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CHAPTER 1

LEGAL AND CONSTITUTIONAL FOUNDATIONS OF BUSINESS

ANSWERS TO LEARNING OBJECTIVES AT THE BEGINNING OF THE CHAPTER

1A. ***What are four primary sources of law in the United States?*** Primary sources of law are sources that establish the law. In the United States, these include the U.S. Constitution and the state constitutions, statutes passed by Congress and the state legislatures, regulations created by administrative agencies, and court decisions, or case law.

2A. ***What is a precedent? When might a court depart from precedent?*** Judges attempt to be consistent, and when possible, they base their decisions on the principles suggested by earlier cases. They seek to decide similar cases in a similar way and consider new cases with care, because they know that their conflicting decisions make new law. Each interpretation becomes part of the law on the subject and serves as a legal precedent—a decision that furnishes an example or authority for deciding subsequent cases involving similar legal principles or facts.

A court will depart from the rule of a precedent when it decides that the rule should no longer be followed. If a court decides that a precedent is simply incorrect or that technological or social changes have rendered the precedent inapplicable, the court might rule contrary to the precedent.

3A. ***What are some important differences between civil law and criminal law?*** Civil law spells out the rights and duties that exist between persons and between persons and their governments, and the relief available when a person's rights are violated. In a civil case, a private party may sue another private party (the

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government can also sue a party for a civil law violation) to make that other party comply with a duty or pay for damage caused by a failure to comply with a duty.

Criminal law has to do with wrongs committed against society for which society demands redress. Local, state, or federal statutes proscribe criminal acts. Public officials, such as district attorneys, not victims or other private parties, prosecute criminal defendants on behalf of the state.

In a civil case, the object is to obtain remedies (such as damages) to compensate an injured party. In a criminal case, the object is to punish a wrongdoer to deter others from similar actions. Penalties for violations of criminal statutes include fines and imprisonment, and in some cases, death.

4A. ***What constitutional clause gives the federal government the power to regulate commercial activities among the states?*** To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to the national government the power to regulate interstate commerce. The commerce clause—Article I, Section 8, of the U.S. Constitution—expressly permits Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

5A. ***What is the Bill of Rights? What freedoms does the First Amendment guarantee?*** The Bill of Rights consists of the first ten amendments to the U.S. Constitution. Adopted in 1791, the Bill of Rights embodies protections for individuals against interference by the federal government. Some of the protections also apply to business entities. The First Amendment guarantees the freedoms of religion, speech, and the press, and the rights to assemble peaceably and to petition the government.

6A. ***Where in the Constitution can the due process clause be found?*** Both the Fifth and the Fourteenth Amendments to the U.S. Constitution provide that no person shall be deprived "of life, liberty, or property, without due process of law." The due process clause of each of these constitutional amendments has two aspects—procedural and substantive.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE FEATURES

BEYOND OUR BORDERS—CRITICAL THINKING

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

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might this have on their decisions? Explain. U.S. courts should consider foreign law when deciding issues of national importance because changes in views on those issues is not limited to domestic law. How other jurisdictions and other nations regulate those issues can be informative, enlightening, and instructive, and indicate possibilities that domestic law might not suggest. U.S. courts should not consider foreign law when deciding issues of national importance because it can be misleading and irrelevant in our domestic and cultural context.

ADAPTING THE LAW TO THE ONLINE ENVIRONMENT—CRITICAL THINKING

The Court said in its opinion that "specific criminal acts are not protected speech even if speech is the means for their commission." What use of the social media and the Internet might therefore still be unlawful (and not protected free speech) for registered sex offenders? If a registered sex offender used the Internet specifically to contact a minor, that type of speech would be prohibited. Additionally, a registered sex offender's use of a website specifically to obtain information about a minor would not be protected free speech.

ANSWERS TO CRITICAL THINKING QUESTIONS IN THE CASES

CASE 1.1—CRITICAL THINKING QUESTION
WHAT IF THE FACTS WERE DIFFERENT?

If this case had involved a small, private retail business that did not advertise nationally, would the result have been the same? Why or why not? It is not likely that the result in this case would have been different even if the facts had involved a small, private retail business that did not advertise nationally. The intended impact of the decision in *Heart of Atlanta* was to uphold the constitutionality of the Civil Rights Act of 1964 and the power of Congress to regulate interstate commerce to stop local discriminatory practices. In the Supreme Court's opinion, "The power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."

Thus, if the case had involved a small, local retail business, the Court would have found participation in interstate commerce based on the use of a phone, or a Facebook page (or other Web presence), or sales to customers who traveled across state lines—or, as in *Wickard v. Filburn*, participation might have been based on any transaction that might otherwise have occurred in interstate commerce.

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CASE 1.2—CRITICAL THINKING QUESTIONS

LEGAL ENVIRONMENT

How does the making of "audio and video recordings of an agricultural production facility" fall under the protection of the First Amendment? As the court in the *Animal* case recognized, "Audiovisual recordings are protected by the First Amendment as recognized organs of public opinion and as a significant medium for the communication of ideas." Thus, there is a constitutional right to film matters in the public interest.

The public consumes food obtained from "agricultural production facilities," such as the dairy farm in the *Animal* case. This consumption brings those facilities within the public interest. Matters related to food safety, and by inference animal cruelty, are of significant public importance. And journalists have a constitutional right to investigate and broadcast or publish exposés on the agricultural industry, particularly with regard to food safety.

WHAT IF THE FACTS WERE DIFFERENT?

Suppose that instead of banning recordings of an agricultural production facility's operations, the state had criminalized misrepresentations by journalists to gain access to such a facility. Would the result have been different? Explain. No, the result would not have been different. Like the statute struck down by the court in the *Animal* case, the provision suggested in this question would target speech protected by the First Amendment.

As the court in the *Animal* case observed, "Journalists [have a] constitutional right to investigate and publish exposés on the agricultural industry. Matters related to food safety and animal cruelty are of significant public importance." Of course, false statements are not always protected under the First Amendment. For example, false statements made for material gain or advantage or to inflict harm can be criminalized. But a false statement made to gain access to an agricultural production facility merely allows the speaker to cross the threshold of another's property, including property that is generally open to the public. Such lies are pure speech—they do not inflict any material or legal harm on the deceived party.

CASE 1.3—CRITICAL THINKING QUESTIONS

LEGAL ENVIRONMENT

Whose interests are advanced by the banning of certain types of advertising? The government's interests are advanced when certain ads are banned. For example, in the *Bad Frog* case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of "vulgar and profane" advertising from children's sight arguably advanced the state's interest in protecting children from those ads.

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WHAT IF THE FACTS WERE DIFFERENT?

If Bad Frog had sought to use the offensive label to market toys instead of beer, would the court's ruling likely have been the same? Explain your answer. Probably not. The reasoning underlying the court's decision in the case was, in part, that "the State's prohibition of the labels . . . does not materially advance its asserted interests in insulating children from vulgarity . . . and is not narrowly tailored to the interest concerning children." The court's reasoning was supported in part by the fact that children cannot buy beer. If the labels advertised toys, however, the court's reasoning might have been different.

ANSWERS TO QUESTIONS IN THE PRACTICE AND REVIEW FEATURE AT THE END OF THE CHAPTER

1A. ***Equal protection***

When a law or action limits the liberty of some persons but not others, it may violate the equal protection clause. Here, because the law applies only to motorcycle operators and passengers, it raises equal protection issues.

2A. ***Levels of scrutiny***

The three levels of scrutiny that courts apply to determine whether the law or action violates equal protection are (1) strict scrutiny (if fundamental rights are at stake), (2) intermediate scrutiny (in cases involving discrimination based on gender or legitimacy), and (3) the "rational basis" test (in matters of economic or social welfare).

3A. ***Standard***

The court would likely apply the rational basis test, because the statute regulates a matter of social welfare by requiring helmets. Similar to seat-belt laws and speed limits, a helmet statute involves the state's attempt to protect the welfare of its citizens. Thus, the court would consider it a matter a social welfare and require that it be rationally related to a legitimate government objective.

4A. ***Application***

The statute is probably constitutional, because requiring helmets is rationally related to a legitimate government objective (public health and safety). Under the rational basis test, courts rarely strike down laws as unconstitutional, and this statute will likely further the legitimate state interest of protecting the welfare of citizens and promoting safety.

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ANSWER TO DEBATE THIS QUESTION IN THE PRACTICE AND REVIEW FEATURE AT THE END OF THE CHAPTER

Under the doctrine of* stare decisis*, courts are obligated to follow the precedents established in their jurisdictions unless there is a compelling reason not to. Should U.S. courts continue to adhere to this common law principle, given that our government now regulates so many areas by statute? Both England and the U.S. legal systems were constructed on the common law system. The doctrine of *stare decisis* has always been a major part of this system—courts should follow precedents when they are clearly established, excepted under compelling reasons. Even though more common law is being turned into statutory law, the doctrine of *stare decisis* is still valid. After all, even statutes have to be interpreted by courts. What better basis for judges to render their decisions than by basing them on precedents related to the subject at hand?

In contrast, some students may argue that the doctrine of *stare decisis* is passé. There is certainly less common law governing, say, environmental law than there was one hundred years ago. Given that federal and state governments increasingly are regulating more aspects of commercial transactions between merchants and consumers, perhaps the courts should simply stick to statutory language when disputes arise.

ANSWERS TO ISSUE SPOTTERS AT THE END OF THE CHAPTER

1A. ***The First Amendment to the U.S. Constitution provides protection for the free exercise of religion. A state legislature enacts a law that outlaws all religions that do not derive from the Judeo-Christian tradition. Is this law valid within that state? Why or why not?*** No. The U.S. Constitution is the supreme law of the land, and applies to all jurisdictions. A law in violation of the Constitution (in this question, the First Amendment to the Constitution) will be declared unconstitutional.

2A. ***South Dakota wants its citizens to conserve energy. To help reduce consumer consumption of electricity, the state passes a law that bans all advertising by power utilities within the state. What argument could the power utilities use as a defense to the enforcement of this state law?*** Even if commercial speech is neither related to illegal activities nor misleading, it may be restricted if a state has a substantial interest that cannot be achieved by less restrictive means. In this situation, however, the interest in energy conservation is

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substantial, but it could be achieved by less restrictive means. That would be the utilities' defense against the enforcement of this state law.

ANSWERS TO BUSINESS SCENARIOS AND CASE PROBLEMS AT THE END OF THE CHAPTER

1–1A. ***Binding v. persuasive authority***

A decision of a court is binding on all inferior courts. Because no state's court is inferior to any other state's court, no state's court is obligated to follow the decision of another state's court on an issue. The decision may be persuasive, however, depending on the nature of the case and the particular judge hearing it. A decision of the United States Supreme Court on an issue is binding, like the decision of any court, on all inferior courts. The United States Supreme Court is the nation's highest court, however, and thus, its decisions are binding on all courts, including state courts.

1–2A. ***Sources of law***

1. The U.S. Constitution—The U.S. Constitution is the supreme law of the land. A law in violation of the Constitution, no matter what its source, will be declared unconstitutional and will not be enforced.

2. The federal statute—Under the U.S. Constitution, when there is a conflict between a federal law and a state law, the state law is rendered invalid.

3. The state statute—State statutes are enacted by state legislatures. Areas not covered by state statutory law are governed by state case law.

4. The U.S. Constitution—State constitutions are supreme within their respective borders unless they conflict with the U.S. Constitution, which is the supreme law of the land.

1–3A. ***Equal protection***

Yes. The equal protection clause can be applied to prohibit discrimination based on sexual orientation in jury selection. The appropriate level of scrutiny would be intermediate scrutiny. Under the equal protection clause of the Fourteenth Amendment, the government cannot enact a law or take another action that treats similarly situated individuals differently. If it does, a court examines the basis for the distinction. Intermediate scrutiny applies in cases involving discrimination based on gender. Under this test, a distinction must be substantially related to an important government objective.

Gays and lesbians were long excluded from participating in our government and the privileges of citizenship. A juror strike on the basis of sexual orientation tells the individual who has been struck, as well as the trial participants and the general

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public, that the judicial system still treats gays and lesbians differently. This deprives these individuals of the opportunity to participate in a democratic institution on the basis of a characteristic that has nothing to do with their fitness to serve.

In the actual case on which this problem is based, SmithKline challenged the strike. The judge denied the challenge. On SmithKline's appeal, the U.S. Court of Appeals for the Ninth Circuit held that the equal protection clause prohibits discrimination based on sexual orientation in jury selection and requires that heightened scrutiny be applied to equal protection claims involving sexual orientation. The appellate court remanded the case for a new trial.

1–4A. *Procedural due process*

No. The school's actions did not deny Brown due process. Procedural due process requires that any government decision to take life, liberty, or property must be made fairly. The government must give a person proper notice and an opportunity to be heard. The government must use fair procedures—the person must have at least an opportunity to object to a proposed action before a fair, neutral decision maker.

In this problem, Robert Brown applied for admission to the University of Kansas School of Law. He answered "no" to the questions on the application about criminal history and acknowledged that a false answer constituted cause for dismissal. He was accepted for admission to the school. But Brown had previous criminal convictions for domestic battery and driving under the influence. When school officials discovered this history, Brown was notified of their intent to dismiss him and given an opportunity to respond in writing. He demanded a hearing. The officials refused, and expelled him. As for due process, Brown knew he could be dismissed for false answers on his application. The school gave Brown notice of its intent to expel him and gave him an opportunity to be heard (in writing). Due process does not require that any specific set of detailed procedures be followed as long as the procedures are fair.

In the actual case on which this problem is based, Brown filed a suit in a federal district court against the school, alleging denial of due process. From a judgment in the school's favor, Brown appealed. The U.S. Court of Appeals for the Tenth Circuit affirmed, concluding that "the procedures afforded to Mr. Brown were fair."

1–5A. *The commerce clause*

Yes. Massachusetts's use tax is valid under the commerce clause. When a state regulation that affects interstate commerce is challenged under the commerce clause, the court weighs the state's interest in regulating the matter against the burden that the regulation places on interstate commerce. Because a court balances the interests involved, it is difficult to predict the outcome in a particular case. State laws that alter conditions of competition to favor in-state interests over out-of-state competitors in a market are considered discriminatory and usually invalidated.

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In this problem, Regency Transportation, Inc., operates a freight business throughout the eastern United States. Regency maintains a headquarters, warehouses, and other facilities in Massachusetts. All of the vehicles in Regency's fleet were bought in other states. When Massachusetts imposed a use tax on the purchase price of each tractor and trailer in Regency's fleet, the trucking firm challenged the assessment as discriminatory under the commerce clause. But Massachusetts imposes the tax on all taxpayers subject to its jurisdiction, not only those that, like Regency, do business in interstate commerce. Hence, the tax is not discriminatory. As for the balancing test, Massachusetts presumably imposes the tax based on the benefits derived from a company's using and storing vehicles in the state. The burden that the regulation places on interstate commerce seems slight weighed against the state's interest in regulating this matter.

In the actual case on which this case problem is based, Regency sought review of imposition of motor vehicle tax by the Commissioner of Revenue. The Appellate Tax Board affirmed, and Regency filed a petition for direct appellate review. The Supreme Judicial Court of Massachusetts affirmed the decision of the board.

1–6A. Business CASE PROBLEM WITH SAMPLE ANSWER—*Reading citations*

The court's opinion in this case—*WorldwideTechServices, LLC v. Commissioner of Revenue,* 479 Mass. 20, 91 N.E.3d 650 (2018)—can be found in Volume 479 of the *Massachusetts Reports* on page 20, and in Volume 91 of West's *North Eastern Reporter*, Third Series, on page 650. The Supreme Judicial Court of Massachusetts issued the opinion in 2018.

1–7A. *Freedom of speech*

The First Amendment to the U.S. Constitution protects the freedom of speech. Government regulation of speech is presumed to be unconstitutional. To "pass muster" under the free-speech clause, a law or government action that regulates the content of speech must serve a compelling state interest and must be narrowly tailored to achieve that interest.

In this problem, the government, through OGS, disfavored WD's speech because of its branding. The agency may have labeled the branding offensive because of its perceived effect on the members of a certain ethnic group. The interest that the government sought to serve might have been a mandate of positive expression. But denying the business application of any vendor whose branding might demean or offend could silence dissent in the "marketplace of ideas."

In some contexts, an ethnic slur might be hostile and involve conduct. A regulation of that conduct would arguably serve the interest of preventing immediate harm. For example, the government can regulate threats of violence, harassment, and fighting words. But WD's speech did not fall into any of these categories.

