The utilitarian school of law concentrated on the social usefulness of legislation rather than on metaphysical notions of goodness and justice.[9] **Utilitarians** thought that government was responsible for enacting laws that promote the general public's happiness. They believed that the desire to maximize pleasure and minimize pain is what motivates people, and that legislatures were responsible for inducing people to act in socially desirable ways through a legislated system of incentives and disincentives.[10] For example, if the pain imposed by a criminal sentence exceeds the gain realized by an offender in committing the offense, future criminal actions will be deterred. Additionally, they thought that law should focus on providing people with security and equality of opportunity. They maintained that property rights should be protected because security of property is crucial to attaining happiness. People, they thought, should perform their contracts because increased commercial activity and economic growth produce socially beneficial increases in employment.

Utilitarians also favored the simplification of legal procedures. They opposed checks and balances, legal technicalities, and complex procedures. They believed that these "formalities" increased the costs and length of the judicial process and made the justice system ineffective and unresponsive to the needs of large numbers of average people. Modern utilitarians would favor small claims courts, with their simplified pleading requirements, informality, low cost, and optional use of lawyers.

Utilitarian influence can be found in legislative enactments that require the nation's broadcasters to operate "in the public interest," in "lemon laws," and in other consumer protection legislation. A major problem with utilitarianism is that not everyone agrees about what is pleasurable and what is painful. And many, if not most, political scientists would dispute that legislators actually make decisions according to the pleasure–pain principle.

Analytical Positivism

Analytical positivists asserted that law was a self-sufficient system of legal rules that the sovereign issues in the form of commands to the governed. These commands did not depend for legitimacy on extraneous considerations such as reason, ethics, morals, or even social consequences.[11] However, the sovereign's will was law only if it was developed according to duly established procedures, such as the enactments of a national legislature.

Thus, the apartheid laws passed by the previously all-white South African legislature were "the law" of that country at that time to the same extent that civil rights legislation enacted by the U.S. Congress was the law of this country. Each of these lawmaking bodies was exercising sovereign power in accordance with provisions of a national constitution. Positivists would maintain that individuals and governmental officials have no right to disobey laws with which they personally disagree due to moral, ethical, or policy objections. Positivists would also

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maintain that trial jurors have a legal obligation to apply the law according to the judge's instructions, even if that means disregarding strongly held personal beliefs about the wisdom of the law or its application in a particular factual dispute.

Members of this philosophical school would view disputes about the goodness or badness of legal rules as extra-legal.[12] They would maintain that such issues do not relate to the law *as it is*. This approach promotes stability and security. It also legitimizes governmental line drawing (such as laws that specify the age at which people can lawfully drink or vote, or those that determine automobile speed limits).

In the United States, people often disagree with governmental decisions about foreign policy, as well as about such issues as housing, the financing of public education, health care, abortion, environmental protection, and the licensing of nuclear power plants. Many contend that governmental officials are pursuing wrongful, and sometimes immoral, objectives. Such concerns, however, are generally unpersuasive in our courts. If governmental officials are authorized to make decisions, act within constitutional limitations, and follow established procedures, even decisions that are unpopular with some segments of society are nevertheless law.

But is law really just a closed system of rules and the product of a sovereign? Doesn't international law exist despite the absence of a sovereign? Don't contracting parties routinely create their own rules without any sovereign's involvement unless a dispute arises that results in litigation? And is law really morally neutral? Shouldn't the positivist approach be criticized if it protects governmental officials who act unfairly?

SOCIOLOGICAL JURISPRUDENCE, LEGAL REALISM, AND LEGAL SOCIOLOGY

After the Civil War, the nation's economy rapidly expanded, and America moved toward a market economy. Along with this expansion came new technologies, new products, and changing legal attitudes about government's rights to interfere with private property. Laissez-faire was in vogue, and although it contributed to expanding the economy, it also produced monopolies, political corruption, environmental pollution, hazardous working conditions, and labor-management conflict. The U.S. Supreme Court often opposed social reforms initiated by state governments. In *Lochner v. New York*, for example, the Court struck down a reform statute that limited bakers to ten-hour workdays and sixty-hour work weeks.[13] The majority ruled that this statute unreasonably infringed on the rights of employees and employers to negotiate their own contracts. The Court also declared the Erdman Act unconstitutional in *Adair v. United States*.[14] Congress enacted the Erdman Act to stop the railroad monopolies from discharging employees who joined labor unions. Congress, said the Supreme Court, had no right under the interstate Commerce Clause to regulate labor relations in the railroad industry.

The excesses of laissez-faire produced social and economic unrest among farmers and laborers in particular, and produced political pressure for reforms. These factors culminated in the rise of the Progressive Movement. The Progressives sought an expanded governmental role in the economy. They wanted government to pay attention to reforming and to enact laws that would regulate special interests. The Progressives rejected the notion that law is based on immutable principles and deductive reasoning, and therefore is unrelated to political, social, and economic factors in society. Too often, they contended, the courts had ignored what Benjamin Cardozo would call the "pursuit of social justice."[15]

Sociological Jurisprudence

Roscoe Pound, of Harvard Law School, published an article in the 1911 *Harvard Law Review* that picked up on Progressive themes and announced a philosophy of law called **sociological jurisprudence.**[16] Pound argued against what he called "mechanical jurisprudence," with its backwardness and unjust outcomes in individual cases.

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He advocated that governments become proactive in working to promote social and economic reforms and that judges become more socially aware of the impact of their decisions on society.[17]

Early sociologists were interested in examining jurisprudence from a social-scientific perspective. They focused on what they called the living law—not just the law declared by legislatures and courts, but the informal rules that actually influence social behavior. The sociological school maintains that law can only be understood when the formal system of rules is considered in conjunction with social realities (or facts). In this sense, it is similar to the historical school. However, the historical school approached time in terms of centuries, whereas the sociological school focused on ten- or twenty-year segments.

Sociological jurisprudence theorists, for example, would note that during the last sixty years the courts and legislatures have made many attempts to eliminate racial discrimination in voting, housing, employment, and education, and that the law on the books has significantly changed. It is equally clear from scholarly studies, however, that discrimination continues. The written law provides for equal opportunity, and on the surface racial discrimination is not as obvious as it once was. But the social facts continue to reveal subtle forms of racism that law has not been able to legislate or adjudicate away. Similarly, employment discrimination against women, older workers, and the disabled continues despite the enactment of federal and state legislation that legally puts an end to such practices. Informally enforced social norms that condone bigotry and inflict personal indignities and economic inequities on targeted segments of society are not easily legislated away.

Although this approach effectively points out the discrepancies between the promise and the reality of enacted law, it often fails to produce practical solutions to the problems. Should judges be encouraged to consider social consequences in addition to legal rules in reaching decisions? If so, might this not result in arbitrary, discretionary decisions that reflect only the personal preferences of one particular jurist or group of jurists?

Legal Realists

During the early decades of the twentieth century, the social sciences were emerging. Academics and judges were attempting to borrow the scientific methods that had been used to study the natural and physical sciences and use them to examine social institutions. From the late 1920s through the middle 1930s, juries, and judges in particular, were subjected to empirical scrutiny by reformists such as Jerome Frank and Karl Llewellyn, who called themselves *legal realists*. The realists focused on the extent to which actual practices varied from the formal legal rules.[18] They believed that judges were influenced more by their personal convictions than by established and immutable rules. Llewellyn made a very important distinction between the legal rules and precedent-setting cases that were often cited as the basis for deciding why cases were won and lost (which he called "paper" rules) and the "real" rules of decisions that were undisclosed unless revealed by behavioral research.[19] Llewellyn believed that judges made law instead of discovering it, and he went so far as to proclaim that law was merely "what officials do about disputes."[20] Rules, the realists pointed out, do not adequately account for witness perjury and bias, and neither do rules compensate for the differing levels of ability, knowledge, and prejudice of individual lawyers, judges, and jurors. Because the realists produced little theory and research, they primarily blazed a trail for the legal sociologists to follow.