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WD's use of ethnic slurs reflected its owners' viewpoint about when and how such language should be used. There does not seem to be a sufficiently substantial compelling state interest to justify proscribing this viewpoint. By rejecting WD's application only on the ground of the business's branding, OGS impermissibly discriminated against WD's expression of the owners' viewpoint, and thereby violated the First Amendment.

In the actual case on which this problem is based, the court rejected WD's contention and entered a judgment in the defendants' favor. A state intermediate appellate court reversed, holding, based in part on the points stated above, that OGS violated WD's right to freedom of speech. The appellate court concluded that WD was entitled to an injunction denying WD's future lunch program applications because of the use of ethnic slurs in its branding.

1–8A. A QUESTION OF ETHICS—*Free speech*

1. No. The First Amendment guarantees the freedom of speech for individuals against interference by the government. To protect citizens from those who would abuse the right, speech is subject to reasonable restrictions. Speech that violates criminal laws is not constitutionally protected.

In this problem, Michael Mayfield received a "notice of a legal claim" from Edward Starski. The "claim" alleged that a stack of lumber fell on a customer at Mayfield's company as a result of "incompetence" of one of Mayfield's employees. The "notice" included a settlement offer on the customer's behalf in exchange for a release of liability. In a conversation with Mayfield, Starski stated that he was an attorney—when, in fact, he was not. He was arrested and charged with violating a state statute that prohibited the unlawful practice of law. He argued that "creating an illusion" he was an attorney fell within the protection of the First Amendment. He is wrong. It is within the government's power to restrict speech to frustrate a false claim made to accomplish a fraud. And the interest of the government in regulating the practice of law is part of its interest in protecting the public.

In the actual case on which this problem is based, the court convicted Starski of the charge. On appeal, a state intermediate appellate court affirmed the conviction. Responding to his free speech defense, the court concluded, that Starski was wrong.

2. The question concerns the extent to which the government can regulate the practice of law without infringing on certain rights. The rights at issue include the right of a person to exercise free speech, and the rights of the public to be protected from misleading or deceptive speech, and to have access to competent legal representation.

In recognition of a person's right to exercise free speech, the government might choose *not* to prohibit the unauthorized practice of law. This would deny the public's right to be protected from misleading or deceptive speech. The government might choose to prohibit the practice of law entirely, but this would deprive the public of legal

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representation of all kinds in all circumstances. So, the government must strike a balance that protects the public and individual rights.

The government generally prohibits the *unauthorized* practice of law—the practice of law by those who have not met the state's competency standards to be licensed as attorneys. The government also sanctions persons who have not met the standards from misrepresenting their status to practice law.

The government's objective is to ensure that those performing legal services do so competently, without infringing on the rights to free speech, to be protected from misleading or deceptive speech, and to have access to competent legal representation. The regulation protects the public and goes no further than necessary, in recognition of the rights at issue.

CRITICAL THINKING AND WRITING ASSIGNMENTS

1–9A. BUSINESS LAW WRITING

The court ruled that like a state, Puerto Rico generally may not enact policies that discriminate against out-of-state commerce. The law requiring companies that sell cement in Puerto Rico to place certain labels on their products is clearly an attempt to regulate the cement market. The law imposed labeling regulations that affect transactions between the citizens of Puerto Rico and private companies. State laws that on their face discriminate against foreign commerce are almost always invalid, and this Puerto Rican law is such a law. The discriminatory labeling requirement placed sellers of cement manufactured outside Puerto Rico at a competitive disadvantage. This law therefore contravenes the dormant commerce clause.

1–10A. TIME-LIMITED GROUP ASSIGNMENT—*Court opinions*

1. A majority opinion is a written opinion outlining the views of the majority of the judges or justices deciding a particular case. A concurring opinion is a written opinion by a judge or justice who agrees with the conclusion reached by the majority of the court but not necessarily with the legal reasoning that led the conclusion.

2. A concurring opinion will voice alternative or additional reasons as to why the conclusion is warranted or clarify certain legal points concerning the issue. A dissenting opinion is a written opinion in which a judge or justice, who does not agree with the conclusion reached by the majority of the court, expounds his or her views on the case.

3. Obviously, a concurring or dissenting opinion will not affect the case involved—because it has already been decided by majority vote. Nevertheless, such opinions often are used by another court later to support its position on a similar issue.

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ANSWER TO CRITICAL THINKING QUESTION IN APPENDIX EXHIBIT 1A–3

EXHIBIT 1A–3—CRITICAL THINKING

LEGAL ENVIRONMENT

Did the court hold that Yeasin had a right to post his tweets without being disciplined by the university? Explain. No, the court did not decide whether Yeasin had a First Amendment right to post his tweets without being disciplined by the university. The question before the court was whether KU and Dr. Durham violated clearly established law when Yeasin was expelled for his tweets and his misconduct. The court held that Yeasin, the plaintiff and appellant, failed to show such a violation.

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech." The United States Supreme Court and other federal courts, however, permit schools to circumscribe students' free speech rights in certain contexts. In the *Yeasin* case, in the court's view, these broad statements of legal principle do not qualify as clearly established law. The court further concluded that the cases cited by Yeasin to argue the university could not discipline him for his tweets did not apply to his situation because the facts were not similar.

Considering these principles and cases, the court iterated that "at the intersection of university speech and social media, First Amendment doctrine is unsettled." Yeasin could not establish that Dr. Durham violated clearly established law when she expelled him. And, the court concluded, in this case Dr. Durham and KU had a reasonable basis—Yeasin's conduct and his tweets—to expel him from the university. His presence on campus would disrupt A.W.'s education and interfere with her rights.

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Chapter 1

Legal and Constitutional Foundations of Business

INTRODUCTION

This introductory chapter examines how business law and the legal environment affect business decisions. For your students to benefit from this course, they must first understand that (1) the law is a set of general rules, (2) that, in applying these general rules, a judge cannot always fit a case to suit a rule, so must fit (or find) a rule to suit the case, (3) that, in fitting (or finding) a rule, a judge must also supply reasons for the decision.

Law consists of enforceable rules governing relationships among individuals and between individuals and their society. The tension in the law between the need for stability and the need for change is one of the concepts introduced in this chapter. How common law courts originated, and the rationale for the doctrine of *stare decisis* are also covered in this chapter. Another major concept in the chapter involves the distinctions among today's sources of law and distinctions in its different classifications on which to hang the mass of principles known as the law.

The latter half of this chapter emphasizes a different perspective from which to view the law—action taken by the government must come from authority and this authority cannot be exceeded. Neither Congress nor any state may pass a law in conflict with the Constitution. The Constitution is the supreme law in this country. The Constitution is the source of federal power, and to sustain the legality of a federal law or action, a specific federal power must be found in the Constitution. States have inherent sovereign power—that is, the power to enact legislation that has a reasonable relationship to the welfare of the citizens of that state. The power of the federal government was *delegated* to it by the states while the power of the states was *retained* by them when the Constitution was ratified.

CHAPTER OUTLINE

I. Sources of American Law

A. CONSTITUTIONAL LAW

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

B. STATUTORY LAW

Laws enacted by legislative bodies at any level of government, such as the statutes passed by Congress or by state legislatures, make up the body of law generally referred to as statutory law. When a

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legislature passes a statute, that statute ultimately is included in the federal code of laws or the relevant state code of laws. Much of the work of courts is interpreting what lawmakers meant when a law was enacted and applying that law to a set of facts (a case). Local legislative bodies enact ordinances—regulations passed by municipal or county governing units to deal with matters not covered by federal or state law.

1. Applicability of Statutes
A federal statute applies to all states. A state statute applies only within the state's borders.

2. Uniform Laws
Panels of experts and scholars create uniform laws that any state's legislature can adopt.

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

ADDITIONAL BACKGROUND—

National Conference of Commissioners on Uniform State Laws, Co-Sponsor of the Uniform Commercial Code

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

C. ADMINISTRATIVE LAW

Administrative law consists of the rules, orders, and decisions of administrative agencies. The creation of federal administrative agencies, agencies' powers, and the administrative process (rulemaking, investigation, and adjudication) are discussed in the text. Executive agencies within the cabinet departments of the executive branch are subject to the power of the president to appoint and remove their officers. The officers of independent agencies serve fixed terms and cannot be removed without just cause. These agencies are often parallel federal agencies in areas of expertise and subjects of regulation. Federal rules that conflict with state rules take precedence.

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

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2. Rulemaking

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

a. Legislative Rules

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

- Public notice through the publication of a proposed rule in the *Federal Register.*
- Receipt and review of public comments.
- Drafting and publication of the final rule in the *Federal Register*.

b. Interpretive Rules

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

3. Enforcement and Investigation

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

4. Adjudication

On a formal complaint, an agency's administrative law judge may conduct a trial-like hearing and render a decision, which may compel a fine or prohibit certain behavior. This may be appealed to the board or commission that governs the agency and ultimately to a federal court.

D. CASE LAW AND COMMON LAW DOCTRINES

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

ADDITIONAL BACKGROUND—

Restatement (Second) of Contracts

The American Law Institute (ALI), a group of American legal scholars, is responsible for the *Restatements.* These scholars also work with the National Conference of Commissioners on Uniform State Laws on some of the uniform state laws. Members include law educators, judges, and attorneys. Their goal is to promote uniformity in state law to encourage the fair administration of justice.

The ALI publishes summaries of common law rules on selected topics. Intended to clarify the rules, the summaries are published as the *Restatements*. Each *Restatement* is further divided into chapters and sections. Accompanying the sections are explanatory comments, examples illustrating the principles, relevant case citations, and other materials. The following is ***Restatement (Second) of Contracts***, Section 1 (that is, Section 1 of the second edition of the *Restatement of Contracts*) with excerpts from the Introductory Note to Chapter 1 and Comments accompanying the section.

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Chapter 1
MEANING OF TERMS

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Introductory Note: A persistent source of difficulty in the law of contracts is the fact that words often have different meanings to the speaker and to the hearer. Most words are commonly used in more than one sense, and the words used in this *Restatement* are no exception. It is arguable that the difficulty is increased rather than diminished by an attempt to give a word a single definition and to use it only as defined. But where usage varies widely, definition makes it possible to avoid circumlocution in the statement of rules and to hold ambiguity to a minimum.

In the *Restatement,* an effort has been made to use only words with connotations familiar to the legal profession, and not to use two or more words to express the same legal concept. Where a word frequently used has a variety of distinct meanings, one meaning has been selected and indicated by definition. But it is obviously impossible to capture in a definition an entire complex institution such as "contract" or "promise." The operative facts necessary or sufficient to create legal relations and the legal relations created by those facts will appear with greater fullness in the succeeding chapters.

§ 1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Comment:

* * * *

c. Set of promises. A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises. One person may make several promises to one person or to several persons, or several persons may join in making promises to one or more persons. To constitute a "set," promises need not be made simultaneously; it is enough that several promises are regarded by the parties as constituting a single contract, or are so related in subject matter and performance that they may be considered and enforced together by a court.

II. The Common Law

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

A. Early English Courts

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

B. *Stare Decisis*

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

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1. Controlling Precedents

A court's application of a specific principle to a certain set of facts is binding on that court and lower courts, which must then apply it in future cases. A controlling precedent is binding authority. Other binding authorities include constitutions, statutes, and rules. This doctrine permits a predictable, quick, and fair resolution of cases, which makes the application of law more stable.

ENHANCING YOUR LECTURE—

"IS AN 1875 CASE PRECEDENT STILL BINDING?

In a suit against the U.S. government for breach of contract, Boris Korczak sought compensation for services that he had allegedly performed for the Central Intelligence Agency (CIA) from 1973 to 1980. Korczak claimed that the government had failed to pay him an annuity and other compensation required by a secret *oral* agreement he had made with the CIA. The federal trial court dismissed Korczak's claim, and Korczak appealed the decision to the U.S. Court of Appeals for the Federal Circuit.

At issue on appeal was whether a U.S. Supreme Court case decided in 1875, *Totten v. United States*,[a] remained the controlling precedent in this area. In *Totten*, the plaintiff alleged that he had formed a secret contract with President Lincoln to collect information on the Confederate Army during the Civil War. When the plaintiff sued the government for compensation for his services, the Court held that the agreement was unenforceable. According to the Court, to enforce such agreements could result in the disclosure of information that "might compromise or embarrass our government" or cause other "serious detriment" to the public. In Korczak's case, the federal appellate court held that the *Totten* case precedent was still "good law," and therefore Korczak, like the plaintiff in *Totten,* could not recover compensation for his services. Said the court, "*Totten*, despite its age, is the last pronouncement on this issue by the Supreme Court. . . . We are duty bound to follow the law given us by the Supreme Court unless and until it is changed."[b]

THE BOTTOM LINE

Supreme Court precedents, no matter how old, remain controlling until they are overruled by a subsequent decision of the Supreme Court, by a constitutional amendment, or by congressional legislation.

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a. 92 U.S. 105 (1875).
b. *Korczak v. United States*, 124 F.3d 227 (Fed.Cir. 1997).

2. Departures from Precedent

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

3. When There Is No Precedent

When determining which rules and policies to apply in a given case, and in applying them, a judge may examine: prior case law, the principles and policies behind the decisions, and their historical

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setting; statutes and the policies behind a legislature's passing a specific statute; society's values and custom; and data and principles from other disciplines.

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C. EQUITABLE REMEDIES AND COURTS OF EQUITY

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

1. Remedies in Equity

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

2. The Merging of Law and Equity

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

III. Classifications of Law

- *Substantive law* defines, describes, regulates, and creates rights and duties. *Procedural law* includes rules for enforcing those rights.
- Other classifications include splitting law into federal and state divisions or private and public categories.
- Cyberlaw is an informal term that describes the body of case and statutory law dealing specifically with issues raised by Internet transactions.

A. CIVIL LAW AND CRIMINAL LAW

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

B. NATIONAL AND INTERNATIONAL LAW

- National law is the law of a particular nation. Laws vary from country to country, but generally each nation has either a common law or civil law system. A common law system, like ours, is based on case law. A civil law system is based on codified law (statutes).
- International law includes written and unwritten laws that independent nations observe. Sources include treaties and international organizations. International law represents attempts to balance each nation's need to be the final authority over its own affairs and to benefit economically from relations with other nations.

IV. The Constitutional Powers of Government

Before the U.S. Constitution, the Articles of Confederation defined the central government.

A. A FEDERAL FORM OF GOVERNMENT

A federal form of government establishes the relationship between the national government and the state governments as a partnership—neither partner is superior to the other except within the particular area of exclusive authority granted to it under the Constitution.

1. Federal Powers

The U.S. Constitution sets forth the specific powers that can be exercised by the national government.

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2. Regulatory Powers of the States

As part of their inherent **sovereignty** (power to govern themselves), state governments have the authority to regulate certain affairs within their borders. State regulatory powers are often referred to as **police powers.**

B. THE SEPARATION OF POWERS

Deriving power from the Constitution, each of the three governmental branches (the executive, the legislative, and the judicial) performs a separate function. No branch may exercise the authority of another, but each has some power to limit the actions of the others. This is the system of *checks and balances*. Congress, for example, can enact a law, but the president can veto it. The executive branch is responsible for foreign affairs, but treaties with foreign governments require the advice and consent of the members of the Senate. Congress determines the jurisdiction of the federal courts, but the courts have the power to hold acts of the other branches of the government unconstitutional.

C. THE COMMERCE CLAUSE

1. The Expansion of National Powers under the Commerce Clause

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

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

CASE SYNOPSIS—

Classic Case 1.1: *Heart of Atlanta Motel v. United States*

A motel owner, who refused to rent rooms to African Americans despite the Civil Rights Act of 1964, brought an action to have the Civil Rights Act of 1964 declared unconstitutional. The owner alleged that, in passing the act, Congress had exceeded its power to regulate commerce because his motel was not engaged in interstate commerce. The motel was accessible to state and interstate highways. The owner advertised nationally, maintained billboards throughout the state, and accepted convention trade from outside the state (75 percent of the guests were residents of other states). The district court sustained the constitutionality of the act and enjoined the owner from discriminating on the basis of race. The owner appealed. The case went to the United States Supreme Court.

The United States Supreme Court upheld the constitutionality of the Civil Rights Act of 1964. The Court noted that it was passed to correct "the deprivation of personal dignity" accompanying the denial of equal access to "public establishments." Congressional testimony leading to the passage of the act indicated that African Americans in particular experienced substantial discrimination in attempting to secure lodging. This discrimination impeded interstate travel, thus impeding interstate commerce. As for the owner's argument that his motel was "of a purely local character," the Court said, "[I]f it is interstate commerce that feels the pinch, it does not matter how local the operation that applies the squeeze." Therefore, under the commerce clause, Congress has the power to regulate any local activity that has a harmful effect interstate commerce.

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Notes and Questions

Does the Civil Rights Act of 1964 actually regulate commerce or was it designed to end the practice of race (and other forms of) discrimination? In this case, the Supreme Court said, "[T]hat Congress was legislating against moral wrongs . . . rendered its enactments no less valid."

Are there any businesses in today's economy that are "purely local in character"? An individual who contracts to perform manual labor such as lawn mowing or timber cutting within a small geographic area might qualify, as long as the activity has no effect on interstate commerce. But in most circumstances it would be difficult if not impossible to do business "purely local in character" in today's U.S. economy. Federal statutes that derive their authority from the commerce clause often include requirements or limits to exempt small or arguably local businesses.

Which constitutional clause empowers the federal government to regulate commercial activities among the states? To prevent states from establishing laws and regulations that would interfere with trade and commerce among the states, the Constitution expressly delegated to the national government the power to regulate interstate commerce. The commerce clause—Article I, Section 8, of the U.S. Constitution—expressly permits Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Enhancing Your Lecture

"Does State Regulation of Internet Prescription Transactions Violate the Commerce Clause?

Every year, about 30 percent of American households purchase at least some prescription drugs online. There is nothing inherently unlawful in such a transaction. Consider that Article X of the Constitution gives the states the authority to regulate activities affecting the safety and welfare of their citizens. In the late 1800s, the states developed systems granting physicians the exclusive rights to prescribe drugs and pharmacists the exclusive right to dispense prescriptions. The courts routinely upheld these state laws.[a] All states use their police power authority to regulate the licensing of pharmacists and the physicians who prescribe drugs.

AN EXTENSION OF STATE LICENSING LAWS

About 40 percent of the states have attempted to regulate Internet prescription transactions by supplementing their licensure rules in such a way to define a "safe" consulting relationship between the physician prescribing and the pharmacists dispensing prescription drugs. For example, certain states allow an electronic diagnosis. This consists of a patient filling out an online questionnaire that is then "approved" by a physician before an Internet prescription is filled and shipped. In contrast, other states specifically prohibit a physician from creating a prescription if there is no physical contact between the patient and the physician providing the prescription.

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SOME STATES ARE ATTEMPTING TO REGULATE INTERSTATE COMMERCE

Recently, the New York State Narcotic Bureau of Enforcement started investigating all companies in New Jersey and Mississippi that had been involved in Internet prescription medicine transactions with residents of New York. None of the companies under investigation has New York offices. The legal question immediately raised is whether the New York State investigations are violating the commerce clause. Moreover, it is the Food and Drug Administration (FDA) that enforces the regulation of prescription drugs, including their distributors.

ARE NEW YORK AND OTHER STATES VIOLATING THE DORMANT COMMERCE CLAUSE?

As you learned in this chapter, the federal government regulates all commerce not specifically granted to the states. This is called the dormant commerce clause. As such, this clause prohibits state regulations that discriminate against interstate commerce. Additionally, this clause prohibits state regulations that impose an undo burden on interstate commerce. The dormant commerce clause has been used in cases that deal with state regulation of pharmacy activities.[b]

In this decade, there is an opposing view based on a line of cases that suggest that state regulation of Internet activities do *not* violate the dormant commerce clause. In one case, a New York state law that banned the sale of cigarettes to its residents over the Internet was found not to violate the dormant commerce clause because of public health concerns.[d] In another case, a Texas statute that prohibited automobile manufacturers from selling vehicles on its website was upheld.[e] Whether the reasoning in these cases will be extended to cases involving Internet pharmacies remains to be seen. There exist state laws limiting Internet prescriptions. For example, in Nevada, no resident can obtain a prescription from an Internet pharmacy unless that pharmacy is licensed and certified under the laws of Nevada. Because this statute applies equally to in-state and out-of-state Internet pharmacies, it is undoubtedly nondiscriminatory. Additionally, the requirement that Internet pharmacies obtain a Nevada license prior to doing business in the state will probably be viewed as not imposing an undo burden on interstate commerce

WHERE DO YOU STAND?

Clearly, there are two sides to this debate. Many states contend that they must regulate the provision of prescription drugs via the Internet in order to ensure the safety and well-being of their citizens. In some instances, however, the states may be imposing such regulations at the behest of traditional pharmacies, which do not like online competition. What is your stand on whether state regulation of Internet prescription drug transactions violates the dormant commerce clause of the Constitution? Realize that if you agree that it does, then you probably favor less state regulation. If you believe that it does not, then you probably favor more state regulation.

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a. See, for example, *Dent v. West Virginia,* 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889).
b. See, for example, *Pharmaceutical Manufacturers' Association v. New Mexico Board of Pharmacy*, 86 N.M. 571, 525 P.2d 931 (N.M. App. 1974); *State v. Rasmussen*, 213 N.W.2d 661 (Iowa 1973).
c. See *American Libraries Association v. Pataki,* 969 F.Supp.160 (S.D.N.Y. 1997).
d. *Brown & Williamson Tobacco Corp. v. Pataki,* 320 F.3d 200 (2nd Cir. 2003).
e. *Ford Motor Company v. Texas Department of Transportation*, 264 F.3d 493 (5th Cir. 2001).

2. The "Dormant" Commerce Clause

States do not have the authority to regulate interstate commerce. When state regulations impinge on interstate commerce, the state's interest in the merits and purposes of the regulation must be

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balanced against the burden placed on interstate commerce. It is difficult to predict the outcome in a particular case.

D. THE SUPREMACY CLAUSE

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

1. Preemption

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

2. Congressional Intent

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

V. Business and the Bill of Rights

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

A. LIMITS ON FEDERAL AND STATE GOVERNMENTAL ACTIONS

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

B. THE FIRST AMENDMENT—FREEDOM OF SPEECH

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

1. Reasonable Restrictions

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

a. Content-Neutral Laws

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

b. Laws That Restrict the Content of Speech

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

CASE SYNOPSIS—

Case 1.2: *Animal Legal Defense Fund v. Wasden*

An animal rights activist worked at an Idaho dairy farm, where he secretly filmed ongoing animal abuse. Posted online, the film attracted national attention. The dairy owner fired the abusive employees, established

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a code of conduct, and undertook an animal welfare audit of the farm. Meanwhile, the Idaho state legislature enacted the Interference with Agricultural Production statute targeted at undercover investigation of agricultural operations. The statute's "Recordings Clause" criminalized making audio and video recordings of an agricultural production facility without the owner's consent. The Animal Legal Defense Fund filed a suit in a federal district court against Lawrence Wasden, the Idaho attorney general, alleging that the statute's Recordings Clause violated the First Amendment. The court issued an injunction against its enforcement. The state appealed this order to the U.S. Court of Appeals for the Ninth Circuit.

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

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Notes and Questions

Should the First Amendment protect all speech? One argument in support of this suggestion is that all views could then be fully expressed, and subject to reasoned consideration, in the "marketplace of ideas" without the chilling effect of legal sanctions. One argument against this suggestion is exemplified by the yelling of "Fire!" in a crowded theater: there are statements that are too inflammatory to be allowed unfettered expression.

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

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

CASE SYNOPSIS—

Case 1.3: *Bad Frog Brewery, Inc. v. New York State Liquor Authority*

Bad Frog Brewery, Inc., sells alcoholic beverages with labels that display a frog making a gesture known as "giving the finger." Bad Frog's distributor, Renaissance Beer Co., applied to the New York State Liquor Authority (NYSLA) for label approval, required before the beer could be sold in New York. The NYSLA denied the application, in part because children might see the labels in grocery and convenience stores. Bad Frog filed a suit in a federal district court against the NYSLA, asking for, among other things, an injunction against this denial. The court granted a summary judgment in favor of the NYSLA. Bad Frog appealed.

The U.S. Court of Appeals for the Second Circuit reversed. The NYSLA's ban on the use of the labels lacked a "reasonable fit" with the state's interest in shielding minors from vulgarity, and the NYSLA did not adequately consider alternatives to the ban. "In view of the wide currency of vulgar displays throughout

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contemporary society, including comic books targeted directly at children, barring such displays from labels for alcoholic beverages cannot realistically be expected to reduce children's exposure to such displays to any significant degree." Also, there were "numerous less intrusive alternatives."

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Notes and Questions

The free flow of commercial information is essential to a free enterprise system. Individually and as a society, we have an interest in receiving information on the availability, nature, and prices of products and services. Only since 1976, however, have the courts held that communication of this information ("commercial speech") is protected by the First Amendment.

Because some methods of commercial speech can be misleading, this protection has been limited, particularly in cases involving in-person solicitation. For example, the United States Supreme Court has upheld state bans on personal solicitation of clients by attorneys. Currently, the Supreme Court allows each state to determine whether or not in-person solicitation as a method of commercial speech is misleading and to restrict it appropriately.

Whose interests are advanced by banning certain ads? The government's interests are advanced when certain ads are banned. For example, in the *Bad Frog* case, the court acknowledged, by advising the state to restrict the locations where certain ads could be displayed, that banning of "vulgar and profane" advertising from children's sight arguably advanced the state's interest in protecting children from those ads.

ADDITIONAL CASES ADDRESSING THIS ISSUE—

Advertising and the Commerce Clause

Cases involving the **constitutionality of government restrictions on advertising under the commerce clause** include the following.

- Cases in which restrictions on advertising were held unconstitutional include *Thompson v. Western States Medical Center,* 535 U.S. 357, 122 S.Ct. 1497, 152 L.Ed.2d 563 (2002) (restrictions on advertising of compounded drugs); and *This That and Other Gift and Tobacco, Inc. v. Cobb County,* 285 F.3d 1319 (11th Cir. 2002) (restrictions on advertising of sexual devices).

- Cases in which restrictions on advertising were held not unconstitutional include *Long Island Board of Realtors, Inc. v. Inc. Village of Massapequa Park,* 277 F.3d 622 (2d Cir. 2002) (restrictions on signs in residential areas); *Borgner v. Brooks,* 284 F.3d 1204 (11th Cir. 2002) (restrictions on dentists' ads*); Genesis Outdoor, Inc. v. Village of Cuyahoga Heights,* __ Ohio App.3d __, __ N.E.2d __ (8 Dist. 2002) (restrictions on billboard construction); and *Johnson v. Collins Entertainment Co.,* 349 S.C. 613, 564 S.E.2d 653 (2002) (restrictions on offering special inducements in video gambling ads).

4. Unprotected Speech

Constitutional protection has never been afforded to certain classes of speech—defamatory speech, threats, child pornography, "fighting" words, and statements of fact, for example. Note, however, that obscene material is unprotected. But other than child pornography, there is little agreement about what material qualifies as obscene.

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C. THE FIRST AMENDMENT—FREEDOM OF RELIGION

1. The Establishment Clause

Under the establishment clause, the government cannot establish a religion nor promote, endorse, or show a preference for any religion. Federal or state law that does not promote, or place a significant burden on, religion is constitutional even if it has some impact on religion. Public displays that include nonreligious symbols or symbols of different religions, or that have historical, as well as religious, significance do not necessarily violate the establishment clause.

2. The Free Exercise Clause

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

a. Restrictions Must Be Necessary

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

b. Restrictions Must Not Be a Substantial Burden

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

c. Public Welfare Exception

When public safety is an issue, an individual's religious beliefs often must give way to the government's interests in protecting the public.

VI. Due Process, Equal Protection, and Privacy

A. DUE PROCESS

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

1. Procedural Due Process

A government decision to take life, liberty, or property must be made fairly. Fair procedure has been interpreted as requiring that the person have at least an opportunity to object to a proposed action before a fair, neutral decision maker (who need not be a judge).

2. Substantive Due Process

If a law or other governmental action limits a fundamental right, it will be held to violate substantive due process unless it promotes a compelling or overriding state interest. Fundamental rights include interstate travel, privacy, voting, and all First Amendment rights. Compelling state interests could include, for example, public safety. In all other situations, a law or action does not violate substantive due process if it rationally relates to any legitimate governmental end.

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B. EQUAL PROTECTION

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

1. Strict Scrutiny

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

2. Intermediate Scrutiny

Intermediate scrutiny is applied in cases involving discrimination based on gender or legitimacy. Laws using these classifications must be substantially related to important government objectives.

3. The "Rational Basis" Test

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

C. PRIVACY RIGHTS

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

1. Federal Privacy Legislation

Federal laws relating to privacy usually deal with personal information collected by governments or private businesses.

2. The USA Patriot Act

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

ADDITIONAL BACKGROUND—

USA PATRIOT Act Tech Provisions

The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act **(USA PATRIOT Act)** of 2001, which is mentioned in the text, touches on many topics, including immigration, money laundering, terrorism victim relief, intelligence gathering, and surveillance of Internet communications. Technology related provisions of the USA PATRIOT Act include the following, as summarized. (Some of these provisions were due to "sunset" in 2005.)

Wiretap Offenses

Sections 201 and 202—Crimes that can serve as a basis for law enforcement agencies (LEAs) to obtain a wiretap include crimes relating to terrorism and crimes relating to computer fraud and abuse.

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Voice Mail

Section 209—LEAs can seize voice mail messages, with a warrant.

ESP Records

Sections 210 and 211—LEAs can obtain, with a subpoena, such information about e-communications service providers' (ESPs) subscribers as "name," "address," "local and long distance telephone connection records, or records of session times and durations," "length of service (including start date) and types of service utilized," "telephone or instrument number or other subscriber number or identity, including any temporarily assigned network address," and "means and source of payment for such service (including any credit card or bank account number)."

Pen Registers, and Trap and Trace Devices

Section 216—LEAs can expand their use of pen registers and trap and trace devices (PR&TTs). A PR records the numbers that are dialed on a phone. TTs "capture the incoming electronic or other impulses which identify the originating number of an instrument or device from which a wire or electronic communication was transmitted." PR&TTs can be used to capture routing, addressing, and other information in e-communications, but not the contents of the communication. This is considered one of the key sections of the act.

Computer Trespassers

Section 217—LEAs can assist companies, universities, and other entities that are subject to distributed denial of service, or other, Internet attacks by intercepting "computer trespasser's communications."

ESP Compensation

Section 222—An ESP "who furnishes facilities or technical assistance pursuant to section 216 shall be reasonably compensated for such reasonable expenditures incurred in providing such facilities or assistance."

Enhancing Your Lecture—

"*Creating a Website Privacy Policy*"

Firms with online business operations realize that to do business effectively with their customers, they need to have some information about those customers. Yet online consumers are often reluctant to part with personal information because they do not know how that information may be used. To allay consumer fears about the privacy of their personal data, as well as to avoid liability under existing laws, most online businesses today are taking steps to create and implement website privacy policies.

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PRIVACY POLICY GUIDELINES

In the last several years, a number of independent, nonprofit organizations have developed model privacy policies and guidelines for online businesses to use. Website privacy guidelines are now available from a number of online privacy groups and other organizations, including the Online Privacy Alliance, the Internet Alliance, and the Direct Marketing Association. Some organizations, including the Better Business Bureau, have even developed a "seal of approval" that Web-based businesses can display at their sites if they follow the organization's privacy guidelines.

One of the best known of these organizations is TRUSTe. Website owners that agree to TRUSTe's privacy standards are allowed to post the TRUSTe "seal of approval" on their websites. The idea behind the seal, which many describe as the online equivalent of the "Good Housekeeping Seal of Approval," is to allay users' fears about privacy problems.

DRAFTING A PRIVACY POLICY

Online privacy guidelines generally recommend that businesses post notices on their websites about the type of information being collected, how it will be used, and the parties to whom it will be disclosed. Other recommendations include allowing website visitors to access and correct or remove personal information and giving visitors an "opt-in" or "opt-out" choice. For example, if a user selects an "opt-out" policy, the personal data collected from that user would be kept private.

In the last several years, the Federal Trade Commission (FTC) has developed privacy standards that can serve as guidelines. An online business that includes these standards in its website privacy policies—and makes sure that they are enforced—will be in a better position to defend its policy should consumers complain about the site's practices to the FTC. The FTC standards are incorporated in the following checklist.