Legal Sociologists

Legal sociologists such as Donald Black have gone beyond the legal realists. Using quantitative methodological tools, they examine such factors as the financial standing, race, social class, respectability, and cultural differences of those involved in disputes.[21] In addition, they evaluate the social facts of the lawyers and judges working on the case, as well as those of the parties. In theory, legal outcomes should not be affected by differences in the socioeconomic status of the litigants, because all are

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"equal" before the law. Individual plaintiffs, for example, should be able to win when suing multinational corporations. But legal sociologists claim that the facts do not support this theory.[22] The rule of law is a myth, they say, because legal rules fail to take into account the impact of social diversity on litigation. Discrimination is a fact of modern life, and different combinations of social factors will produce disparate legal outcomes.[23] Donald Black points out that disputes between friends, neighbors, and family members are rarely litigated because "law varies directly with relational distance."[24] It can be argued persuasively that well-trained lawyers should decide whether to settle a case or go to trial, whether to try a case to a judge or a jury, and whether to appeal only after carefully considering the relevant social factors and relationships.[25]

Legal sociologists raise issues that challenge fundamental postulates of our society. If people become convinced that legal outcomes are largely a function of sociological considerations, rather than the application of impartial rules, the integrity of the judicial process itself will be undermined, as will the legitimacy of government. If research, however, can reveal more precisely how various combinations of sociological factors influence legal outcomes, this information could be used either to eliminate the bias or to develop alternative mechanisms for resolving particular types of disputes.

OBJECTIVES OF LAW

One of the foundations of our society is the belief that ours is a nation committed to the rule of law. No person is above the law. Our shared legal heritage binds us together as Americans. We use law to regulate people in their relationships with each other, and in their relationships with government. Law reflects our societal aspirations, our culture, and our political and economic beliefs. It provides mechanisms for resolving disputes and for controlling government officials. Private law includes property, family, tort, probate, and corporate law. Public law includes constitutional, criminal, and administrative law. Common to both, however, are certain legal objectives.

Continuity and Stability

It is important that established laws change gradually. Litigants have greater confidence that justice has been done when preexisting rules are used to determine legal outcomes. Laws work best when people become aware of them and learn how they work and why they are necessary. Stable laws are also more likely to be applied uniformly and consistently throughout a jurisdiction, and will be better understood by those charged with enforcement.

Stable laws are also very important to creating and maintaining a healthy economy because they are predictable and serve as a guide for conduct. Businesspeople, for example, are not likely to incur risk in a volatile legal and political environment. They are likely to feel more comfortable in making investments and taking economic risks where it appears likely that the future will resemble the present and the recent past. This stability is threatened by society's appetite for producing rules. Various state and federal legislative and administrative rule-making bodies are currently promulgating so many regulations that it is difficult, if not impossible, for affected citizens to stay current.

Adaptability

In one sense, it would be desirable if society could create a great big "legal cookbook" that contained a prescribed law or rule for every conceivable situation. We would then only have to look in the cookbook for definitive answers to all legal problems. In reality, there is no such cookbook. Legislators produce statutes that have a broad scope and that are designed to promote the public health, safety, welfare, and morals. Judges make law in conjunction with resolving disputes that have been properly brought before the court. Experience has shown that legislative enactments and judicial

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opinions produce imperfect law. Lawmakers cannot anticipate every factual possibility. Courts, in particular, often feel compelled to recognize exceptions to general rules in order to provide justice in individual cases. Judges often find that there are gaps in the law that they have to fill in order to decide a case, or that a long-standing rule no longer makes any sense, given current circumstances and societal values. In this way, law adapts to social, environmental, and political changes within our evolving society.

Justice, Speed, and Economy

Although most people would agree with the preamble to the U.S. Constitution that it is the role of the government "to establish justice," there is no consensus about what that means. Some see justice as a natural law–type settlement, which means each party to a dispute receives what he or she is due. To other people justice means that a specified process was followed by governmental institutions. In some situations, justice requires the elimination of discretion so that law is applied more equally. In other situations, justice requires the inclusion of discretion (equity) so that the law is not applied too mechanically. In this respect, it is helpful to look at recent history. Our current notions of justice with respect to race, gender, and class differ from the views of many of our forebears. Posterity will probably have a concept of justice that differs from our own.

Rule 1 of the Federal Rules of Civil Procedure provides that procedural rules should be construed "to secure the just, speedy and inexpensive determination of every action." Although it would be desirable if our judicial systems could satisfy all three of these objectives, they are often in conflict. As a society we continually have to make choices about how much justice we desire and can afford.

Consider a society dedicated to achieving the highest possible levels of justice in its judicial system. Elaborate measures would be required to ensure that all relevant evidence has been located and all possible witnesses identified and permitted to testify. In such a society, all litigants would be entitled to the services of investigators, thorough pretrial discovery procedures, and qualified and experienced trial attorneys. Great care would have to be taken to ensure that jurors were truly unbiased and competent to render a fair verdict. Only highly probative evidence would be permitted as proof, and various levels of appellate review would be required to consider carefully whether significant substantive or procedural errors were made at trial. Obviously, such a process would be very slow and very expensive. Denying deserving plaintiffs a recovery until the process had run its course could itself be unfair, because a recovery would be denied for several years.

Instead, some judicial systems build in cost-cutting measures such as six-person instead of twelve-person juries. They also make it easier for juries to reach decisions by permitting less-than-unanimous verdicts. Although each cost-cutting step risks more error in the system, there are limits as to how much justice society is willing to provide. People have a multitude of needs, including medical care, housing, education, and defense, as well as a limited interest in paying taxes. These competing needs have to be prioritized. In recent years, governmental funding of poverty lawyers has been greatly reduced. This has occurred at a time when the costs of litigating average cases have risen substantially. As the costs of using the legal system increase, fewer persons will be able to afford to use litigation to resolve their disputes. Private attorneys often decline to represent a potential client if the likely recovery in the case will not produce an acceptable profit.

An example of how law balances the desire for justice with a concern for cost appears in the case of *Goss v. Lopez* (which can be read on the textbook website). In that case the U.S. Supreme Court determined that public school administrators only have to provide rudimentary procedural due process to students who face short suspensions. The Supreme Court explained that requiring schools to provide students with extensive trial-type procedures would make the disciplinary process too expensive. In Chapter XIV we examine alternative methods for resolving disputes.

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Determining Desirable Public Policy

Historically, law has been used to determine desirable public policy. It has been used to establish and then abolish discrimination on the basis of race, gender, age, and sexual preference. Law has been used to promote environmental protection and to permit resource exploitation. Through law, society determines whether doctors can assist in suicides, whether people of the same sex can marry, and which kinds of video games minors can purchase.

ORIGIN OF LAW IN THE UNITED STATES

The British victory over the French in the French and Indian War and the signing of the Treaty of Paris (1763) concluded the competition between the two nations for domination of North America. A French victory might well have resulted in the establishment of the French legal system in the colonies along the Atlantic seaboard. The British victory, however, preserved the English common law system for what would become the United States. The following discussion highlights some of the important milestones in the development of the common law.

The Origins of English Common Law

Anglo-Saxon kings ruled England prior to 1066. During the reign of Edward the Confessor (1042–1066), wealthy landowners and noblemen, called earls, gained power over local affairs. There was no central legislature or national judicial court. Instead, the country was organized into communal units, based on population. Each unit was called a hundred, and was headed by an official called the reeve. The primary function of the hundred was judicial; it held court once each month and dealt with routine civil and criminal matters. Local freemen resolved these cases in accordance with local custom.[26]

The hundreds were grouped into units called shires (counties), which in earlier times often had been Anglo-Saxon kingdoms. The shire was of much greater importance than the hundred. The king used it for military, administrative, and judicial purposes. The king administered the shires through the person of the shire reeve (sheriff). Royal sheriffs existed in each of the shires throughout the country. The sheriff was the king's principal judicial and administrative officer at the local level. Sheriffs collected taxes, urged support of the king's administrative and military policies, and performed limited judicial functions.[27] The shire court, composed of all the freemen in the county, was held twice a year and was presided over by the bishop and the sheriff.[28] It handled criminal, civil, and religious matters that were too serious or difficult for the hundred court, as well as disputes about land ownership.[29] The freemen in attendance used local custom as the basis for making decisions, even in religious matters, resulting in a variety of regional practices throughout the country. Anglo-Saxon law did not permit a person to approach the king to appeal the decisions of these communal courts.[30]

The Anglo-Saxon king had a number of functions. He raised armies and a navy for the defense of the kingdom. He issued **writs,** which were administrative letters containing the royal seal.[31] The writs were used to order courts to convene, the sheriffs to do justice, and to award grants of land and privileges.[32] The king administered the country with the assistance of the royal household, an early form of king's council.[33] He also declared laws (called dooms),[34] sometimes after consulting with the Witan, a national assembly of important nobles.[35]

When Edward the Confessor died childless in 1066, the candidates to succeed him were his brother-in-law, Harold, Earl of Wessex, and his cousin, William, Duke of Normandy (a French duchy). Harold was English and the most powerful baron in the country. William was French. Each claimed that Edward had selected him as the next king. William also claimed that Harold had agreed to support William's claim to the throne.[36] Harold, however, was elected king by the Witan and was crowned. William's response was to assemble an army, cross the English Channel, and invade England.