CHECKLIST FOR A WEBSITE PRIVACY POLICY

1. Include on your website a notice of your privacy policy.

2. Give consumers a choice (such as opt-in or opt-out) with respect to any information collected.

3. Outline the safeguards that you will employ to secure all consumer data.

4. Let consumers know that they can correct and update any personal information collected by your business.

5. State that parental consent is required if a child is involved.

6. Create a mechanism to enforce the policy.

TEACHING SUGGESTIONS

1. Emphasize that the law is not simple—there are no simple solutions to complex problems. Legal principles are presented in this course as "black letter law"—that is, in the form of basic principles generally accepted by the courts or expressed in statutes. In fact, the law is not so concrete and static. One of the

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purposes of this course is to acquaint students with legal problems and issues that occur in society in general and in business in particular. The limits of time and space do not allow all of the principles to be presented against the background of their development and the reasoning in their application. By the end of the course, students should be able to recognize legal problems ("spot the issues") when they arise. In the real world, this may be enough to seek professional legal assistance. In this course, students should also be able to recognize the competing interests involved in an issue and reason through opposing points of view to a decision.

2. Point out that the law assumes everyone knows it, or, as it's often phrased, "Ignorance of the law is no excuse." Of course, the volume and expanding proliferation of statutes, rules, and court decisions is beyond the ability of anyone to know it all. But pointing out the law's presumption might encourage students to study. Also, knowing the law allows business people to make better business decisions.

3. As Oliver Wendell Holmes noted, "The life of the law has not been logic"—that is, the law does not respond to an internal logic. It responds to social change. Emphasize that laws (and legal systems) are manmade, that they can, and do, change over time as society changes. ***To what specific social forces does law respond? Are the changes always improvements?***

4. One method of introducing the subject matter of each class is to give students a hypothetical at the beginning of the class. The hypothetical should illustrate the competing interests involved in some part of the law in the assigned reading. Students should be asked to make a decision about the case and to explain the reasons behind their decision. Once the law has been discussed, the same hypothetical can be considered from an ethical perspective.

5. It might be explained to your students that constitutional law is concerned primarily with the exercise of judicial review. The emphasis is on the way that the courts in general, and the United States Supreme Court in particular, interpret provisions of the Constitution. *Stare decisis* does not have as much impact in constitutional law as in other areas of the law. In this area, the courts are not reluctant to overrule statutes, regulations, precedential case law, or other law.

6. The concept of federalism is basic to students' understanding of the authority of the federal and state governments to regulate business. The Constitution has a significantly different impact on the regulation of business by the federal government that it does on the regulation of business by state governments. Emphasize that the federal government was *granted* specific powers by the states in the Constitution while the states *retained* the police power.

7. The commerce clause has become a very broad source of power for the federal government. It also restricts the power of the states to regulate activities that result in an undue burden on interstate commerce. Determining what constitutes an undue burden can be difficult. A court balances the benefit that the state derives from its regulation against the burden it imposes on commerce. The requirements for a valid state regulation under the commerce clause are (1) that it serve a legitimate end and (2) that its purpose cannot be accomplished as well by less discriminatory means.

To illustrate the balance, use a hypothetical involving a statute designed to protect natural resources. (Explain that this is an area traditionally left open to state regulation; that is, it is not considered preempted by a federal scheme of regulation.) For example, imagine a statute banning the importation of baitfish. The ban is a burden on interstate commerce, but the statute's concern is to protect the state's fish from nonnative predators and parasites, and there is no satisfactory way to inspect imported baitfish for parasites. This statute would likely be upheld as legitimate.

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Cyberlaw Link

Ask your students, at this early stage in their study of business law, what they feel are the chief legal issues in developing a Web site or doing business online. ***What are the legal risks involved in transacting business over the Internet?*** As their knowledge of the law increases over the next few weeks, this question can be reconsidered.

Ask your students to consider the following issue: In most circumstances, it is not constitutional for the government to open private mail. ***Why is it then sometimes considered legal for the government to open e-mail between consenting adults?***

DISCUSSION QUESTIONS

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

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

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

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

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

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

7. ***What is the conflict between the states' police power and the commerce clause?*** The term *police power* refers to the inherent right of the states to regulate private activities within their own borders to protect or promote the public order, health, safety, morals, and general welfare. When state regulation encroaches on interstate commerce—

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which Congress regulates under the commerce clause—the state's interest in the merits and purposes of the regulation must be balanced against the burden placed on interstate commerce.

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

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

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

ACTIVITY AND RESEARCH ASSIGNMENTS

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

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

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

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

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EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 6: In ***Brown v. Board of Education of Topeka,*** the United States Supreme Court unanimously held that the separate but equal concept had no place in education. The case involved four consolidated cases focusing on the permissibility of local governments conducting school systems that segregated students by race. In each case blacks sought admission to public schools on a non-segregated basis, and in each case the lower court based its decision on the separate but equal doctrine. The Court interpreted the principles of the U.S. Constitution's Fourteenth Amendment as they should apply to modern society and looked at the effects of segregation. The justices found that segregation of children in public schools solely on the basis of race deprives the children of the minority group of equal educational opportunities. To separate black children "from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

Footnote 7: In ***Plessy v. Ferguson*,** the United States Supreme Court adopted the doctrine of separate but equal. A Louisiana state statute required that all railway companies provide separate but equal accommodations for black and white passengers, imposing criminal sanctions for violations. Plessy, who alleged his ancestry was seven-eighths Caucasian and one-eighth African, attempted to use the coach for whites. The Court said that the U.S. Constitution's Thirteenth and Fourteenth Amendments (the Civil War Amendments) "could not have been intended to abolish distinctions based on color, or to enforce social . . . equality, or a commingling of the two races upon terms unsatisfactory to either." According to the Court, laws requiring racial separation did not necessarily imply the inferiority of either race. In a lone dissent, Justice Harlan expressed the opinion that the Civil War Amendments had removed "the race line from our governmental systems," and the Constitution was thus "color-blind."

Footnote 10: The regulation in ***Wickard v. Filburn*** involved a marketing quota. The United States Supreme Court upheld the regulation even though it would be difficult for the farmer alone to affect interstate commerce. Total supply of wheat clearly affects market price, as does current demand for the product. The marketing quotas were designed to control the price of wheat. If many farmers raised wheat for home consumption, they would affect both the supply for interstate commerce and the demand for the product. The Court deferred to congressional judgment concerning economic effects and the relationship between local activities and interstate commerce. This was a return to the broad view of the commerce power that John Marshall had defined in *Gibbons v. Ogden,* 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824).

Footnote 16: At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a banner conveying a message that she regarded as promoting illegal drug use. Consistent with school policy, which prohibited such messages at school events, the principal told the students to take down the banner. One student refused. The principal confiscated the banner and suspended the student. The student filed a suit in a federal district court against the principal and others, alleging a violation of his rights under the U.S. Constitution. The court issued a judgment in the defendants' favor. On the student's appeal, the U.S. Court of Appeals for the Ninth Circuit reversed. The defendants appealed. In ***Morse v. Frederick,*** the United States Supreme Court reversed the lower court's judgment and remanded the case. The Supreme Court viewed this set of facts as a "school speech case." The Court acknowledged that the message on Frederick's banner was "cryptic," but interpreted it as advocating the use of illegal drugs. Congress requires schools to teach students that this use is "wrong and harmful." Thus it was reasonable for the principal in this case to order the banner struck.

Did—or should—the Court rule that Frederick's speech can be proscribed because it is "plainly offensive"? The petitioners (Morse and the school board) argued for this rule. The Court, however, stated, "We think this stretches [previous case law] too far; that case [law] should not be read to encompass any speech that could fit

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under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

Footnote 21: Mount Soledad is in San Diego, California. There has been a forty-foot cross atop the peak since 1913. Since the 1990s, a war memorial has surrounded the cross. The site was privately owned until 2006 when the federal government acquired it to preserve the war memorial. Steve Trunk and others filed a suit in a federal district court against San Diego, claiming a violation of the establishment clause. The court determined that the government acted with a secular purpose and the memorial did not advance religion, and issued a summary judgment in its favor. The plaintiffs appealed. In ***Trunk v. City of San Diego,*** the U.S. Court of Appeals for the Ninth Circuit reversed and remanded. The government's purpose may have been nonreligious, but the memorial can be perceived as endorsing Christianity. Not all crosses at war memorials violate the Constitution. The context and setting must be examined. This cross physically dominates its site, was originally dedicated to religious purposes, and had a long history of religious use. From a distance, the cross was the only visible element. The court reasoned that "the use of a distinctively Christian symbol to honor all veterans sends a strong message of endorsement and exclusion."

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

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

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

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Appendix to Chapter 1

Finding and Analyzing the Law

INTRODUCTION

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

APPENDIX OUTLINE

I. Finding Statutory and Administrative Law

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

II. Finding Case Law

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

III. Reading and Understanding Case Law

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

ADDITIONAL BACKGROUND—

The *Federal Reporter*

Federal court decisions are published unofficially in a variety of publications. These reports are organized by court level and issued chronologically. Opinions from the United States Court of Appeals, for example, are reported in the *Federal Reporter*. Thomson Reuters publishes these decisions with headnotes condensing important legal points in the cases. The headnotes are assigned key numbers that cross-reference the points

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to similar points in cases reported in other publications. The following are excerpts from *Ferguson v. Commissioner of Internal Revenue,* as published with headnotes in the *Federal Reporter*.

Betty Ann FERGUSON, Petitioner-Appellant,
v.
COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

No. 90-4430

Summary Calendar.
United States Court of Appeals,
Fifth Circuit.

Jan. 22, 1991.

Taxpayer filed petition. The United States Tax Court, Korner, J., dismissed for lack of prosecution, and appeal was taken. The Court of Appeals held that court abused its discretion in refusing testimony of taxpayer, who refused, on religious grounds, to swear or affirm.

Reversed and remanded.

1. Constitutional Law 92K84(2)

Protection of free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. U.S.C.A. Const. Amend. 1. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

2. Witnesses 410K227

Court abused its discretion in refusing testimony of witness who refused, on religious grounds, to swear or affirm, and who instead offered to testify accurately and completely and to be subject to penalties for perjury. U.S.C.A. Const. Amend. 1; Fed.Rules Evid.Rule 603, 28 U.S.C.A. *Ferguson v. C.I.R.* 921 F.2d 588, 67 A.F.T.R.2d 91-459, 91-1 USTC P 50,052

Betty Ann Ferguson, Metairie, La., pro se.

Peter K. Scott, Acting Chief Counsel, I.R.S., Gary R. Allen, David I. Pincus, William S. Rose, Jr., Asst. Attys. Gen., Dept. of Justice, Tax Div., Washington, D.C., for respondent-appellee.

Appeal from a Decision of the United States Tax Court.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

PER CURIAM:

Betty Ann Ferguson appeals the Tax Court's dismissal of her petition for lack of prosecution after she refused to swear or affirm at a hearing. We find the Tax Court's failure to accommodate her objections inconsistent with both Fed.R.Evid. 603 and the First Amendment and reverse.

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I.

This First Amendment case ironically arose out of a hearing in Tax Court. Although the government's brief is replete with references to income, exemptions, and taxable years, the only real issue is Betty Ann Ferguson's refusal to "swear" or "affirm" before testifying at the hearing. Her objection to oaths and affirmations is rooted in two Biblical passages, Matthew 5:33-37 and James 5:12. * * *

Ms. Ferguson, proceeding pro se, requested that Judge Korner consider the following statement set forth by the Supreme Court of Louisiana in *Staton v. Fought,* 486 So.2d 745 (La.1986), as an alternative to an oath or affirmation:

> I, [Betty Ann Ferguson], do hereby declare that the facts I am about to give are, to the best of my knowledge and belief, accurate, correct, and complete.

Judge Korner abruptly denied her request, commenting that "[a]sking you to affirm that you will give true testimony does not violate any religious conviction that I have ever heard anybody had" and that he did not think affirming "violates any recognizable religious scruple." Because Ms. Ferguson could only introduce the relevant evidence through her own testimony, Judge Korner then dismissed her petition for lack of prosecution. She now appeals to this court.

II.

[1] The right to free exercise of religion, guaranteed by the First Amendment to the Constitution, is one of our most protected constitutional rights. The Supreme Court has stated that "only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion." *Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526, 1533, 32 L.Ed.2d 15 (1972). *Accord Hobbie v. Unemployment Appeals Comm'n of Florida,* 480 U.S. 136, 141, 107 S.Ct. 1046, 1049, 94 L.Ed.2d 190 (1987); and *Sherbert v. Verner*, 374 U.S. 398, 403, 83 S.Ct. 1790, 1793, 10 L.Ed.2d 965 (1963). The protection of the free exercise clause extends to all sincere religious beliefs; courts may not evaluate religious truth. *United States v. Lee*, 455 U.S. 252, 257, 102 S.Ct. 1051, 1055, 71 L.Ed.2d 127 (1982); and *United States v. Ballard,* 322 U.S. 78, 86-87, 64 S.Ct. 882, 886-887, 88 L.Ed. 1148 (1944). Fed.R.Evid. 603, applicable in Tax Court under the Internal Revenue Code, 26 U.S.C. § 7453, requires only that a witness "declare that [she] will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." As evidenced in the advisory committee notes accompanying Rule 603, Congress clearly intended to minimize any intrusion on the free exercise of religion:

> The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. Accord Wright and Gold, *Federal Practice and Procedure* § 6044 (West 1990).

The courts that have considered oath and affirmation issues have similarly attempted to accommodate free exercise objections. In *Moore v. United States,* 348 U.S. 966, 75 S.Ct. 530, 99 L.Ed. 753 (1955) (*per curiam*), for example, the Supreme Court held that a trial judge erred in refusing the testimony of witnesses who would not use the word "solemnly" in their affirmations for religious reasons.

* * * *

[2] The government offers only two justifications for Judge Korner's refusal to consider the *Staton* statement. First, the government contends that the Tax Court was not bound by a Louisiana decision. This argument misses the point entirely; Ms. Ferguson offered *Staton* as an alternative to an oath or affirmation and not as a precedent.

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The government also claims that the *Staton* statement is insufficient because it does not acknowledge that the government may prosecute false statements for perjury. The federal perjury statute, 18 U.S.C. § 1621, makes the taking of "an oath" an element of the crime of perjury. *Accord Smith v. United States*, 363 F.2d 143 (5th Cir.1966). However, Ms. Ferguson has expressed her willingness to add a sentence to the Staton statement acknowledging that she is subject to penalties for perjury. The government has cited a number of cases invalidating perjury convictions where no oath was given, but none of the cases suggest that Ms. Ferguson's proposal would not suffice as "an oath" for purposes of § 1621. See *Gordon*, 778 F.2d at 1401 n. 3 (statement by defendant that he understands he must accurately state the facts combined with acknowledgment that he is testifying under penalty of perjury would satisfy Fed.R.Civ.P. 43(d)).

The parties' briefs to this court suggest that the disagreement between Ms. Ferguson and Judge Korner might have been nothing more than an unfortunate misunderstanding. The relevant portion of their dialogue was as follows:

MS. FERGUSON: I have religious objections to taking an oath.
THE COURT: All right. You may affirm. Then in lieu of taking an oath, you may affirm.
MS. FERGUSON: Sir, may I present this to you? I do not—
THE COURT: Just a minute. The Clerk will ask you.
THE CLERK: You are going to have to stand up and raise your right hand.
MS. FERGUSON: I do not affirm either. I have with me a certified copy of a case from the Louisiana Supreme Court.
THE COURT: I don't care about a case from the Louisiana Supreme Court, Ms. Ferguson. You will either swear or you will affirm under penalties of perjury that the testimony you are about to give is true and correct, to the best of your knowledge.
MS. FERGUSON: In that case, Your Honor, please let the record show that I was willing to go under what has been acceptable by the State of Louisiana Supreme Court, the State versus—
THE COURT: We are not in the state of Louisiana, Ms. Ferguson. You are in a Federal court and you will do as I have instructed, or you will not testify.
MS. FERGUSON: Then let the record show that because of my religious objections, I will not be allowed to testify.

Ms. Ferguson contends that Judge Korner insisted that she use either the word "swear" or the word "affirm"; the government suggests instead that Judge Korner only required an affirmation which the government defines as "an alternative that encompasses all remaining forms of truth assertion that would satisfy [Rule 603]." Even Ms. Ferguson's proposed alternative would be an "affirmation" under the government's definition.

If Judge Korner had attempted to accommodate Ms. Ferguson by inquiring into her objections and considering her proposed alternative, the entire matter might have been resolved without an appeal to this court. Instead, however, Judge Korner erred not only in evaluating Ms. Ferguson's religious belief, and concluding that it did not violate any "recognizable religious scruple," but also in conditioning her right to testify and present evidence on what she perceived as a violation of that belief. His error is all the more apparent in light of the fact that Ms. Ferguson was proceeding pro se at the hearing.

We therefore REVERSE the decision of the Tax Court and REMAND this case for further proceedings not inconsistent with this opinion.

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ADDITIONAL BACKGROUND—

State Codes:

Pennsylvania Consolidated Statutes

State codes may have any of several names—Codes, General Statutes, Revisions, and so on—depending on the preference of the states. Also arranged by subject, some codes indicate subjects by numbers. Others assign names. The following is the text of one of the state statutes whose citations are explained in the textbook—Section 1101 of Title 13 of the **Pennsylvania Consolidated Statutes** (13 Pa. C.S. § 1101).

PURDON'S PENNSYLVANIA CONSOLIDATED STATUTES ANNOTATED
TITLE 13. COMMERCIAL CODE
DIVISION 1. GENERAL PROVISIONS
CHAPTER 11. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF TITLE

§ 1101. Short title of title

This title shall be known and may be cited as the "Uniform Commercial Code."

1984 Main Volume Credit(s)

1979, Nov. 1, P.L. 255, No. 86, § 1, effective Jan. 1, 1980.

California Commercial Code

The text of another of the state statutes whose citations are explained in the textbook follows—Section 1101 of the **California Commercial Code** (Cal. Com. Code § 1101).

WEST'S ANNOTATED CALIFORNIA CODES
COMMERCIAL CODE
DIVISION 1. GENERAL PROVISIONS
CHAPTER 1. SHORT TITLE, CONSTRUCTION, APPLICATION AND SUBJECT MATTER OF THE CODE

§ 1101. Short Title

This code shall be known and may be cited as Uniform Commercial Code.

1964 Main Volume Credit(s)

(Stats.1963, c. 819, § 1101.)

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ADDITIONAL BACKGROUND—

Corpus Juris Secundum

Because the body of American case law is huge, finding relevant precedents would be nearly impracticable were it not for case digests, legal encyclopedias, and similar publications that classify decisions by subject. Like case digests, legal encyclopedias present topics alphabetically, but encyclopedias provide more detail. The legal encyclopedia **Corpus Juris Secundum** (or C.J.S.) covers the entire field of law. It has been cited or directly quoted more than 50,000 times in federal and state appellate court opinions. The following is an excerpt from C.J.S.—Section 47 of the category "*Theaters & Shows"* (86 C.J.S. *Theaters & Shows* § 47).

f. Assumption of Risk

A patron assumes the ordinary and natural risks of the character of the premises, devices, and form of amusement of which he has actual or imputed knowledge; but he does not assume the risk of injury from the negligence of the proprietor or third persons.

While it has been said that, strictly speaking, the doctrine of assumed risk is applicable only to the relationship of master and servant,[3] patrons of places of public amusement assume all natural and inherent risks pertaining to the character of the structure,[4] or to the devices located therein,[5] or to the form of amusement,[6] which are open and visible. Patrons of places of public amusement assume such risks as are incident to their going without compulsion to some part of the premises to which patrons are not invited and where they are not expected to be, and which risks

3. Cal.—Potts v. Crafts, 42 P.2d 87, 5 Cal.App.2d 83.
4. Mo.—King v. Ringling, 130 S.W. 482, 145 Mo.App. 285.
62 C.J. p 877 note 62.

Darkened motion picture theater
Ky.—Columbia Amusement Co. v. Rye, 155 S.W.2d 727, 288 Ky. 179.
N.J.—Falk v. Stanley Fabian Corporation of Delaware, 178 A. 740, 115 N.J.Law 141.
Tenn.—Smith v. Crescent Amusement Co., 184 S.W.2d 179, 27 Tenn.App. 632.
5. Cal.—Chardon v. Alameda Park Co., 36 P.2d 136, 1 Cal.App.2d 18.
Fla.—Payne v. City of Clearwater, 19 So.2d 406, 155 Fla. 9.
Mass.—Beaulieu v. Lincoln Rides, Inc., 104 N.E.2d 417, 328 Mass. 427.
Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Toroian v. Parkview Amusement Co., 56 S.W.2d 134, 331 Mo. 700.
Ohio.—Pierce v. Gooding Amusement Co., App., 90 N.E.2d 585.
Tex.—Vance v. Obadal, Civ.App., 256 S.W.2d 139.
62 C.J. p 877 note 63

Particular amusement devices
(1) "Dodge Em" cars.—Connolly v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—Frazier v. Palisades Realty & Amusement Co., 168 A. 419, 11 N.J.Misc. 841, affirmed 171 A. 795, 112 N.J.Law 502—62 C.J. p 877 note 63 [b].
(2) Loop the loop.—Kemp v. Coney Island, Ohio App., 31 N.E.2d 93.
(3) Roller coaster.—Wray v. Fair-ield Amusement Co., 10 A.2d 600, 126 Conn. 221—62 C.J. p 877 note 63 [e].
6. Miss.—Blizzard v. Fitzsimmons, 10 So.2d 343, 193 Miss. 484.
Mo.—Page v. Unterreiner, App., 106 S.W.2d 528.
N.J.—Griffin v. De Geeter, 40 A.2d 579, 132 N.J.Law 381—Thurber v. Skouras Theatres Corporation, 170 A. 863, 112 N.J.Law 385.
N.Y.—Levy v. Cascades Operating Corpora-tion, 32 N.Y.S.2d 341, 263 App.Div. 882 —Saari v. State, 119 N.Y.S.2d 507, 203 Misc. 859—Schmidt v. State, 100 N.Y.S.2d 504, 198 Misc. 802.
Vt.—Dusckiewicz v. Carter, 52 A.2d 788, 115 Vt. 122.
62 C.J. p 877 note 63.

Other statements of rule
(1) A spectator at game assumes risk of such dangers incident to playing of game as are known to him or should be obvious to reasonable and prudent person in exercise of due care under circumstances.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
Neb.—Klause v. Nebraska State Board of Agriculture, 35 N.W.2d 104, 150 Neb. 466—Tite v. Omaha Coliseum Corporation, 12 N.W.2d 90, 144 Neb. 22.
(2) One participating in a race assumes the risk of injury from natural hazards necessarily incident to, or which inhere in, such a race, under maxim "volenti non fit injuria," which means that to which a person assents is not esteemed in law an injury.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.
(3) Patrons of a place of amusement assume the risk of ordinary dangers normally attendant thereon and also the risks ensuing from conditions of which they now or of which, in the particular circumstances, they are charged with knowledge, and which inhere therein.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.

Liability of proprietor of sports arena
Generally, the proprietor of an establishment where contests of baseball, hockey, etc., are conducted, is not liable for injuries to its patrons.—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.

Risks of particular sports/entertainment
(1) Baseball.
Cal.—Quinn v. Recreation Park Ass'n, 46 P.2d 141, 3 Cal.2d 725—Brown v. San Francisco Ball Club, 222 P.2d 19, 99 Cal.App.2d 484—Ratcliff v. San Diego Baseball Club of Pacific Coast League, 81 P.2d 625, 27 Cal.App.2d 733.
Ind.—Emhardt v. Perry Stadium, 46 N.E.2d 704, 113 Ind.App. 197.
La.—Jones v. Alexandria Baseball Ass'n, App., 50 So.2d 93.
Mo.—Hudson v. Kansas City Baseball Club, 164 S.W.2d 318, 349 Mo. 1215—Grimes v. American League Baseball Co., App., 78 S.W.2d
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S. 505, 245 App.Div.137—Jones v. Kane & Roach, 43 N.Y.S.2d 140, 187 Misc. 37—Blackball v. Albany Baseball & Amusement Co., 285 N.Y.S.2d 695, 157 Misc. 801—Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56.
N.C.—Cates v. Cincinnati Exhibition Co., 1 S.E.2d 131, 215 N.C. 64.
Ohio.—Hummel v. Columbus Baseball Club, 49 N.E.2d 773, 71 Ohio App. 321—Ivory v. Cincinnati Baseball Club Co., 24 N.e.2d 837, 62 Ohio App. 514.
Okl.—Hull v. Oklahoma City Baseball Co., 163 P.2d 982, 196 Okl. 40.
Tex.—Williams v. Houston Baseball Ass'n, Civ.App., 154 S.W.2d 874—Keys v. Alamo City Baseball Co., Civ.App., 150 S.W.2d 368.
Utah.—Hamilton v. Salt Lake City Corp., 237 P.2d 841.
62 C.J. p 877 note 63 [a].

(2) Basketball.—Paine v. Young Men's Christian Ass'n, 13 A.2d 820, 91 N.H. 78.
(3) Golf.
Mass.—Katz v. Gow, 75 N.E.2d 438, 321 Mass. 666.
N.J.—Young v. Ross, 21 A.2d 762, 127 N.J.Law 211.
(4) Diving.—Hill v. Merrick, 31 P.2d 663, 147 Or. 244.
(5) Hockey.
Minn.—Modec v. City of Eveleth, 29 N.W.2d 453, 224 Minn. 556.
N.Y.—Ingersoll v. Onondaga Hockey Club, 281 N.Y.S.2d 505, 245 App.Div. 137—Hammel v. Madison Square Garden Corporation, 279 N.Y.S. 815, 156 Misc. 311.
(6) Horse racing.
Nev.—Hotels El Rancho v. Pray, 187 P.2d 568, 64 Nev. 591.
N.Y.—Futterer v. Saratoga Ass'n for Improvement of Breed of Horses, 31 N.Y.S.2d 108, 262 App.Div. 675.
(7) Ice skating.
Neb.—McCullough v. Omaha Coliseum Corporation, 12 N.W.2d 639, 144 Neb. 92.
N.D.—Filler v. Stenvick, 56 N.W.2d 798.
Pa.—Oberheim v. Pennsylvania Sports & Enterprises, 55 A.2d 766, 358 Pa. 62.
(8) Square dancing.—Gough v. Wadhams Mills Grange No. 1015, P. of H., 109 N.Y.S.2d 374.

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ADDITIONAL BACKGROUND—

United States Code

Until 1926, federal statutes were published in one volume of the Revised Statutes of 1875 and in each subsequent volume of the Statutes at Large. In 1926, these laws were rearranged into fifty subject areas and republished as the ***United States Code***. In the *United States Code,* all federal laws of a public and permanent nature are compiled by subject. Subjects are assigned titles and title numbers. Within each title, subjects are further subdivided, and each statute is given a section number. The following is the text of Section 1 of Title 15 of the *United States Code* (15 U.S.C. § 1).

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

ADDITIONAL BACKGROUND—

Code of Federal Regulations

Created by Congress in 1937, the ***Code of Federal Regulations*** is a set of soft cover volumes that contain the regulations of federal agencies currently in effect. Items are selected from those published in the *Federal Register* and arranged in a scheme of fifty titles, some of which are the same as those organizing the statutes in the *United States Code* (discussed above). Each title is divided into chapters, parts, and sections. The *Code of Federal Regulations* is completely revised every year. The following is the text of Section 230.504 of Title 17 of the *Code of Federal Regulations* (17 C.F.R. § 230.504).

TITLE 17—COMMODITY AND SECURITIES EXCHANGE
Chapter II—Securities and Exchange Commission
Part 230—General Rules and Regulations, Securities Act of 1933
REGULATION B—EXEMPTION RELATING TO FRACTIONAL UNDIVIDED INTERESTS IN OIL OR GAS RIGHTS
Regulation D—Rules Governing the Limited Offer and Sale of Securities Without Registration Under the Securities Act of 1933

§ 230.504 Exemption for Limited Offerings and Sales of Securities Not Exceeding $1,000,000.

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(a) Exemption.

Offers and sales of securities that satisfy the conditions in paragraph (b) of this Section by an issuer that is not subject to the reporting requirements of section 13 or 15(d) of the Exchange Act and that is not an investment company shall be exempt from the provisions of section 5 of the Act under section 3(b) of the Act.

(b) Conditions to be met—

(b)(1) General Conditions. To qualify for exemption under this § 230.504, offers and sales must satisfy the terms and conditions of §§ 230.501 and 230.502, except that the provisions of § 230.502(c) and (d) shall not apply to offers and sales of securities under this § 230.504 that are made:

(b)(1)(i) Exclusively in one or more states each of which provides for the registration of the securities and requires the delivery of a disclosure document before sale and that are made in accordance with those state provisions; or

(b)(1)(ii) In one or more states which have no provision for the registration of the securities and the delivery of a disclosure document before sale, if the securities have been registered in at least one state which provides for such registration and delivery before sale, offers and sales are made in the state of registration in accordance with such state provisions, and such document is in fact delivered to all purchasers in the states which have no such procedure before the sale of the securities.

(b)(2) Specific condition—

(b)(2)(i) Limitation on aggregate offering price. The aggregate offering price for an offering of securities under this § 230.504, as defined in § 230.501(c), shall not exceed $1,000,000, less the aggregate offering price for all securities sold within the twelve months before the start of and during the offering of securities under this § 230.504 in reliance on any exemption under section 3(b) of the Act or in violation of section 5(a) of the Act, provided that no more than $500,000 of such aggregate offering price is attributable to offers and sales of securities without registration under a state's securities laws.

Note 1.—The calculation of the aggregate offering price is illustrated as follows:

Example 1. If an issuer sells $500,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504, it would be able to sell an additional $500,000 worth of securities either pursuant to state registration or without state registration during the ensuing twelve-month period, pursuant to this § 230.504.

Example 2. If an issuer sold $900,000 pursuant to state registration on June 1, 1987 under this § 230.504 and an additional $4,100,000 on December 1, 1987 under § 230.505, the issuer could not sell any of its securities under this § 230.504 until December 1, 1988. Until then the issuer must count the December 1, 1987 sale towards the $1,000,000 limit within the preceding twelve months.

Note 2.—If a transaction under this § 230.504 fails to meet the limitation on the aggregate offering price, it does not affect the availability of this § 230.504 for the other transactions considered in applying such limitation. For example, if an issuer sold $1,000,000 worth of its securities pursuant to state registration on January 1, 1988 under this § 230.504 and an additional $500,000 worth on July 1, 1988, this § 230.504 would not be available for the later sale, but would still be applicable to the January 1, 1988 sale.

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Note 3.—In addition to the aggregation principles, issuers should be aware of the applicability of the integration principles set forth in § 230.502(a).

(b)(2)(ii) Advice about the limitations on resale. Except where the provision does not apply by virtue of paragraph (b)(1) of this section, the issuer, at a reasonable time prior to the sale of securities, shall advise each purchaser of the limitations on resale in the manner contained in paragraph (d)(2) of § 230.502.

[53 FR 7869, March 10, 1988; 54 FR 11372, March 20, 1989]

AUTHORITY: Secs. 6, 7, 8, 10, 19(a), 48 Stat. 78, 79, 81, 85; secs. 205, 209, 48 Stat. 906, 908; sec. 301, 54 Stat. 857; sec. 8, 68 Stat. 685; Sec. 308(a)(2), 90 Stat. 57; Secs. 3(b), 12, 13, 14, 15(d), 23(a), 48 Stat. 882, 892, 894, 895, 901; secs. 203(a), 1, 3, 8, 49 Stat. 704, 1375, 1377, 1379; sec. 202, 68 Stat. 686; secs. 4, 5, 6(d), 78 Stat. 569, 570-574; secs. 1, 2, 3, 82 Stat. 454, 455; secs. 28(c), 1, 2, 3, 4, 5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 10, 89 Stat. 117, 118, 119; sec. 308(b), 90 Stat. 57; sec. 18, 89 Stat. 155; secs. 202, 203, 204, 91 Stat. 1494, 1498-1500; sec. 20(a), 49 Stat. 833; sec. 319, 53 Stat. 1173; sec. 38, 54 Stat. 841; 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a), 78c(b), 78l, 78m, 78n, 78o(d), 78w(a), 79t(a), 77sss(a), 80a-37.

Source: Sections 230.490 to 230.494 contained in Regulation C, 12 FR 4076, June 24, 1947, unless otherwise noted.

Note.—In §§ 230.400 to 230.499, the numbers to the right of the decimal point correspond with the respective rule number in Regulation C, under the Securities Act of 1933.

ADDITIONAL BACKGROUND—

United States Code Annotated

The ***United States Code Annotated*** contains the complete text of laws enacted by Congress that are included in the *United States Code* (discussed above), together with case notes (known as annotations) of judicial decisions that interpret and apply specific sections of the statutes. Also included are the text of presidential proclamations and executive orders, specially prepared research aids, historical notes, and library references. The following are excerpts from the materials found at Section 1 of Title 15 of the *United States Code Annotated* (15 U.S.C.A. § 1), including the historical notes and selected references.