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The Norman Invasion

In 1066, Duke William of Normandy, with 5,000 soldiers and 2,500 horses, defeated the Anglo-Saxons, and killed King Harold at the Battle of Hastings.[37] William became king of England, and the Normans assumed control of the country. Although the Anglo-Saxons had implemented a type of feudalism before the invasion, the Normans developed and refined it. Feudalism was a military, political, and social structure that ordered relationships among people. Under feudalism, a series of duties and obligations existed between a lord and his vassals. In England, the Normans merged feudalism with the Anglo-Saxon institution of the national king. William insisted, for example, that all land in England belonged ultimately to the king, and in 1086 he required all landholders to swear allegiance to him.[38] In this way, all his barons and lords and their vassals were personally obligated to him by feudal law. At his coronation, King William decreed that Englishmen could keep the customary laws that had been in force during the reign of the Anglo-Saxon King Edward the Confessor. This meant that the communal, hundred, and shire courts could continue to resolve disputes between the English as they had in the past.[39] William did, however, make one significant change in the jurisdiction of the communal courts: He rejected the Anglo-Saxon practice of allowing church officials to use the communal courts to decide religious matters. Instead, he mandated that the church should establish its own courts and that religious matters should be decided according to canon (church) law, rather than customary law.[40] William also declared that the Normans would settle their disputes in the courts of the lords and barons in agreement with feudal law.

England at that time consisted of two societies, one French and the other English.[41] French was the language spoken by the victorious Normans, as well as by the king, the upper classes, the clergy, and scholars.[42] Following the invasion, English was only spoken by the lower classes, and it did not achieve prominence and become the language of the courts and the "common law" until 1362.[43] The French legacy can be seen in many words used by lawyers today. **Acquit, en banc, voir dire, demurrer, embezzle,** and **detainer** are some examples of English words that were borrowed from the French. Although the Normans spoke French, formal documents were written in Latin. This may help to explain why students reading judicial opinions in the twenty-first century encounter Latin words such as **certiorari, subpoena, mens rea, actus reus, in camera, mandamus, capias,** and **pro se.**

The Development of the Common Law

Over time, marriages between Norman and English families blurred the old class system. William's son Henry (who became Henry I), for example, married a descendant of the Anglo-Saxon royal house.[44] It was not until after 1453, when the French drove the English out of France (except for Calais), however, that the Normans and English were unified as one nation.

William died in 1100. The most important of his successors—in terms of the development of the common law—were Henry I and Henry's grandson, Henry II. After the death of the very unpopular William II, the nobles elected Henry I as king. Henry I had promised the nobles that if elected he would issue a charter in which he pledged to respect the rights of the nobles.[45] He also promised to be a fair ruler in the manner of William I. This charter is significant because it was a model for the most famous of all charters, the **Magna Carta.**[46]

Henry I ruled during a prosperous period and strengthened the king's powers while making peace with the church and feudal barons. He also strengthened the judiciary by requiring members of his council, the **Curia Regis,** to ride circuit occasionally throughout the country to listen to pleas and supervise the local courts. During this period, the communal courts, the religious courts, and the feudal courts of the barons were still meeting, and there was much confusion over jurisdiction.[47] Henry I encouraged people who distrusted the local courts to turn to the king for justice.

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Henry II was the king most involved in the development of the central judiciary and the common law.[48] He created a professional royal court to hear civil litigation between ordinary parties (common pleas) and staffed this court with barons who had learned how to judge from working as members of the Curia Regis.[49] The king had some of his judges sit with him at Westminster (in London), and others traveled throughout the country listening to pleas and supervising local courts.[50] These royal judges applied the same law in each of the jurisdictions in which they held court.[51] They did not treat each case as if it were a case of first impression, or apply the customary law of the particular region. Decisions were not based on abstract principles and theories. The royal judges decided disputes in a consistent manner throughout the country, based on slowly evolving legal rules adopted by the members of the court.[52]

There were important procedural incentives for bringing suit in the royal courts rather than in the local courts. One was that the losing party in a communal or feudal court could have the decision reviewed by common pleas. Another was that the king enforced royal court judgments. Last, royal courts used juries instead of trials by battle and ordeal.[53]

One type of problem that was often brought to the king involved land disputes between neighboring nobles. One noble would claim part of his neighbor's land and seize it without bringing the matter to the attention of any court. Henry II's response was to allow victims to petition him for issuance of a writ of right. This writ, which was purchased from the king, directed the communal courts to do full justice without delay or to appear in a royal court and give an explanation.[54] The development of the writ of right resulted in a law making it illegal to dispossess someone of land without a trial conducted according to a royal writ.

The Normans became very creative in the way they used writs. Under the Norman kings, prospective plaintiffs had to obtain writs in order to litigate any claim. As the demand for writs increased, the responsibility for issuing them was transferred from the king to the chancellor,[55] and in later years to the courts themselves. Each writ conferred jurisdiction on a designated court to resolve a particular dispute. It also specified many of the procedures to be followed since there was no general code of civil procedure to regulate the conduct of litigation.[56] A writ, for example, would often be addressed to the sheriff and would require him to summons in the defendant and convene a jury. In Henry I's era, there were very few writs. By Henry III's reign, many writs existed, including entry, debt, detinue, account, replevin, covenant, and novel disseisin (wrongful ejection).[57] A few master registers of writs were developed to form a primitive "law library."

By roughly 1200, the principal components of the common law system were in place. National law had replaced local and regional customs of the shire and hundred. A body of royal judges applied a common law throughout the nation, a tradition of respecting precedent was established, and the writ system was functioning.[58]

The development of legal literature was important to the development and improvement of the common law.[59] Henry Bracton, a thirteenth-century English lawyer, wrote commentaries on the writs of the day during the reign of Henry III (Henry II's grandson) and collected cases from the preceding twenty years.[60] During the fourteenth and fifteenth centuries, lawyers and law students began a series of "Year Books," a collection of the cases that had been heard in the most important courts for each year. The Year Books were discontinued in 1535 and were replaced by case reports, which were informal collections by various authors. Some of these authors, such as Chief Justice Edward Coke (pronounced "cook"), were well known and highly respected.[61] Coke published thirteen volumes of cases between 1572 and 1616. The reports established a process that in 1865 resulted in the publication of official law reports. In 1765, Sir William Blackstone, an Oxford professor, published a collection of his lectures in a book titled *Commentaries on the Laws of England*, which was immensely popular in the American colonies. The first American judicial reports were published in

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1789, and James Kent's influential *Commentaries on American Law* was published between 1826 and 1830.[62]

The common law came to what is now the United States as a result of Britain's colonization policies. In the early 1600s, British monarchs began awarding charters to merchants and proprietors to establish colonies along the Atlantic coast of North America. Over the next 150 years, a steady flow of immigrants, most of whom were British, crossed the Atlantic, bringing the English language, culture, law books, and the English legal tradition. The common law was one major component of that tradition; another was the court of equity.

The Origin of the English Equitable Court

Until the fourteenth century, the common law courts were willing to consider arguments based on conscience as well as law. The judges were concerned with equity (fairness and mercy) as well as legality. By the fifteenth century, however, the common law courts were sometimes less concerned with justice than with technicalities. Common law pleading was complex and jury tampering was common.[63] The courts often refused to allow parties to testify, and there were no procedures for discovering an opponent's evidence. Although the common law courts were able to act against land and would award money judgments, they refused to grant injunctive relief (court orders directing individuals to perform or refrain from engaging in certain acts).[64] Unusual situations arose for which there was no common law relief, or where the relief available was inadequate as a remedy. In addition, the law courts were often slow, and litigation was very costly. Increasingly, dissatisfied parties began to petition the king and his council to intervene in the name of justice. As the number of petitions rose, the king and council forwarded the petitions to the chancellor.[65]

The **chancellor,** originally a high-ranking member of the clergy, was part of the royal household. He was the king's leading advisor in political matters and was a professional administrator. The chancellor's staff included people with judicial experience who issued the writs that enabled suitors to litigate in the common law courts.[66] Because they were ecclesiastics, the early chancellors were not trained as common law lawyers. They were well educated,[67] however, and were familiar with the canon law of the Roman Catholic Church.[68] As a result, the chancellors were often more receptive to arguments based on morality than to arguments based exclusively on legality.