TITLE 15. COMMERCE AND TRADE
CHAPTER 1—MONOPOLIES AND COMBINATIONS IN RESTRAINT OF TRADE

§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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(July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.)

(As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.)

HISTORICAL AND STATUTORY NOTES

Effective Date of 1975 Amendment. Section 4 of Pub. L. 94-145 provided that: "The amendments made by sections 2 and 3 of this Act [to this section and section 45(a) of this title] shall take effect upon the expiration of the ninety-day period which begins on the date of enactment of this Act [Dec. 12, 1975]."

Short Title of 1984 Amendment. Pub. L. 98-544, § 1, Oct. 24, 1984, 98 Stat. 2750, provided: "That this Act [enacting sections 34 to 36 of this title and provisions set out as a note under section 34 of this title] may be cited as the 'Local Government Antitrust Act of 1984'."

Short Title of 1982 Amendment. Pub. L. 97-290, Title IV, § 401, Oct. 8, 1982, 96 Stat. 1246, provided that "This title [enacting section 6a of this title and section 45(a) (3) of this title] may be cited as the 'Foreign Trade Antitrust Improvements Act of 1982'."

Short Title of 1980 Amendment. Pub. L. 96-493, § 1, Dec. 2, 1980, 94 Stat. 2568, provided: "That this Act [enacting section 26a of this title] may be cited as the 'Gasohol Competition Act of 1980'."

Short Title of 1975 Amendment. Section 1 of Pub. L. 94-145 provided: "That this Act [which amended this section and section 45(a) of this title and enacted provisions set out as a note under this section] may be cited as the 'Consumer Goods Pricing Act of 1975'."

Short Title of 1974 Amendment. Section 1 of Pub. L. 93-528 provided: "That this Act [amending this section, and sections 2, 3, 16, 28, and 29 of this title, and section 401 of Title 47, Telegraphs, Telephones, and Radiotelegraphs, and enacting provisions set out as notes under sections 1 and 29 of this title] may be cited as the 'Antitrust Procedures and Penalties Act'."

Short Title. Pub. L. 94-435, Title III, § 305(a), Sept. 30, 1976, 90 Stat. 1397, inserted immediately after the enacting clause of Act July 2, 1890, c. 647, the following: "That this Act [sections 1 to 7 of this title] may be cited as the 'Sherman Act'."

Legislative History. For legislative history and purpose of Act July 7, 1955, see 1955 U.S.Code Cong. and Adm.News, p. 2322.

For legislative history and purpose of Pub. L. 93-528, see 1974 U.S. Code Cong. and Adm. News, p. 6535. See, also, Pub. L. 94-145, 1975 U.S. Code Cong. and Adm. News, p. 1569.

REFERENCES

CROSS REFERENCES

Antitrust laws inapplicable to labor organizations, see § 17 of this title.

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Carriers relieved from operation of antitrust laws, see § 5(11) of Title 49, Transportation.

Combinations in restraint of import trade, see § 8 of this title.

Conspiracy to commit offense or to defraud United States, see § 371 of Title 18, Crimes and Criminal Procedure.

Discrimination in price, services or facilities, see § 13 of this title.

Fishing industry, restraints of trade in, see § 522 of this title.

Misdemeanor defined, see § 1 of Title 18, Crimes and Criminal Procedure.

Monopolies prohibited, see § 2 of this title.

Trusts in territories or District of Columbia prohibited, see § 3 of this title.

FEDERAL PRACTICE AND PROCEDURE

1990 Pocket Part Federal Practice and Procedure

Adding new parties, see Wright & Miller: Civil § 1504.

Adequacy of representation of members in class actions instituted under sections 1 to 7 of this title, see Wright, Miller & Kane: Civil 2d § 1765.

Answers to interrogatories with respect to justification for unlawful activity, see Wright & Miller: Civil § 2167.

Applicability of rule relating to summary judgment, see Wright, Miller & Kane: Civil 2d § 2730.

Applicability of standards developed by federal courts under sections 1 to 7 of this title to certain intrastate transactions, see Wright, Miller, Cooper & Gressman: Jurisdiction § 4031.

Authority of district court to award injunctive relief in actions to restrain antitrust violations, see Wright & Miller: Civil § 2942.

Capacity of unincorporated association to sue and be sued, see Wright & Miller: Civil § 1564.

Discretion of court in taxing costs, see Wright, Miller & Kane: Civil 2d § 2668.

Elements of offense to be alleged directly and with certainty, see Wright: Criminal 2d § 126.

Joiner of claims, see Wright & Miller: Civil § 1587.

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CODE OF FEDERAL REGULATIONS

1973 Main Volume *Code of Federal Regulations*

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Advisory opinions and rulings of particular trade practices, see 16 CFR 15.1 *et seq*.

Common sales agency, see 16 CFR 15.46.

Compliance with state milk marketing orders, see 16 CFR 15.154.

Guides and trade practice rules for particular industries, see 16 CFR subd. B, parts 17 to 254.

LAW REVIEW COMMENTARIES

Abolishing the act of state doctrine. Michael J. Bazyler, 134 U.Pa.L.Rev. 325 (1986).

Affecting commerce test: The aftermath of McLain. Richard A. Mann, 24

* * * *

ANNOTATIONS

1. Common law

Congress did not intend text of sections 1 to 7 of this title to delineate their full meaning or their application in concrete situations, but, rather, Congress expected courts to give shape to their broad mandate by drawing on common-law tradition. *National Society of Professional Engineers v. U.S.,* U.S.Dist.Col.1978, 98 S.Ct. 1355, 435 U.S. 679, 55 L.Ed.2d 637.

This section has a broader application to price fixing agreements than the common law prohibitions or sanctions. *U.S. v. Socony-Vacuum Oil Co.,* Wis.1940, 60 S.Ct. 811, 310 U.S. 150, 84 L.Ed. 1129, rehearing denied 60 S.Ct. 1091, 310 U.S. 658, 84 L.Ed. 1421.

Effect of §§ 1 to 7 of this title was to make contracts in restraint of trade, void at common law, unlawful in positive sense and created civil action for damages in favor of injured party. *Denison Mattress Factory v. Spring-Air Co.,* C.A.Tex.1962, 308 F.2d 403.

Combinations in restraint of trade or tending to create or maintain monopoly gave rise to actions at common law. *Rogers v. Douglas Tobacco Bd. of Trade, Inc.,* C.A.Ga.1957, 244 F.2d 471.

Federal statutory law on monopolies did not supplant common law but incorporated it. *Mans v. Sunray DX Oil Co.,* D.C.Okl.1971, 352 F.Supp. 1095.

Common-law principle that manufacturer can deal with one retailer in a community or area and refuse to sell to any other has not been modified by §§ 1 to 7 of this title or any other act of Congress. *U.S. v. Arnold, Schwinn & Co.,* D.C.Ill.1965, 237 F.Supp. 323, reversed on other grounds 87 S.Ct. 1856, 388 U.S. 365, 18 L.Ed.2d 1249, on remand 291 F.Supp. 564, 567.

This section is but an exposition of common law doctrines in restraint of trade and is to be interpreted in the light of common law. *U.S. v. Greater Kansas City Chapter Nat. Elec. Contractors Ass'n,* D.C.Mo.1949, 82 F.Supp. 147.

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CASE SYNOPSIS—

A Sample Court Case: *Yeasin v. Durham*

Navid Yeasin and A.W. were students at the University of Kansas (KU). They dated for about nine months. When A.W. tried to end the relationship, Yeasin restrained her in his car, took her phone, and threatened to make the "campus environment so hostile that she would not attend any university in the state of Kansas." He repeatedly tweeted disparaging comments about her. Tammara Durham, the university's vice provost for student affairs, found that Yeasin's conduct and tweets violated the school's student code of conduct and sexual-harassment policy. She expelled him.

Yeasin filed a suit in a Kansas state court against Durham, and the university reinstated him. He then filed a suit in a federal district court against Durham, claiming that she had violated his First Amendment rights by expelling him for the content of his off-campus speech. The court dismissed the claim. Yeasin appealed to the U.S. Court of Appeals for the Tenth Circuit.

The U.S. Court of Appeals for the Tenth Circuit affirmed the lower court's dismissal of Yeasin's suit. Yeasin argued that three cases decided by the United States Supreme Court clearly established his right to tweet about A.W. without the university being able to place restrictions on, or discipline him for, his tweets. In response, the court here pointed out that those cases did not involve circumstances similar to Yeasin's situation. In those cases, no student had been charged with a crime against another student and then made sexually harassing comments affecting her ability to feel safe while attending classes. And, the court concluded, in this case Dr. Durham could reasonably believe, based on Yeasin's conduct and his tweets, that his presence at the university would disrupt A.W.'s education and interfere with her rights.

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BUSINESS ACTIVITIES AND THE LEGAL ENVIRONMENT

- **Law:** A body of enforceable rules governing relationships among individuals and between individuals and their society.
  - All rules have one feature in common: they establish rights, duties, and privileges that are consistent with the values and beliefs of a society or its ruling group.

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SOURCES OF AMERICAN LAW

- **Primary Source of Law:** A document that establishes the law on a particular issue. In the U.S., primary sources of law include:

  (1) *constitutions* setting forth the fundamental rights of the people living within the United States or a given state, describing and empowering the various branches of government, and prescribing limitations on that power;

  (2) legislatively-enacted *statutes* and local *ordinances*;

  - A given state statute <u>may</u> be based on a *uniform law* (*e.g.*, the Uniform Commercial Code) or on a *model act* (*e.g.*, the Model Business Corporations Act). However, each state is free to depart from the uniform law or model act as it sees fit.

  (3) *administrative rules and regulations* promulgated by federal, state, and local regulatory agencies; and

  (4) *case law*, which is the body of judicial decisions that interpret and enforce any of the foregoing.

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

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CONSTITUTIONAL LAW

- **Constitutional Law:** The body of law derived from the U.S. Constitution (for example, the Tenth Amendment) and the constitutions of the various states.

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STATUTORY LAW

- **Statutory Law:** The body of law enacted by legislative bodies, as opposed to constitutional law, administrative law, or case law.
  - **Citation:** A reference to a publication in which a legal authority—such as a statute or a court decision—can be found.
- **Ordinance:** A regulation enacted by a city or county legislative body that becomes part of that state's statutory law.
- A federal statute applies to all states; a state statute applies only within the state's borders. No state statute or local ordinance may violate the U.S. Constitution or the relevant state constitution.
- To counteract problems arising from differences among state laws, the National Conference of Commissioners on Uniform State Laws draft **uniform laws** ("model statutes") that states can choose to adopt or reject.
  - The Uniform Commercial Code (UCC), one of the most important uniform acts, facilitates commerce among the states by providing a uniform, yet flexible, set of rules governing commercial transactions.

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ADMINISTRATIVE LAW

- **Administrative Law:** The body of rules, orders, and decisions issued by administrative agencies, such as the federal Securities and Exchange Commission or a state's public utilities commission.

- **Administrative Agencies:** Agencies authorized by federal or state legislation to make and enforce rules to administer and enforce legislative acts (*e.g.*, the Social Security Administration).

  - *Federal Agencies:* Agencies formed to assist the President or, at the state level, the Governor, in carrying out executive functions (*e.g.*, the Federal Bureau of Investigation).

  - *Independent Regulatory Agencies:* Agencies neither designed to aid nor directly accountable to the legislative or executive branches (*e.g.*, the Federal Reserve System).

  - *State and Local Agencies:* State or local agencies often created as a parallel to a federal agency.

- **Enabling Legislation:** Legislative action specifying the name, purposes, functions, and powers of the agency the legislation created.

  - As a general rule, an agency lacks the power to act beyond the scope of its enabling legislation.

  - Agencies are empowered to hold trial-like hearings and to **adjudicate** (resolve judicially) certain kinds of disputes.

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THE ADMINISTRATIVE PROCESS: RULEMAKING

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

- **Rulemaking:** The process of formulating new **legislative rules**, which carry the same weight as a congressionally enacted statute, as well as **interpretive rules**, a nonbinding rule or policy statement issued by an administrative agency that explains how it interprets and intends to apply the statutes it enforces.

  - Legislative rulemaking involves the following three steps:

    (1) Notice must be published in the *Federal Register*, a daily publication of the U.S. government.

    (2) The agency must allow ample time for interested parties to comment on the proposed rule, and the agency must take these comments into consideration when drafting the final version of the regulation.

    (3) Once the agency has drafted the final rule, it is published in the *Federal Register.*

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THE ADMINISTRATIVE PROCESS: ENFORCEMENT AND INVESTIGATION

- Both as part of the rulemaking process and as part of the enforcement of the rules, agencies can inspect regulated entities' facilities or business records.

- If an agency determines that an entity has violated one or more rules, the agency may take *administrative action* against the entity. When possible, the agency will seek the entity's voluntary compliance, thus avoiding the expense and inconvenience of full-blown judicial or quasi-judicial proceedings.

- **Adjudication:** If voluntary compliance is not forthcoming, the agency and the entity will appear before an **administrative law judge** (ALJ), who will conduct a quasi-judicial (or "court-like") proceeding, the exact nature of which varies from agency to agency.

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CASE LAW AND COMMON LAW DOCTRINES

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

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THE COMMON LAW

- Due to colonial heritage, much American law is based on the English court system, which began under William the Conqueror in the 11th century.

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

- **Precedent:** The authority afforded to a prior judicial decision by judges deciding subsequent disputes involving the same or similar facts and the same jurisdiction's substantive law.

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STARE DECISIS

- ***Stare Decisis*:** The common law doctrine that obliges judges to follow established precedent within a particular jurisdiction.

  - **Binding Authority:** Any primary source of law a court must follow when deciding a dispute. This includes all constitutional provisions, statutes, treaties, regulations, or ordinances that govern the issue being decided, as well as prior court decisions that constitute controlling precedent in the court's jurisdiction.

  - **Persuasive Authority:** Any primary or secondary source of law which a court may, but which the court is not bound to, rely upon for guidance in resolving a dispute.

  - A prior judicial decision acts as *binding* precedent only when the subsequent court is applying the same law as the prior court; otherwise, the prior decision is only *persuasive* authority.

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EQUITABLE REMEDIES AND COURTS OF EQUITY

- From their origin in the late 11th century, common law courts were typically classified as either "courts of law" or "courts of equity."
  - *Courts of Law* were empowered only to award wronged parties money or other valuable compensation for their injuries or other losses.
  - *Courts of Equity*, by contrast, were empowered to award any manner of non-monetary relief, such as ordering a person to do something (a.k.a. "specific performance") or to cease doing something (a.k.a. "injunction").
- In most of the United States the courts of law and equity have *merged*. Nonetheless, American courts still recognize *legal remedies* and *equitable remedies*.
  - **Remedy:** The means given to a party to enforce a right or to compensate for another's violation of a right.
  - **Plaintiff:** One who initiates a lawsuit in court.
  - **Defendant:** The party against whom the plaintiff brings a lawsuit or the accused person in a criminal proceeding.

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CLASSIFICATIONS OF LAW

- **Substantive vs. Procedural Law**
  - **Substantive law** consists of all laws that define, describe, regulate, and create legal rights and obligations.
  - **Procedural law** consists of all laws that establish and regulate the manner of enforcing or vindicating the rights established by substantive law.
    - An example of an emerging body of law is **Cyberlaw**, which refers to all laws governing electronic communications and transactions, particularly those conducted via the Internet

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CIVIL LAW AND CRIMINAL LAW

- **Civil law** defines and enforces the duties or obligations of persons to one another.
  - **Civil law systems**, such as those in Mexico and France, are based primarily on statutory, or "codified," law. Prior judicial decisions have no *binding* authority except as between the parties to the decision.
- **Criminal law**, by contrast, defines and enforces the obligations of persons to society as a whole.

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NATIONAL AND INTERNATIONAL LAW

- **National Law:** Laws governing rights and obligations within a particular country.

- **International Law:** Laws governing the relations between and among nations and between nations and the citizens of one or more other sovereign nations (*e.g.*, the Geneva Convention on the Treatment of Prisoners of War, the Warsaw Convention on International Air Travel, the General Agreement on Tariffs and Trade).

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THE CONSTITUTIONAL POWERS OF GOVERNMENT

- **Federal Form of Government:** A form of government where states form a union and the sovereign power is divided between the national government (federal powers) and the various states (regulatory powers of the states).

  - **Sovereignty:** The power of a state to do what is necessary to govern itself, as determined by the U.S. Constitution.