As chancellors began to hear petitions, the **court of chancery,** or **equity court,** came into being. It granted relief based on broad principles of right and justice in cases in which the restrictions of the common law prevented it. Chancellors began to use the **writ of subpoena** to speed up their hearings and the **writ of summons** to require people to appear in the chancery.[69] Chancery trials were conducted before a single judge who sat without a jury. The chancellor, who exercised discretion and did not rely on precedent in granting relief, would only act where extraordinary relief was required, because no writ applied to the wrong from which the petitioner sought relief. One such area was specific performance of contracts. Although a suit for what we would call breach of contract could be maintained in a common law court, that court could not require a contracting party to perform his bargain. The chancellor, however, could issue such an order directed to the nonperforming person and could enforce it with the contempt power.

The equity court became very popular and was very busy by the middle 1500s. For centuries, common law and equity were administered in England by these two separate courts. Each court applied its own system of jurisprudence and followed its own judicial rules and remedies. Much of traditional equity is based on concepts such as adequacy, practicality, clean hands, and hardship (matters we discuss in Chapter VII). The equity court's workload continued to grow, as did the chancellor's staff. By the seventeenth century, the most important of the chancellor's staff clerks were called masters in chancery. The chief master was called the Master of the Rolls. Masters in chancery helped the chancellor conduct the equity court, particularly while the

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chancellor was performing nonjudicial duties for the king.

Initially, despite their differing aims, the common law courts and the equity court cooperated with each other. Starting with Henry VIII's reign, common law lawyers rather than ecclesiastics were named chancellor, which improved relations between courts of law and equity[70] Sir Thomas More, as chancellor, invited the common law judges to incorporate the notion of conscience into the common law, but the judges declined, preferring to stand behind the decisions of the juries. Gradually, however, this dual-court system created a competition for business, and the common law courts became more flexible by borrowing from equity. The equitable courts were also changing, and chancellors began to identify jurisdictional boundaries between the equitable and common law courts. Equity, for example, agreed to furnish a remedy only when the common law procedure was deficient or the remedy at common law was inadequate.[71]

Beginning in 1649, the decisions of the chancellors were sporadically collected and published, a process that led to the establishment of equitable precedent.[72] Eventually, equitable precedent made the equity courts as formalistic and rigid as the common law courts had been in equity's early days.[73] This dual-court system continued in England until the passage by Parliament of the Judicature Acts of 1873 and 1875, which merged the equitable and common law courts into a unified court.

Some North American colonies along the Atlantic coast diverged from British precedent when it came to the establishment of equity courts. Massachusetts never established an equity court, and its trial courts were not permitted to exercise the equitable powers of the chancellor until 1870. Maryland, New York, New Jersey, Delaware, North Carolina, and South Carolina initially established separate courts for common law and equity. However, by 1900 common law and equity had merged into a single judicial system in most states.

As you read the cases included in this textbook, you will notice that plaintiffs often request legal and equitable relief in the same complaint. A plaintiff may demand money damages (common law relief), a declaratory judgment (equitable relief), and an injunction (equitable relief) in the complaint. This creates no problem for the courts. The legal issues will be tried by a jury (unless the parties prefer a bench trial), and the equitable issues will be decided by the judge sitting as a chancellor according to the rules of equity. In Chapter VII we look more closely at the differences between the common law and equitable remedies.

A PROCEDURAL PRIMER

The following highly simplified overview of litigation is intended to give you a sense of the big picture before we examine each stage of the process in more detail. Like a trial attorney's opening statement in a jury trial, it is intended to help you see how the various procedural stages fit together. This abbreviated treatment omits many of the details and is intentionally very limited in scope.

Every lawsuit is based on some event that causes a person to feel that he or she has been legally injured in some manner by another. The injured party will often contact an attorney to discuss the matter. The attorney will listen to the facts, make a determination about whether the client has a case, and present the client with a range of options for pursuing a claim. These options will often include informal attempts to settle the claim, alternative dispute resolution methods such as those discussed in Chapter XIV, and filing suit in court. After weighing the costs and benefits of each option and listening to the advice of the attorney, the client will make a decision as to how to proceed. If the decision is made to file suit, the lawyer will draft a document called a **complaint** and a **writ of summons,** and serve them on the defendant in accordance with the law. The complaint will explain the plaintiff's claims and requested relief. The summons will tell the defendant to serve a document called an **answer** in which the defendant responds to the claims made in the complaint, on the plaintiff's attorney by a statutorily determined date. If the defendant's attorney finds any legal

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defects in jurisdiction, venue, form, or substance in either the summons or the complaint, he or she can make motions seeking modification or dismissal of the action. Assuming that the motions are denied and any defects are corrected, the defendant will then draft and serve the answer. If the defendant fails to file a timely answer, the court can declare the plaintiff the winner by default due to the defendant's inaction.

Once the complaint has been properly served and filed with the court, the **discovery** phase begins. This is where each party learns as much as possible about the case. Virtually all relevant information can be obtained from friendly, neutral, or adverse sources, such as the opposing party. Obviously some information is not discoverable, such as an attorney's trial strategy, research notes (work product), and other material that is classified as privileged. Later in the chapter, we learn specific techniques lawyers use during the discovery phase.

After the facts have been sufficiently investigated, one or both parties will frequently request the court to dispose of the case and award a **judgment** (the court's final decision in a case), rather than proceeding to trial. This request, called a **motion for summary judgment,** is properly granted when the plaintiff and defendant substantially agree about the important facts in the case. If there is no dispute about the significant facts, there is no reason to conduct a trial. In that situation, the judge can resolve any dispute about what legal rule applies to this particular set of facts and award a judgment to the deserving party.

It is important to note that informal discussions between the attorneys often take place at all stages of the process, up to and even during the course of the trial, in an effort to settle the case. These discussions usually intensify once motions for summary judgment have been denied and it appears that the case will be tried. Assuming that summary judgment is denied and there is no negotiated settlement, what usually follows is the pretrial conference.

At a **pretrial conference,** the court and the attorneys will meet to define the issues, prepare for the trial, and discuss the possibility of settlement. At this meeting, the parties can indicate how many days they believe it will take to try the case, try to resolve evidentiary and discovery problems, and schedule any necessary pretrial hearings. After the meeting, the judge will sign a pretrial order that records the decisions that were made at the conference.

Before proceeding to trial, many jurisdictions will require or encourage the litigating parties to participate in **alternative dispute resolution (ADR).** Some form of ADR is practiced in every state, but it is more commonly used in some jurisdictions than in others. The situation in the federal district courts is somewhat similar. Although all districts are required by federal statute to offer at least one ADR procedure, its use varies greatly by district.[74] ADR is an umbrella concept for a variety of procedures designed to help parties resolve their disputes without trials. Jurisdictions participate in ADR to differing degrees. Some mandate cooperation, and others make participation optional. In Chapter XIV we explain such ADR techniques as mediation, arbitration, summary jury trials, and minitrials, but we emphasize that any party dissatisfied with the ADR process can insist on proceeding to trial. There is a continuing dispute as to whether ADR is living up to its proponents' claims and producing faster, less expensive, and higher-quality justice than litigation.[75]

Less than 2 percent of all federal lawsuits filed actually are decided at trial.[76] Nonjury trials (also known as **bench trials**), in which a judge decides the factual issues, are conducted differently from trials in which juries render a verdict. In bench trials, for example, there are no jurors to select, the attorneys generally do not make opening statements, the rules of evidence are often relaxed, and there are no jury instructions to prepare and deliver. The judge will consider the evidence presented by each party and determine whether the plaintiff has satisfied the burden of proof. At the end of a bench trial, the judge will announce findings of fact, state conclusions of law, and award a judgment.

Additional procedures are necessary for jury trials. The jurors have to be carefully selected, and in major trials, the lawyers may seek help from trial

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consultants. Because jurors generally know little about rules of evidence and the applicable law, the lawyers do not present their cases as they would in a bench trial. Judges must keep the lawyers in check and ensure that the jury is exposed only to evidence that is relevant, material, and competent (legally adequate). After each side has had the opportunity to present evidence and cross-examine opposing witnesses, the attorneys will conclude by arguing their cases to the jury. After the closing arguments, the judge instructs the jury on the law and sends it out to deliberate. The jury deliberates until it reaches a verdict, which it reports to the court. After deciding any postverdict motions, the court will enter a **judgment** in favor of one of the parties and award relief accordingly. Normally any party dissatisfied with the judgment will have a specified number of days after the entry of judgment in which to make an appeal, provided timely objections were made during the trial.