  - **Police Powers:** As part of their sovereign powers, states possess the power to regulate private activities in order to protect or promote public order, health, safety, morals, and general welfare.

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THE SEPARATION OF POWERS

- **Checks and Balances:** The system under which the powers of the national government are divided among three separate branches, each of which exercises a check on the actions of the others, for example:

  - The *Legislative Branch* (*i.e.*, Congress) can enact a law, but the executive branch (*i.e.*, the President) has the constitutional authority to veto that law.

  - The *Executive Branch* (*i.e.*, the President), has the power to veto legislation passed by Congress and to appoint the members of the Judiciary; and

  - The *Judicial Branch* (*i.e.*, the Supreme Court and the lower federal courts), has the power to void the acts of the Executive and Legislative branches because they are unconstitutional.

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THE COMMERCE CLAUSE

- **Commerce Clause:** Article I, Section 8 of the U.S. Constitution empowers Congress "[t]o regulate Commerce with foreign nations, and among the several States, and with the Indian Tribes."

- Since 1824, the Supreme Court has interpreted the Commerce Clause to permit Congress to regulate both

  - *interstate commerce* (*i.e.*, commerce between two or more states) and

  - *intrastate commerce* (*i.e.*, commerce within a single state),

  as long as the intrastate commerce at issue "substantially affects" interstate commerce, according to *Gibbons v. Ogden* (1824).

- The "Dormant" Commerce Clause is used when state regulations impinge on interstate commerce, and courts must balance the state's interest in the merits and purposes of the regulation against the burden that the regulation places on interstate commerce.

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THE SUPREMACY CLAUSE

- Federal constitutional and statutory law and treaties supersede their state counterparts due to the **Supremacy Clause**, Article VI, Section 2 of the U.S. Constitution, which states that the U.S. Constitution, laws, and treaties are "the supreme Law of the Land."

- When there is a direct conflict between a federal law and a state law, it is necessary to determine which law governs in that circumstance. **Preemption** is the doctrine under which federal laws preempt, or take precedence over, conflicting state or local laws.

- If it is not clear whether Congress, in passing a law, intended to preempt an entire subject area against state regulation, the courts generally ascribe *congressional intent* to preempt when:

  - federal law is so pervasive, comprehensive, or detailed that it leaves state and local law no room to supplement it, or

  - federal law creates a federal regulatory agency that is empowered to enforce federal law.

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BUSINESS AND THE BILL OF RIGHTS

- The first ten amendments to the U.S. Constitution comprise the **Bill of Rights**, a series of protections for individuals against various types of government action.

- The Bill of Rights, with certain notable exceptions, protects *legal persons*, such as corporations and sole proprietorships, as well as *natural persons*, against action by the federal government.

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THE BILL OF RIGHTS SUMMARIZED

- Most significantly, for our purposes, the Bill of Rights:
  - guarantees freedom of religion, speech, and the press, as well as the rights to peaceably assemble and to petition the government [Amend. 1] and to keep and bear arms [Amend. 2];
  - prohibits unreasonable searches and seizures of persons or property [Amend. 4] and guarantees fair payment for property taken for public use [Amend. 5];
  - guarantees the rights to due process of law [Amend. 5], as well as the rights to a speedy and public (criminal) trial with the assistance of counsel and to cross-examine witnesses and to solicit favorable testimony [Amend. 6];
  - guarantees the right to trial by jury in both criminal cases [Amend. 6] and civil cases [Amend. 7];
  - prohibits excessive bails and fines, as well as cruel and unusual punishment [Amend. 8];
  - guarantees additional rights not specified in the Constitution [Amend. 9]; and
  - states that powers not delegated to the federal government are reserved for the states [Amend. 10].

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LIMITS ON FEDERAL AND STATE GOVERNMENTAL ACTIONS

- In order to extend the same protections against actions by state and local governments, the U.S. Supreme Court has incorporated the protections afforded by the Bill of Rights into the following language of the Fourteenth Amendment:

  > . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

- The Supreme Court, as the final *judicial interpreter* of the Constitution, gives meaning to constitutional rights and determines their boundaries.

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FIRST AMENDMENT:
FREEDOM OF SPEECH

- The First Amendment safeguards freedom of speech, including *corporate political speech* and *symbolic speech*.
  - **Symbolic speech** includes all forms of expressive conduct, including gestures, movements, and clothing.
- Expression—oral, written, or symbolized by conduct—is subject to *reasonable restrictions*.
  - Content-neutral laws are aimed at combating some secondary societal problem, such as crime, and not at suppressing the expressive conduct or message.
  - **Compelling Government Interest**: A test of constitutionality that requires the government to have convincing reasons for passing any law that restricts fundamental rights, such as free speech, or distinguishes between people based on a suspect trait.

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FREEDOM OF SPEECH

- *Corporate political speech* is protected by the First Amendment, as it prevents limits from being placed on independent political expenditures by corporations.

- *Commercial speech* (*i.e.*, advertising and marketing) may be restricted as long as the restriction

  (1) promotes a *substantial government interest*,

  (2) *directly advances* said interest, and

  (3) is *no more restrictive than necessary* in order to achieve the substantial government interest.

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UNPROTECTED SPEECH

- Certain types of speech may be prohibited, for example:
  - speech (*i.e.*, *slander*) or writing (*i.e.*, *libel*) that defames or harms the good reputation of another person,
  - *threatening words* intended to communicate a serious threat to commit an unlawful, violent act against a person or group, and
  - *obscene or pornographic speech*.

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FIRST AMENDMENT: FREEDOM OF RELIGION

- The First Amendment states that the government may neither establish any religion nor prohibit the free exercise of religious practices.

  - The **Establishment Clause** generally prohibits government from establishing a state-sponsored religion or passing laws that promote or show a significant preference for one religion over another, or that impose a significant burden on one or more religions.

  - The **Free Exercise Clause** generally prohibits government from compelling anyone to do something contrary to his religious beliefs or restricting anyone's legitimate exercise of his religious beliefs, except where public policy or public welfare require government action.

- The key to analyzing a federal or state law or regulation as it relates to these provisions is to focus on the *primary effect* of the law or regulation, not any secondary effect. As long as the law or regulation does not promote or place a *significant burden* on religion, it will not be deemed unconstitutional simply because it has <u>some</u> impact on religion. An exception is any religious practice that works against public policy and the public welfare.

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DUE PROCESS

- **Due Process Clause:** The provisions in the Fifth and Fourteenth Amendments that guarantee that no person shall be deprived of life, liberty, or property without due process of law.

- *Procedural Due Process* requires that any government decision to take life, liberty, or property must be made fairly, giving the persons from whom life, liberty, or property is to be taken prior notice and the opportunity to be heard by an impartial decisionmaker.

- *Substantive Due Process* requires that the interest of the state to be served by any law or other governmental action must be weighed against the right of the individuals against whom the law or action is directed.

  - A fundamental right (*e.g.*, free speech, interstate travel, privacy) will be protected <u>unless</u> the government can show a compelling state interest (*e.g.*, public safety).

  - In all other cases, a law or action will not violate substantive due process as long as it is rationally related to any legitimate governmental purpose.

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EQUAL PROTECTION

- **Equal Protection Clause:** The provision in the Fourteenth Amendment that requires state governments to treat similarly situated individuals in a similar manner.

- Like *substantive due process*, the equal protection clauses require the substantive effect of a law or other government action to be weighed against the right of the individuals against whom the law or action is directed.

  - If the law or action inhibits a group's exercise of a fundamental right or if it embodies a classification based on a suspect trait (*e.g.*, race, national origin), the law or action is subject to *strict scrutiny*, and will only be upheld if it serves a compelling state interest.

  - If the law or action embodies a classification based on gender or legitimacy, it is subject to *intermediate scrutiny*, and will only be upheld if it is substantially related to important government objectives.

  - If the law or action inhibits only rights related to economic or social welfare, it will be upheld as long as there is a *rational basis* on which the classification might relate to a legitimate government interest.

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PRIVACY RIGHTS

- Despite the lack of any explicit right to privacy in the Bill of Rights, the courts have implied a *fundamental right to personal privacy* from the provisions of the First, Third, Fourth, Fifth, and Ninth Amendments.

- In addition, Congress has passed a number of statutes protecting individual privacy, including the

  - *Freedom of Information Act,* which affords individuals access to information collected about them by the federal government.

- Congress has also passed legislation authorizing government encroachment into individual privacy, most notably, *The USA Patriot Act,* enacted in 2001, which empowered government agencies to access and monitor electronic, financial, and other personal data and communication.

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C.A.9 (Cal.),2014.
SmithKline Beecham Corp. v. Abbott Laboratories
740 F.3d 471, 14 Cal. Daily Op. Serv. 563, 2014 Daily Journal D.A.R. 717

United States Court of Appeals,
Ninth Circuit.
SMITHKLINE BEECHAM CORPORATION, dba GlaxoSmithKline, Plaintiff–Appellee,
v.
ABBOTT LABORATORIES, Defendant–Appellant.
SmithKline Beecham Corporation, dba GlaxoSmithKline, Plaintiff–Appellant,
v.
Abbott Laboratories, Defendant–Appellee.

Nos. 11–17357, 11–17373.
Argued and Submitted Sept. 18, 2013.
Filed Jan. 21, 2014.

Background: Licensee brought action alleging that manufacturer of drug to treat human immunodeficiency virus (HIV) had violated implied covenant of good faith and fair dealing, antitrust laws, and North Carolina Unfair Trade Practices Act. The United States District Court for the Northern District of California, Claudia Wilken, Chief District Judge, granted judgment for licensee after jury verdict in its favor in part. Licensee appealed.

Holdings: The Court of Appeals, Reinhardt, Circuit Judge, held that:
(1) manufacturer struck juror on basis of his sexual orientation;
(2) heightened scrutiny applies to classifications based on sexual orientation;
(3) equal protection forbids striking juror on basis of sexual orientation; and
(4) *Batson* violation was not subject to harmless error review.

Reversed and remanded.

West Headnotes

[1] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Batson analysis requires the party challenging the peremptory strike to establish a prima facie case of intentional discrimination, the striking party then must give a nondiscriminatory reason for the strike, and, finally, the court

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determines, on the basis of the record, whether the party raising the challenge has shown purposeful discrimination.

[2] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

To establish a prima facie case under *Batson*, the party challenging the peremptory strike must produce evidence that (1) the prospective juror is a member of a cognizable group; (2) counsel used a peremptory strike against the individual; and (3) the totality of the circumstances raises an inference that the strike was motivated by the characteristic in question.

[3] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

The party challenging the peremptory strike satisfies the requirements of *Batson*'s first step that the prospective juror is a member of a cognizable group by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred.

[4] Jury 230 33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Under *Batson*, the burden on the challenging party at the prima facie stage to show that the prospective juror is a member of a cognizable group is a burden of production, not a burden of persuasion, and it is not an onerous one.

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[5] Constitutional Law 92 ⚷3446

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3446 k. Juries. Most Cited Cases

Jury 230 ⚷33(5.15)

230 Jury
230II Right to Trial by Jury
230k30 Denial or Infringement of Right
230k33 Constitution and Selection of Jury
230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Prima facie case was established, under *Batson*, that drug manufacturer intentionally discriminated against juror based on his sexual orientation, in violation of equal protection, by peremptorily striking him, in action alleging that manufacturer had unlawfully increased price of its HIV drug; juror was only self-identified gay member of venire, litigation presented issue of consequence to gay community, and there was reason to infer that manufacturer struck juror on basis of his sexual orientation because of its fear that he would be influenced by concern in gay community over manufacturer's decision to increase price of its HIV drug. U.S.C.A. Const.Amend. 5.

[6] Constitutional Law 92 ⚷3832

92 Constitutional Law
92XXVI Equal Protection
92XXVI(G) Juries
92k3832 k. Peremptory challenges. Most Cited Cases

Equal protection forbids striking even a single prospective juror for discriminatory purpose. U.S.C.A. Const.Amend. 5.

[7] Constitutional Law 92 ⚷3446

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3446 k. Juries. Most Cited Cases

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Jury 230 ⚷33(5.15)

230 Jury
230II Right to Trial by Jury
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230k33(5) Challenges and Objections
230k33(5.15) k. Peremptory challenges. Most Cited Cases

Drug manufacturer failed to offer non-sexual orientation-based reasons for its peremptory strike of only self-identified gay member of venire, and therefore did not rebut prima facie case of equal protection violation under *Batson*, in action alleging that manufacturer had unlawfully increased price of its HIV drug; record did not support manufacturer's claim that juror had lost friends to AIDS, despite manufacturer's claim that juror was acquainted with many people in legal field, other jurors who were lawyers or had close relatives who were lawyers were not stricken, manufacturer's claim that other jurors "might have given extra weight" to juror's opinions because he was computer technician with Ninth Circuit was "highly speculative," and even though juror was only one who testified that he had heard of any of three drugs at issue, when asked what he knew about the drug, juror replied, "not much." U.S.C.A. Const.Amend. 5.

[8] Constitutional Law 92 ⚷3430

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3430 k. In general. Most Cited Cases

Heightened scrutiny applies to equal protection claims involving sexual orientation. U.S.C.A. Const.Amend. 5.

[9] Constitutional Law 92 ⚷3057

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3057 k. Statutes and other written regulations and rules. Most Cited Cases

A law must be upheld under rational basis equal protection review if any state of facts reasonably may be conceived to justify the classifications imposed by the law; this lowest level of review does not look to the actual pur-

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poses of the law, but, instead, it considers whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law. U.S.C.A. Const.Amend. 5.

[10] Constitutional Law 92 ⚷3053

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)6 Levels of Scrutiny
92k3052 Rational Basis Standard; Reasonableness
92k3053 k. In general. Most Cited Cases

Rational basis review under Equal Protection Clause ordinarily is unconcerned with the inequality that results from the challenged state action. U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚷3430

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3430 k. In general. Most Cited Cases

When state action discriminates on the basis of sexual orientation, a court must apply heightened scrutiny under the equal protection clause and examine its actual purposes and carefully consider the resulting inequality to ensure that the most fundamental institutions neither send nor reinforce messages of stigma or second-class status. U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ⚷3446

92 Constitutional Law
92XXVI Equal Protection
92XXVI(B) Particular Classes
92XXVI(B)12 Sexual Orientation
92k3446 k. Juries. Most Cited Cases

Equal protection forbids striking a juror on basis of sexual orientation. U.S.C.A. Const.Amend. 5.

[13] Constitutional Law 92 ⚷3832

92 Constitutional Law

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92XXVI Equal Protection
92XXVI(G) Juries
92k3832 k. Peremptory challenges. Most Cited Cases

Federal Courts 170B 3698(2)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)4 Harmless and Reversible Error
170Bk3686 Particular Errors as Harmless or Prejudicial
170Bk3698 Jury
170Bk3698(2) k. Selection and impaneling of jurors. Most Cited Cases
(Formerly 170Bk893)

Because effect of peremptory strike of juror in violation of equal protection is so pervasive, it is not subject to harmless error review. U.S.C.A. Const.Amend. 5.

[14] Federal Courts 170B 3698(2)

170B Federal Courts
170BXVII Courts of Appeals
170BXVII(K) Scope and Extent of Review
170BXVII(K)4 Harmless and Reversible Error
170Bk3686 Particular Errors as Harmless or Prejudicial
170Bk3698 Jury
170Bk3698(2) k. Selection and impaneling of jurors. Most Cited Cases
(Formerly 170Bk893)

Even if drug manufacturer's *Batson* violation was subject to harmless error review, peremptory strike of juror based on his sexual orientation, in violation of equal protection, was not harmless, with respect to contract claim on which jury held against manufacturer, since there was sufficient evidence for that claim to go jury. U.S.C.A. Const.Amend. 5.

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Appellant.

Shelbi D. Day, Tara L. Borelli, Jon W. Davidson, Lambda Legal Defense and Education Fund, Inc., Los Angeles, CA, for Amicus Curiae.

Appeal from the United States District Court for the Northern District of California, Claudia Wilken, Chief District Judge, Presiding. D.C. No. 4:07–cv–05702–CW.

Before: SCHROEDER, REINHARDT, and BERZON, Circuit Judges.

OPINION

REINHARDT, Circuit Judge:

The central question in this appeal arises out of a lawsuit brought by SmithKline Beecham (GSK) against Abbott Laboratories (Abbott) that contains antitrust, contract, and unfair trade practice (UTPA) claims. The dispute relates to a licensing agreement and the pricing of HIV medications, the latter being a subject of considerable controversy in the gay community. GSK's claims center on the contention that Abbott violated the implied covenant of good faith and fair dealing, the antitrust laws, and North Carolina's Unfair Trade Practices Act by first licensing to GSK the authority to market an Abbott HIV drug in conjunction with one of its own and then increasing the price of the Abbott drug fourfold, so as to drive business to Abbott's own, combination drug.