READING CASES

The application of law to factual situations is necessary when there is a controversy between two or more people or when parties seek guidance concerning the consequences of their conduct or proposed conduct. The court cases in this text involve disputes that the parties were unable to resolve by themselves and that were brought to the trial and appellate courts for a decision. Most disputes, however, are settled by the parties outside court based on professional predictions of what a court would do.

Students learn to understand the legal process and the relationship between judicial theories and practical legal problems by analyzing actual court cases. The cases in this text illustrate particular points of law. They also convey current legal theory. These cases should serve as points of departure for discussions about the legal response to current social problems. It is important to understand the strengths and weaknesses of law as an instrument of social change.

Case reports are official explanations of a court's decision-making process. They explain which legal principles are applicable and why they are controlling under the particular circumstances of each case. Thus, in analyzing each case decision, students should focus on the underlying factual situation, the law that the court applied, whether the decision was just, and the impact the decision will have when it is used as precedent.

Author's Comment about *E. I. Du Pont de Nemours & Co., Inc. v. Christopher*

Persons interested in reading *E. I. Du Pont de Nemours & Co., Inc. v. Christopher*, which was the first case in editions of this textbook published between 1975 and 2006, can find it online in the "retired cases" section of the textbook's website. Many students who initially struggled with the *Du Pont* case later came to appreciate that it previewed and contributed to their understanding of their entire course.

Introduction to *Video Software Dealers Association et al. v. Arnold Schwarzenegger*

Our first case concerns the State of California's attempt to make it a crime for minors to rent or purchase video games featuring what many would consider to be "morbid or deviant" content, such as *Grand Theft Auto* and *Postal 2*. The state contended the aforementioned products and other games with similar content were harming minors.

A bill was passed by the state legislature and signed into law by the governor, which was intended to prevent minors from engaging in "violent, aggressive, and antisocial behavior," and protect minors who do play video games from sustaining "psychological or neurological harm." The state justified the need for such legislation by pointing to the disturbing content contained on such videos—images of humans being killed, maimed, dismembered, or sexually assaulted. The state also emphasized its legitimate concern about the impact these images could have on minors playing these games.

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The law provided that video games containing "serious literary, artistic, political, or scientific" content, which were clearly appropriate for minors and compatible with existing community standards, were exempted from the provisions of this law. The statute also exempted purchases or rentals of "violent video games" made by parents for their children.

The Video Software Dealers Association (VSDA) and another trade association filed suit against the state to prevent the law's implementation.

The issue before the court for decision related to whether the statute infringed on the right to freedom of speech protected by the First and Fourteenth Amendments to the U. S. Constitution.

Video Software Dealers Association et al. v. Arnold Schwarzenegger
U.S. Court of Appeals for the Ninth Circuit
556 F.3d 950
February 20, 2009

Callahan, Circuit Judge:

Defendants–Appellants California Governor Schwarzenegger and California Attorney General Brown (the "State") appeal the district court's grant of summary judgment in favor of…Video Software Dealers Association and Entertainment Software Association ("Plaintiffs")…. Plaintiffs filed suit for declaratory relief seeking to invalidate newly enacted California Civil Code sections 1746–1746.5 (the "Act"), which impose restrictions…on the sale or rental of "violent video games" to minors, on the grounds that the Act violates rights guaranteed by the First and Fourteenth Amendments.…

I.

A.

On October 7, 2005, Governor Schwarzenegger signed into law Assembly Bill 1179 ("AB 1179"), codified at Civil Code §§ 1746–1746.5 …. The Act states that "[a] person may not sell or rent a video game that has been labeled as a violent video game to a minor." Cal. Civ. Code § 1746.1(a)…. Violators are subject to a civil penalty of up to $ 1,000. Id. at § 1746.

Central to this appeal, the Act defines a "violent video game" as follows:

> (d)(1) "Violent video game" means a video game in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human being, if those acts are depicted in the game in a manner that does either of the following:
>
> (A) Comes within all of the following descriptions:
> (i) A reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors.
> (ii) It is patently offensive to prevailing standards in the community as to what is suitable for minors.
> (iii) It causes the game, as a whole, to lack serious literary, artistic, political, or scientific value for minors.
> (B) Enables the player to virtually inflict serious injury upon images of human beings or characters with substantially human characteristics in a manner which is especially heinous, cruel, or depraved in that it involves torture or serious physical abuse to the victim….

Borrowing language from federal death penalty jury instructions, the Act also defines the terms "cruel," "depraved," "heinous," and "serious physical abuse,"… and states that "[p]ertinent factors in determining whether a killing depicted in a video game is especially heinous, cruel, or depraved include infliction of gratuitous violence upon the victim beyond that necessary to commit the killing, needless mutilation of the victim's body, and helplessness of the victim.…"

A.B. 1179 states that the State of California has two compelling interests that support the Act: (1) "preventing violent, aggressive, and antisocial behavior"; and (2) "preventing psychological or neurological harm to minors who play violent video games." A.B. 1179 also "finds and declares" that

> (a) Exposing minors to depictions of violence in video games, including sexual and heinous violence, makes those minors more likely to experience feelings of aggression, to experience a reduction of activity in the frontal lobes of the brain, and to exhibit violent antisocial or aggressive behavior.

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(b) Even minors who do not commit acts of violence suffer psychological harm from prolonged exposure to violent video games.

The State included in the excerpts of record several hundred pages of material on which the Legislature purportedly relied in passing the Act. While many of the materials are social science studies on the asserted impact of violent video games on children, other documents are varied and include legal analyses, general background papers, position papers, etc.

B.

The content of the video games potentially affected by the Act is diverse. Some of the games to which the Act might apply are unquestionably violent by everyday standards, digitally depicting what most people would agree amounts to murder, torture, or mutilation. For example, the State submitted a videotape that contains several vignettes from the games Grand Theft Auto: Vice City, Postal 2, and Duke Nukem 3D, which demonstrate the myriad ways in which characters can kill or injure victims or adversaries.… The record also contains descriptions of several games, some of which are based on popular novels or motion pictures, which are potentially covered by the Act. Many of these games have extensive plot lines that involve or parallel historical events, mirror common fictional plots, or place the player in a position to evaluate and make moral choices.

The video game industry has in place a voluntary rating system to provide consumers and retailers information about video game content. The Entertainment Software Rating Board ("ESRB"), an independent, self-regulated body established by the Entertainment Software Association, rates the content of video games that are voluntarily submitted. ESRB assigns each game one of six age-specific ratings, ranging from "Early Childhood" to "Adults Only." It also assigns to each game one of roughly thirty content descriptors, which include "Animated Blood," "Blood and Gore," "Cartoon Violence," "Crude Humor," "Fantasy Violence," "Intense Violence," "Language," "Suggestive Themes," and "Sexual Violence."

II.

We review a grant of summary judgment de novo and must "determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied substantive law…."

IV.

The Supreme Court has stated that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them…. The State does not contest that video games are a form of expression protected by the First Amendment…. It is also undisputed that the Act seeks to restrict expression in video games based on its content…. ("[A] law is content-based if either the main purpose in enacting it was to suppress or exalt speech of a certain content, or it differentiates based on the content of speech on its face." …We ordinarily review content-based restrictions on protected expression under strict scrutiny, and thus, to survive, the Act "must be narrowly tailored to promote a compelling Government interest." *United States v. Playboy Entm't Group, Inc.*, [529 U.S. 803… (2000)]. "If a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative…." see also *Sable Commc'ns of Cal., Inc. v. FCC*…(1989) ("The Government may…regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.")….

The State, however, urges us to depart from this framework because the Act concerns minors. It argues… that the Court's reasoning in [*Ginsberg v. New York*, 390 U.S. 629 (1968)]…that a state could prohibit the sale of sexually explicit material to minors that it could not ban from distribution to adults should be extended to materials containing violence. This presents an invitation to reconsider the boundaries of the legal concept of "obscenity" under the First Amendment.

In *Ginsberg,* the Court held that New York State could prohibit the sale of sexually explicit material to minors that was defined by statute as obscene because of its appeal to minors…Therefore, the state could prohibit the sale of "girlie magazines" to minors regardless of the fact that the material was not considered obscene for adults…. The Court stated that "[t]o sustain the power to exclude material defined as obscenity by [the statute] requires only that we be able to say that it was not irrational for the legislature to find that exposure to material condemned by the statute is harmful to minors."…The Court offered two justifications for applying this rational basis standard: (1) that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"; and (2) the State's "independent interest in the well being of its youth." …

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The State suggests that the justifications underlying *Ginsberg* should apply to the regulation of violent content as well as sexually explicit material. The assertion, however, fails when we consider the category of material to which the *Ginsberg* decision applies and the First Amendment principles in which that decision was rooted. *Ginsberg* is specifically rooted in the Court's First Amendment obscenity jurisprudence, which relates to non-protected sex-based expression—not violent content, which is presumably protected by the First Amendment…. *Ginsberg* explicitly states that the New York statute under review "simply adjusts the definition of obscenity to social realities by permitting the appeal of this type of material to be assessed in term of the sexual interests of such minors"…. The *Ginsberg* Court applied a rational basis test to the statute at issue because it placed the magazines at issue within a sub-category of obscenity—obscenity as to minors—that had been determined to be not protected by the First Amendment, and it did not create an entirely new category of expression excepted from First Amendment protection. The State, in essence, asks us to create a new category of non-protected material based on its depiction of violence. The Supreme Court has carefully limited obscenity to sexual content. Although the Court has wrestled with the precise formulation of the legal test by which it classifies obscene material, it has consistently addressed obscenity with reference to sex-based material….

In light of our reading of *Ginsberg* and the cases from our sister circuits, we decline the State's invitation to apply the *Ginsberg* rationale to materials depicting violence, and hold that strict scrutiny remains the applicable review standard…. We decline the State's entreaty to extend the reach of *Ginsberg* and thereby redefine the concept of obscenity under the First Amendment.

V.

Accordingly, we review the Act's content-based prohibitions under strict scrutiny. As noted above, "[c]ontent-based regulations are presumptively invalid."…and to survive the Act "must be narrowly tailored to promote a compelling Government interest."… Further, "[i]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative."…

A.

The Legislature stated that it had two compelling interests in passing the Act: (1) "preventing violent, aggressive, and antisocial behavior"; and (2) "preventing psychological or neurological harm to minors who play violent video games." Although there was some early confusion over whether the State was relying on both of these interests, the State subsequently clarified that "[t]he physical and psychological well-being of children is the concern of the Act," as distinguished from the interest of protecting third parties from violent behavior. The State's focus is on the actual harm to the brain of the child playing the video game. Therefore, we will not assess the Legislature's purported interest in the prevention of "violent, aggressive, and antisocial behavior"….

The Supreme Court has recognized that "there is a compelling interest in protecting the physical and psychological well-being of minors"…. Notwithstanding this abstract compelling interest, when the government seeks to restrict speech "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"…. Although we must accord deference to the predictive judgments of the legislature, our "obligation is to assure that, in formulating its judgments, [the legislature] has drawn reasonable inferences based on substantial evidence"…

In evaluating the State's asserted interests, we must distinguish the State's interest in protecting minors from actual psychological or neurological harm from the State's interest in controlling minors' thoughts. The latter is not legitimate…. Violence has always been and remains a central interest of humankind and a recurrent, even obsessive theme of culture both high and low. It engages the interest of children from an early age, as anyone familiar with the classic fairy tales collected by Grimm, Andersen, and Perrault is aware. To shield children right up to the age of eighteen from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it…. *Interactive Digital Software Ass'n*…. Because the government may not restrict speech in order to control a minor's thoughts, we focus on the State's psychological harm rationale in terms of some actual effect on minors' psychological health.

Whether the State's interest in preventing psychological or neurological harm to minors is legally compelling depends on the evidence the State proffers of the effect of video games on minors. Although the Legislature is entitled to some deference, the courts are required to review whether the Legislature has drawn reasonable inferences from the evidence presented…. Here, the State relies on a number of studies in support of its argument that there is substantial evidence of a causal effect between minors playing violent video games and actual psychological harm….

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[T]he evidence presented by the State does not support the Legislature's purported interest in preventing psychological or neurological harm. Nearly all of the research is based on correlation, not evidence of causation, and most of the studies suffer from significant, admitted flaws in methodology as they relate to the State's claimed interest. None of the research establishes or suggests a causal link between minors playing violent video games and actual psychological or neurological harm, and inferences to that effect would not be reasonable. In fact, some of the studies caution against inferring causation. Although we do not require the State to demonstrate a "scientific certainty," the State must come forward with more than it has. As a result, the State has not met its burden to demonstrate a compelling interest.

B.

Even if we assume that the State demonstrated a compelling interest in preventing psychological or neurological harm, the State still has the burden of demonstrating that the Act is narrowly tailored to further that interest, and that there are no less restrictive alternatives that would further the Act…. We hold that the State has not demonstrated that less restrictive alternative means are not available….

Based on the foregoing, and in light of the presumptive invalidity of content-based restrictions, we conclude that the Act fails under strict scrutiny review….

VII.

We decline the State's invitation to apply the variable obscenity standard from Ginsberg to the Act because we do not read Ginsberg as reaching beyond the context of restrictions on sexually explicit materials or as creating an entirely new category of expression—speech as to minors—excepted from First Amendment protections. As the Act is a content-based regulation, it is subject to strict scrutiny and is presumptively invalid. Under strict scrutiny, the State has not produced substantial evidence that supports the Legislature's conclusion that violent video games cause psychological or neurological harm to minors. Even if it did, the Act is not narrowly tailored to prevent that harm, and there remain less restrictive means of forwarding the State's purported interests, such as the improved ESRB rating system, enhanced educational campaigns, and parental controls…. Accordingly, the district court's grant of summary judgment to Plaintiffs…is AFFIRMED.

Case Questions

1. What claim was made by the VSDA in its complaint about the California violent video games law?
2. From what decision did the California officials appeal to the U.S. Court of Appeals for the Ninth Circuit?
3. Assume that the Ninth Circuit ruled in favor of the state, and minors were prohibited from purchasing violent video games. Think through what the subsequent consequences of such a ruling might be.
4. What explanation did the U.S. Court of Appeals give for its decision?

CASE ANALYSIS

Because the case of *Video Software Dealers Association … v. Arnold Schwarzenegger* is the first reported judicial decision in this book, a brief introduction to case analysis is appropriate. The case heading consists of four items. The first line contains the names of the parties to the suit. The Video Software Dealers Association and the Entertainment Software Association (hereafter called the VSDA), were the plaintiffs (the parties filing the complaint in this case). Governor Arnold Schwarzenegger and California Attorney General Edmund G. Brown, Jr. (hereafter called the "California officials") were the defendants (the parties being sued). The next item in the heading describes the volume and page where the judicial opinion in the case can be found. In this instance, the case is reported in volume 556 of the third series of the Federal Reporter (F.3d), on page 950. The name of the appellate court that decided the appeal is next in the heading, followed by the date the decision was published. Although federal and state trials are presided over by a single judge, cases reviewed by U.S. Circuit Courts of Appeals are normally reviewed by a panel of three judges. The VDSA case was decided by

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Alex Kozinski, Chief Judge, and Circuit Judges Sidney R. Thomas and Consuelo M. Callahan.

The first item in the body of the court opinion is the name of the judge who wrote the appellate court's majority opinion (also called the opinion for the court). Generally only one of the judges voting with the majority of the court is selected to write the majority opinion. The other members of the court who constitute the majority are said to have "joined in the opinion." The majority opinion explains the court's decision in the case and the majority's reasoning for reaching that outcome. A concurring opinion is written by a judge who, while voting with the majority, has additional comments to make that go beyond what is included in the majority opinion. Sometimes the majority will agree on the decision but disagree on the reasons for that result. In such a case, the court will announce the decision, but there will be no majority opinion. The judges constituting the majority will write concurring opinions explaining their differing reasons for what they agree is the correct result. A judge who disagrees with the majority opinion can explain why in a dissenting opinion.

In our first case, the VSDA filed suit against the governor and attorney general. It asked for declaratory relief. This means that the VSDA requested that the trial court (the United States District Court for the Northern District of California—hereafter called the district court) award it a **declaratory judgment.** This means that the VSDA wanted the court to declare that the California "violent video games law" (Civil Code §§ 1746–1746.5) violated constitutionally protected free speech rights. The plaintiffs also requested that the district court issue an **injunction** (a court order requiring someone to perform some act or refrain from performing an act). In this case the plaintiffs sought an injunction prohibiting California from enforcing the "violent video games law." Both parties filed pretrial summary judgment motions, with the district court ruling in favor of the VSDA. That decision was appealed to the U.S. Court of Appeals for the Ninth Circuit because the California officials believed the district court had incorrectly decided the case. On appeal, the California officials, the parties seeking appellate review, acquired the status of appellants and the VSDA became the appellees.

Only courts with appellate jurisdiction are entitled to decide cases on appeal. Appeals courts review the decisions of lower courts to see if substantial error was committed in those lower courts. An appellate court can affirm, reverse, and/or remand a lower court's decision. It can also, when appropriate, dismiss an appeal. If an appellate court affirms the lower court, it rules that the lower court's decision is valid and reasserts the judgment. If it reverses, it vacates and sets aside the lower court's judgment. Note that a decision can be reversed in part. When a case is remanded, it is returned to the lower court, generally with instructions as to further proceedings to be undertaken by the trial court.

In order to maximize the benefits of the case study method, one must read each case carefully and pay close attention to detail. After reading a case, one should have not merely a general sense or the gist of what the case says, but a precise understanding of what the court did.

Careful attention should be given to the **holding** of the case—the rule of law that the court says applies to the facts of the case. Majority opinions are often discursive and their authors often stray into writing about issues not actually before the court for decision. Such unnecessary comments are classified as **dicta.** Although these statements may appear to be important, if they are dicta they lack the authority of the case's holding.

Most students new to reading judicial opinions often find it helpful to **brief** a case. With practice it becomes possible to write a brief without having to refer back constantly to the judicial opinion itself. Briefing the case from memory provides a check on understanding, as well as an incentive to careful reading. A brief should contain the parts of the case selected as important, organized for the purpose at hand rather than in the haphazard order in which they may be reported.

The following brief of the *Video Software Dealers Association v. Arnold Schwarzenegger* case illustrates one way of briefing. The elements in the example are usually found in most briefs,

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though writing style is often a matter of individual preference. It is usually desirable to keep copying from the text of the case to a minimum; briefs are not exercises in stenography. This brief was written to help students who have not previously read a judicial opinion. It is intended to help these students understand what is important in the case reports they are reading.

Sample Brief

Video Software Dealers Association v. Schwarzenegger, 556 F.3d 950 (2009)

Facts: California adopted a statute making it a crime for persons under eighteen to purchase or rent what the law termed "violent video games." Violent video games were defined as being products that focused on images that "reasonable people" would think too extreme for minors to see and which otherwise lacked any redeeming literary, artistic, political, or scientific value. Proponents contended that the video games targeted in this statute contained content that was physically and psychologically harmful to minors. The state also argued that the games emphasized "deviant and morbid images," a focus incompatible with "community standards."

Two video trade associations filed suit against the state in the local federal district court, claiming that the "violent video games" statute infringed on constitutionally protected rights to freedom of speech.

Both sides moved for summary judgment, each asserting that there were no material facts in dispute that needed to be resolved and each claiming that it was entitled to judgment as a matter of law with respect to the constitutional claims.

The district court ruled against the state and the state appealed that decision to the U.S. Court of Appeals for the Ninth Circuit.

Issues Presented or Questions of Law:

1. Is a California statute that restricts the right of minors to purchase video games containing violent content subject to strict scrutiny review?

   The district court ruled that strict scrutiny was required.

2. Did the state prove the existence of compelling interests sufficient to justify restricting the free speech rights of minors to purchase and view video games containing violent content?

   The district court ruled that the state had not proven its compelling interest claim and that even if it had, the statutory restrictions had not been narrowly tailored.

3. Did the state disprove the possibility that less restrictive alternative means exist, other than the statute, for remedying the alleged compelling interest, and was the statute narrowly tailored?

   The district court did not address this issue.

Holding: The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's grant of summary judgment in favor of VSDA. It held that minors have the right to purchase violent video games because the California violent video games statute violated the right to freedom of expression protected by the First and Fourteenth Amendments.

Rationale: The appellate court explained the reasoning behind its holding as follows:

1. The statute is subject to strict scrutiny review. Freedom of expression has been recognized by the U.S. Supreme Court as one of the most fundamental of our constitutional rights. Normally state laws that restrict freedom of expression are presumed to be unconstitutional and can only survive constitutional challenge if they pass a rigorous level of judicial examination called *strict scrutiny*. The parties to this case disagreed about whether the court of appeals should examine the "violent video game" statute using the strict scrutiny test or should apply a less-demanding standard. The VSDA argued that strict scrutiny was required, and that to save the statute the state had to prove

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the existence of a "compelling interest" that would justify overriding minors' right to freedom of expression. The state disagreed. It urged the court of appeals to use a "a more relaxed" level of scrutiny when examining the video game statute. It urged the court of appeals to use the same level of scrutiny that the U.S. Supreme Court had approved in the 1968 case of *Ginsburg v. New York*. *Ginsburg* was a case in which the Supreme Court found constitutional a New York state statute that prohibited minors from purchasing "sexually explicit" materials. The Supreme Court ruled in that case that the New York statute did not have to undergo strict scrutiny review. Statutes that restrict minors from purchasing "sexually explicit" materials can survive a constitutional challenge, said the Supreme Court, if there is a rational basis for such laws. To be constitutional under this more relaxed, rationally based standard, the state would only have to prove there was some rationality supporting the legislature's conclusion that "the exposure [of minors] to [sexually explicit] material condemned by the statute is harmful to others." The court of appeals rejected the state's compelling-interest claim, concluding that the *Ginsburg* precedent was "rooted in obscenity" law and had not been extended into "violence" jurisprudence. The Ninth Circuit, after researching the law, found no cases in which the definition of obscenity had been extended beyond sexually oriented materials. The Ninth Circuit declared itself to be unwilling to break new ground itself by defining obscenity as including violence. Thus it concluded that the California statute would only be constitutional if it could withstand strict scrutiny review.

2. The state failed to meet its burden of proving that a compelling interest exists, which is necessary to justify infringing on a minor's right to purchase video games containing violent content.

   The court of appeals, as part of its strict scrutiny review, examined the interests that the state claimed were so compelling as to warrant restricting minors' free speech rights. The state claimed the challenged statute would help to prevent minors from engaging in "violent, aggressive, and antisocial behavior" and would also protect them from sustaining "psychological or neurological harm." The court of appeals reviewed the research studies that the state claimed established a causal relationship linking the playing of violent video games to the occurrence of physical and neurological harm in minors. After identifying serious weaknesses in the proffered research and determining that its probative value was unimpressive, the court of appeals concluded that the state had not proven its compelling interest claim.

3. The state failed to meet either (a) its obligation to disprove the possibility that other nonstatutory, less restrictive options would be equally as effective as, or more effective than, the challenged statute in achieving the government's stated interests, or (b) its obligation to prove that the challenged statute was narrowly tailored.

   The Ninth Circuit was critical of the state's failure to disprove the efficacy of less restrictive alternatives to the challenged statute. This lack of proof led the appellate court to conclude that the statute was not narrowly tailored. The appellate court also objected to the related failure of the state to specifically respond to the video game industry's voluntary efforts to rate videos as to age appropriateness and to educate sellers and buyers of video games about the substantive content of each video.

Video Software Dealers Association Update

Governor Schwarzenegger successfully petitioned the U.S. Supreme Court for certiorari in this case. The high court is not expected to decide the case until spring 2011. The U.S. Supreme Court's decision will be posted on the textbook website once the justices announce their ruling.

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DUE PROCESS

The Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution provide that no person shall be "deprived of life, liberty, or property, without due process of law." These clauses are deeply embedded in Anglo-American legal history, going back to 1215. In June of that year, English barons decided that King John had been acting arbitrarily and in violation of their rights. They sought protection from the king in the Magna Carta, a charter containing sixty-three chapters that limited the king's powers.[77] Chapter XXXIX of the Magna Carta is the predecessor of our Due Process Clauses.

It provided that "no man shall be captured or imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers or by the law of the land."[78]

The barons amassed an army, confronted the king, and forced him to agree to the Magna Carta. Subsequent monarchs reissued the Magna Carta many times over the next two centuries.[79] In 1354 the words "by the law of the land" (which were initially written in Latin) were translated into English to mean "by due process of the law."[80] In the seventeenth century, these words were interpreted to include the customary rights and liberties of Englishmen.[81] English legal commentators further expanded the scope of due process by arguing that it included what philosopher John Locke called each individual's natural right to "life, liberty, and property."[82]

The Magna Carta's influence in this country is apparent in the 1776 constitutions of Maryland and North Carolina, which contain due process language taken verbatim from the Magna Carta. In 1791 the Due Process Clause was included in the Fifth Amendment to the U.S. Constitution. Every person in our society has an inherent right to due process of law, which protects him or her from arbitrary, oppressive, and unjust governmental actions. If a proceeding results in the denial of fundamental fairness and shocks the conscience of a court, a violation of due process has occurred. In addition, under both the Fifth and Fourteenth Amendments, a corporation, as well as a partnership or unincorporated association, is a person to whom that protection applies.

Due process of the law focuses on deprivations of "life, liberty, and property." "Life" refers to deprivation of biological life and to a person's right to have a particular lifestyle. "Liberty," as is further explained below, covers a vast scope of personal rights. It also implies the absence of arbitrary and unreasonable governmental restraints on an individual's person, as well as the freedom to practice a trade or business, the right to contract, and the right to establish a relationship with one's children. "Property" is everything that may be subject to ownership, including real and personal property, obligations, rights, legal entitlements such as a public education, and other intangibles.

Determining what due process means in a given factual situation has been a matter for the judiciary. In this, the courts are influenced by procedures that were established under English common law prior to the enactment of our constitution. They are also influenced by contemporary events, values, and political and economic conditions.

The due process guarantee protects people from unfairness in the operation of both substantive and procedural law. Substantive law refers to the law that creates, defines, and regulates rights. It defines the legal relationship between the individual and the state and among individuals themselves and is the primary responsibility of the legislative branch of the government. Procedural law prescribes the method used to enforce legal rights. It provides the machinery by which individuals can enforce their rights or obtain redress for the invasion of such rights.

The Fifth and Fourteenth Amendments

The Fifth Amendment guarantee of due process of law was included in the Bill of Rights in order to place limits on the federal government. It was intended to control the Congress, and prior to the Civil War, it was primarily used to protect property

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rights from governmental regulation. The Due Process Clause was also interpreted by the Supreme Court to overrule those parts of the Missouri Compromise that prohibited slavery. In the *Dred Scott* case (60 U.S. 393 [1861]), the Supreme Court ruled that slaves were property, and thus the Due Process Clause prohibited Congress from making slavery illegal. This is a historical irony, given the role due process has played in promoting civil rights in recent decades. Even during the Civil War era, many abolitionists interpreted due process differently and identified this Fifth Amendment clause as the basis for their convictions, maintaining that states had no right to deny slaves, or any other person, the right to life, liberty, or property without due process of law.

The addition of the Fourteenth Amendment to the Constitution in 1868 reflected the abolitionists' position. From that point forward, state governments were constitutionally required to provide due process of law and equal protection of the law to *all* people.

The Meaning of Substantive Due Process

The Bill of Rights contains many specifics regarding procedural fairness, particularly in criminal cases, but the meaning of substantive due process is less obvious. In our system of government, the U.S. Supreme Court has historically borne the responsibility for determining the degree to which the concept of due process includes a substantive dimension.

In substantive due process cases, the claimant challenges a statute on the grounds that the law excessively intrudes on individual decision making. The claimant argues that the infringement is against that person's due process liberty interest. When the court examines the facts, it often discovers that the government has no legitimate interest in the matter and is acting arbitrarily, and the claimant has an important, historically validated interest (a "fundamental right," in legalese) to make the decision. The court decides these claims on a case-by-case basis, and the claimant wins when a majority of justices conclude that the claimed right should be classified as fundamental given these particular circumstances.

An example of such a case is found in Chapter IX of this textbook in a case decided by the U.S. Supreme Court in 1967, titled *Loving v. Virginia*. Richard Loving, who was white, and his wife, Mildred, who was black, brought suit challenging Virginia's antimiscegenation laws (statutes making it illegal for white people to marry black people). The U.S. Supreme Court ruled in favor of the Lovings. It concluded that the decision as to whether to enter into an interracial marriage was a matter for Richard and Mildred, not the Commonwealth of Virginia. The Court said that Virginia had no legitimate interest in the races of married people, and could not categorically prohibit black and white people from marrying one another.

But most persons seeking federal due process protection are unsuccessful. You will soon read the case of *Washington v. Glucksberg,* in which doctors unsuccessfully argued before the U.S. Supreme Court that they had a constitutionally protected due process right to assist their terminally ill patients to commit suicide. The Supreme Court ultimately decided that the doctors' claim was not within the scope of due process protection.

U.S. Supreme Court Justice David H. Souter commented in *Washington v. Glucksberg*, 521 U.S. 702 (1997), on substantive due process in his concurring opinion. Souter, although voting with the majority to sustain Washington's statute, recognized the conceptual legitimacy of substantive due process. He referred to substantive due process as the long-standing "American constitutional practice… [of] recognizing unenumerated substantive limits on governmental action" (e.g., rights not explicitly included in the text of the Constitution).

This "American constitutional practice" was also acknowledged by the late Chief Justice Rehnquist in *Cruzan v. Missouri Department of Health*, 497 U.S. 261 (1990), where he asserted in his opinion for the Court that "the principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions." In *Cruzan*, as in *Glucksberg* and *Loving*, the fact that the

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Due Process Clauses were textually silent about a substantive due process claim did not preclude the Court from recognizing that such an unenumerated right is protected within the scope of substantive due process.

Substantive Due Process and Economic and Social Regulation

In the years following the enactment of the Fourteenth Amendment, the U.S. Supreme Court began a slow process of expanding the substantive meaning of due process. As we learned in the earlier discussion of sociological jurisprudence, the Supreme Court in the 1890s was unsympathetic to the Progressives and state reform legislation. In the early cases, the states usually won if they were legislating to protect the public's health, welfare, safety, or morals. Gradually, however, the Court began using the Fourteenth Amendment to strike down state social and economic legislation. The justices often concluded that these laws exceeded the state's legislative power because they infringed upon the individual's due process right to contract. They maintained that the individual had the right to determine how many hours he or she wanted to work, at least in nonhazardous occupations. And legislative attempts to set minimum wages for women hospital workers were viewed by the Court as "price fixing." The Court was, in effect, sitting in judgment on the legislative policies themselves. The Court used the Due Process Clause as an instrument for striking down social and economic legislation with which it disagreed.

The depression of the 1930s resulted in New Deal legislative initiatives that were intended to stimulate the economy. Congress created numerous agencies and programs in order to benefit industry, labor, savers and investors, farmers, and the needy. However, the Supreme Court struck down many of these New Deal laws between 1934 and 1936. This made the Court very unpopular in the "court" of public opinion, and the president responded by proposing that Congress increase the size of the Court, presumably so that he could nominate people for the new seats who were sympathetic to New Deal legislation. In 1936, the Supreme Court began to reverse itself and uphold New Deal legislation. In 1937, the Court's majority began using the Commerce Clause to sustain federal legislation, and they were no longer using the due Process Clause to overturn state reforms. The Court replaced the dual federalism doctrine, which attempted to enforce strict boundaries around the federal and state "zones of interest," with a general policy of deference to legislative preferences with respect to social and economic policies that are in its view neither arbitrary nor irrational.

However, the traditional deference shown to Congress was called into question in 1995 in the case of *United States v. Lopez* (a "Commerce Clause" case that can be read on this textbook's website), in which the Supreme Court explicitly held that Congress did not have the right under the Commerce Clause to criminalize the possession of a gun within a local school zone because there was no connection between the legislation and commerce. The Court also used this same rationale in 2000 to strike down a portion of the Violence Against Women Act in the case of *United States v. Morrison*. But as we will see in *Gonzales v. Raich* (the "medical marijuana" case you will read in Chapter III), the Supreme Court in 1995 upheld Congress's right to make it a crime for someone to grow their own marijuana for personal medicinal purposes. It is unlikely that the existing ambiguity about the Commerce Clause will be resolved in a clear-cut, doctrinaire manner. Rather, its meaning will probably evolve slowly on a case-by-case basis in the traditional common law manner.

The Scope of Substantive Due Process

In the 1920s, the Supreme Court began to recognize that an individual's liberty rights included more than just property rights. Individual "liberty" also required the constitutional protection of certain kinds of conduct. The justices of the U.S. Supreme Court differed, however, about whether such rights could be "found" within the meaning of due process. Although various justices on the Court proposed limits on the scope of substantive due

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