During jury selection, Abbott used its first peremptory strike against the only self-identified gay member of the venire. GSK challenged the strike under *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), arguing that it was impermissibly made on the basis of sexual orientation. The district judge denied the challenge.

This appeal's central question is whether equal protection prohibits discrimination based on sexual orientation in jury selection. We must first decide whether classifications based on sexual orientation are subject to a standard higher than rational basis review. We hold that such classifications are subject to heightened scrutiny. We also hold that equal protection prohibits peremptory strikes based on sexual orientation and remand for a new trial.

I.

During jury selection, the district judge began by asking questions of the potential jurors based on their questionnaires, and then each party's counsel had an opportunity to ask additional questions. When the judge turned her attention to Juror B, a male, she inquired first about his employment, as she had done with each of the previous members of the venire. Juror B stated that he worked as a computer technician for the Ninth Circuit Court of Appeals in San Francisco. During the course of the judge's colloquy with Juror B, the juror revealed that his “partner” studied economics and investments. When the district judge followed up with additional questions, the prospective juror referred to his partner three times by using the masculine pronoun, “he,” and the judge subsequently referred to Juror B's partner as “he” in a follow-up question regarding his employment status. Responding to additional questions from the judge, Juror B stated that he took an Abbott or a GSK medication and that he had friends with HIV. When the time arrived for Abbott's counsel, Weinberger, to question Juror B, the questioning was brief and limited. Counsel's first question concerned Juror B's knowledge of the medications that were the focal point of the litigation: “You indicated that you know some people who have been diagnosed with HIV.... Do you know anything about the

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medications that any of them are on?" Juror B responded, "Not really." Abbott's counsel then continued: "Do you know whether any of them are taking any of the medications that we are going to be talking about here [,] ... Norvir or Kaletra or Lexiva, any of those?" Juror B responded that he did not know whether his friends took those medications, but that he had heard of Kaletra. He added that he didn't know much about the drug and that he had no personal experiences with it. In sum, Abbott's counsel asked Juror B five questions, all regarding his knowledge of the drugs at issue in the litigation. Abbott's counsel did not ask Juror B when he had taken either an Abbott or GSK medication, how long ago, which medication it was, or the purpose of the medication. He also failed to ask any questions as to whether Juror B could decide the case fairly and impartially.

When the time came for peremptory challenges, Abbott exercised its first strike against Juror B. GSK's counsel, Saveri, immediately raised a *Batson* challenge, and the following discussion ensued:

Mr. Saveri: Okay. So, you know, the first challenge, your honor, is a peremptory challenge of someone who is—who I think is or appears to be, could be homosexual.

That's use of the peremptory challenge in a discriminatory way.

The problem here, of course, your honor, is the litigation involves AIDS medication. The incidents [sic] of AIDS in the homosexual community is well-known, particularly gay men.

So with that challenge, Abbott wants to exclude from—it looks like Abbott wants to exclude from the pool anybody who is gay. So I am concerned about that. I wanted to raise it.

The Court: Well, I don't know that, number one, whether *Batson* applies in civil, and number two, whether *Batson* ever applies to sexual orientation. Number three, how we would know—I mean, the evil of *Batson* is not that one person of a given group is excluded, but that everyone is. And there is no way for us to know who is gay and who isn't here, unless somebody happens to say something.

There would be no real way to analyze it. And number four, one turns to the other side and asks for the basis for their challenge other than the category that they are in, and if you have one, it might be the better part of valor to tell us what it is.

Mr. Weinberger: Well, he—

The Court: Or if you don't want to, you can stand on my first three reasons.

Mr. Weinberger: I will stand on the first three, at this point, your honor. I don't think any of the challenge applies. I have no idea whether he is gay or not.

Mr. Saveri: Your honor, in fact, he said on voir dire that he had a male partner. So—

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Mr. Weinberger: This is my first challenge. It's not like we are sitting here after three challenges and you can make a case that we are excluding anybody.

The district judge then stated that she would allow Abbott's strike and would reconsider her ruling if Abbott struck other gay men.

At the conclusion of the four-week trial, the jury returned with a mixed verdict. It held for Abbott on the antitrust and UTPA claims, and for GSK on the contract claim. It awarded $3,486,240 in damages to GSK.

Abbott appealed the jury verdict on the contract claim, and GSK cross-appealed. On cross-appeal, GSK contends that a new trial is warranted on all counts, including the contract claim, because Abbott unconstitutionally used a peremptory strike to exclude a juror on the basis of his sexual orientation. We hold that the exclusion of the juror because of his sexual orientation violated *Batson* and we remand for a new trial.

II.

[1] The *Batson* analysis involves a three-part inquiry. First, the party challenging the peremptory strike must establish a prima facie case of intentional discrimination. *Kesser v. Cambra,* 465 F.3d 351, 359 (9th Cir.2006). Second, the striking party must give a nondiscriminatory reason for the strike. *See id.* Finally, the court determines, on the basis of the record, whether the party raising the challenge has shown purposeful discrimination. *Id.* Because the district judge applied the wrong legal standard in evaluating the *Batson* claim, we review the *Batson* challenge de novo. *United States v. Collins,* 551 F.3d 914, 919 (9th Cir.2009).

[2][3][4] To establish a prima facie case under *Batson,* GSK must produce evidence that 1) the prospective juror is a member of a cognizable group; 2) counsel used a peremptory strike against the individual; and 3) "the totality of the circumstances raises an inference that the strike was motivated" by the characteristic in question. *Collins,* 551 F.3d at 919. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California,* 545 U.S. 162, 170, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). The burden on the challenging party at the prima facie stage is "not an onerous one." *Boyd v. Newland,* 467 F.3d 1139, 1151 (9th Cir.2004). It is a burden of production, not a burden of persuasion. *Crittenden v. Ayers,* 624 F.3d 943, 954 (9th Cir.2010).

[5] GSK has established a prima facie case of intentional discrimination. Juror B was the only juror to have identified himself as gay on the record, and the subject matter of the litigation presented an issue of consequence to the gay community. When jury pools contain little racial or ethnic diversity, we have held that a strike of the lone member of the minority group is a "relevant consideration" in determining whether a prima facie case has been established. *Id.* at 955. We have further cautioned against failing to "look closely" at instances in which the sole minority is struck from the venire; this is because failure to do so would innoculate peremptory strikes against *Batson* challenges in jury pools with scant diversity. *Collins,* 551 F.3d at 921; *see also United States v. Chinchilla,* 874 F.2d 695, 698 n. 5 (9th Cir.1989) ("[A]lthough the striking of one or two members of the same racial group may not always constitute a prima facie case, it is preferable for the court to err on the side of the defendant's rights to a fair and impartial jury.").

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There is also reason to infer that Abbott struck Juror B on the basis of his sexual orientation because of its fear that he would be influenced by concern in the gay community over Abbott's decision to increase the price of its HIV drug. When we analyzed whether the appellant had made out a prima facie case in *Johnson v. Campbell,* 92 F.3d 951 (9th Cir.1996), for instance, we found it significant that the struck juror's sexual orientation had no relevance to the subject matter of the litigation. *Id.* at 953 & n. 1. The converse is true as well. In *J.E.B. v. Alabama,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), the Supreme Court stated that when the gender of the juror coincided with the subject matter of the case, the potential for an impermissible strike based on sex increases substantially. *Id.* at 140, 114 S.Ct. 1419. Here, the increase in the price of the HIV drug had led to considerable discussion in the gay community. Upon raising the *Batson* challenge, GSK's counsel argued that the subject matter of the litigation raised suspicions regarding the purpose of the strike: "The problem here ... is the litigation involves AIDS medications. The incidents [sic] of AIDS in the homosexual community is well-known, particularly gay men." The potential for relying on impermissible stereotypes in the process of selecting jurors was "particularly acute" in this case. *Id.; see also Powers v. Ohio,* 499 U.S. 400, 416, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).[FN1] Viewing the totality of the circumstances, we have no difficulty in concluding that GSK has raised an inference of discrimination and established a prima facie case.

FN1. In evaluating an ineffective assistance of counsel claim for failure to raise a *Wheeler* claim, the California analog of a *Batson* claim, we stated that asking Hispanic-surnamed venire members whether they would be biased in evaluating a case involving a Hispanic defendant did not pose any constitutional problem because "asking questions about potential bias is the purpose of voir dire." *Carrera v. Ayers,* 699 F.3d 1104, 1111 (9th Cir.2012) (en banc). *Carrera* suggests that if Abbott's counsel was concerned that gay members of the jury pool might be biased because the price increase had gained some notoriety in the gay community, he could have questioned Juror B about this potential bias. Instead of pursuing this line of questioning about Juror B's ability to assess the case fairly, Abbott's counsel struck him without any indication that he was biased, thereby raising the inference that he had relied on an impermissible assumption about Juror B's ability to be impartial.

[6] Also, Abbott declined to provide any justification for its strike when offered the opportunity to do so by the district court. After the judge stated that she might reject the *Batson* challenge on legal grounds that were in fact erroneous,[FN2] she told Abbott's counsel that he could adopt those grounds, although she advised him that "it might be the better part of valor" to reveal the basis for his strike. Abbott's counsel replied that he would rely on the grounds given by the judge and further explained, "I don't think any of the challenge applies. I have no idea whether he is gay or not." He later added that he could not have engaged in intentional discrimination because this was only his first strike.

FN2. The district judge offered her view that *Batson* did not apply in civil cases or when only a single member of a protected group is struck. The first statement—that *Batson* does not apply to civil cases—is clearly incorrect. The Supreme Court held over twenty years ago that *Batson* applies in the civil context. *See Edmonson v. Leesville Concrete Co.,* 500 U.S. 614, 631, 111 S.Ct. 2077, 114 L.Ed.2d 660 (1991). Her statement that *Batson* does not apply when only a single member of the given group is excluded is also a legal error because "[t]he [C]onstitution forbids striking even a single prospective juror for a discriminatory purpose." *United States v. Vasquez–Lopez,* 22 F.3d 900, 902 (9th Cir.1994); *see also Snyder v. Louisiana,* 552 U.S. 472, 474, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) (citing and quoting *Vasquez–Lopez*). Her final

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statement expressing uncertainty about whether *Batson* applies to sexual orientation is the subject of this appeal.

Counsel's statement that he did not know that Juror B was gay is neither consistent with the record nor an explanation for his strike. First, Juror B and the judge referred to Juror B's male partner several times during the course of voir dire and repeatedly used masculine pronouns when referring to him. Given the information regarding Juror B's sexual orientation that was adduced during the course of voir dire, counsel's statement was far from credible. *See Snyder,* 552 U.S. at 482–83, 128 S.Ct. 1203 (comparing counsel's proffered reasons with the plausible facts on the record). Second, the false statement was non-responsive; it was simply a denial of a discriminatory intent and it in no way provided a reason, colorable or otherwise, for striking Juror B. Counsel's denial of a discriminatory motive had the opposite effect of that intended. Because the denial was demonstrably untrue, it undermines counsel's argument that his challenge was not based on intentional discrimination. Taking all these factors together, including the absence of any proffered reason for the challenge, a strong inference arises that counsel engaged in intentional discrimination when he exercised the strike.[FN3] *Paulino v. Harrison* (*Paulino II*), 542 F.3d 692, 702–03 (9th Cir.2008); *see also Johnson,* 545 U.S. at 171 n. 6, 125 S.Ct. 2410 ("In the unlikely hypothetical in which [counsel] declines to respond to a trial judge's inquiry regarding his justification for making a strike, the evidence before the judge would consist not only of the original facts from which the prima facie case was established, but also [counsel's] refusal to justify his strike in light of the court's request.").

FN3. Abbott's adoption of the court's erroneous legal reasons why *Batson* might be inapplicable to the type of trial before her does not, of course, provide or even suggest any explanation as to why counsel struck Juror B.

Abbott's counsel asked Juror B only five questions and failed to question him meaningfully about his impartiality or potential biases. *See Collins,* 551 F.3d at 921. Combined with Abbott's counsel's statement, in the face of clear evidence in the record to the contrary, that he did not know that Juror B was gay, the voir dire reveals that Abbott's strike was based not on a concern for Juror B's actual bias, but on a discriminatory assumption that Juror B could not impartially evaluate the case because of his sexual orientation. *See Kesser,* 465 F.3d at 360–62.

[7] Finally, Abbott attempts to offer several neutral reasons for the strike in its brief on appeal to our Court, but these reasons are also belied by the record. *See id.* at 360 ("[I]f a review of the record undermines ... many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination."). Ordinarily, it does not matter what reasons the striking party *might* have offered because "[w]hat matters is the *real* reason [the juror was] stricken," *Paulino v. Castro* (*Paulino I*), 371 F.3d 1083, 1090 (9th Cir.2004) (emphasis in original): that is, the reason offered at the time of the strike, if true. Here, Abbott offered no reasons for the strike at the voir dire, but we know from the reasons offered on appeal after full deliberation by highly respected and able counsel that even the best explanations that counsel could have offered are pretextual.[FN4] *See Kesser,* 465 F.3d at 360.

FN4. One reason advanced by Abbott on appeal is that Juror B was the only juror who had lost friends to AIDS. We reject this reason because it is not supported by the record. Nowhere does the record show that Juror B had friends who died of complications due to HIV or AIDS.

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A second reason advanced by Abbott on appeal is that Juror B was acquainted with many people in the legal field. Other jurors, however, who were lawyers, and other jurors with close relatives who were lawyers were not stricken but served on the jury.

Third, Abbott speculates on appeal that because Juror B was a computer technician at the Court, other jurors "might have given extra weight" to his opinions. We have more respect for jurors than to credit the idea that Juror B would have more influence on his fellow jurors than would the other jurors, including the two lawyers who remained on the panel. This is the kind of "highly speculative" rationale that the Supreme Court rejected in *Snyder,* 552 U.S. at 482, 128 S.Ct. 1203.

Finally, Abbott points out that Juror B was the only potential juror who testified that he had heard of any of the three drugs at issue. When asked what he knew about the drug, however, Juror B replied, "not much," and stated that he had no personal experience with it.

Here, three of the four reasons offered by Abbott are pretextual and the record casts strong doubt on the fourth. In such a circumstance, we follow the rule of our en banc decision in *Kesser,* and conclude that none of those reasons can withstand judicial scrutiny. *See id.,* 465 F.3d at 360 ("A court need not find all nonracial reasons pretextual in order to find racial discrimination."); *see also id.* (" 'Thus the court is left with only two acceptable bases for the challenges.... Although these criteria would normally be adequate 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency.' " (quoting *Chinchilla,* 874 F.2d at 699)).

The record reflects that had the district judge applied the law correctly, she would necessarily have concluded that Abbott's strike of Juror B was impermissibly made on the basis of his sexual orientation. *See United States v. Alanis,* 335 F.3d 965, 969 (9th Cir.2003). Because GSK has established a prima facie case, Abbott offered no nondiscriminatory reason for its strike of Juror B at trial, and Abbott does not now offer in its brief on appeal any colorable neutral explanation for the strike, only one result is possible here. The prima facie evidence that the strike was based on a discriminatory motive is unrefuted, and on appeal it is clear that Abbott has no further credible reasons to advance nor evidence to offer. Accordingly, we need not remand the question whether a *Batson* violation occurred. *See id.* at 969–70. The record persuasively demonstrates that Juror B was struck because of his sexual orientation. This Court may therefore perform the third step of the *Batson* analysis and conclude "even based on a 'cold record,' that [Abbott's] stated reasons for striking [Juror B] was a pretext for purposeful discrimination." *Id.* at 969 n. 5.

III.

We must now decide the fundamental legal question before us: whether *Batson* prohibits strikes based on sexual orientation.[FN5] In *Batson,* the Supreme Court held that the privilege of peremptory strikes in selecting a jury is subject to the guarantees of the Equal Protection Clause. 476 U.S. at 89, 106 S.Ct. 1712. *Batson,* of course, considered peremptory strikes based on race. At stake, the Court explained, were not only the rights of the criminal defendant, but also of the individual who is excluded from participating in jury service on the basis of his race. *Id.* at 87, 106 S.Ct. 1712. Allowing peremptory strikes based on race would "touch the entire community" because it would "undermine public confidence in the fairness of our system of justice." *Id.* Thus, the Court held, the exclusion of prospective jurors because of their race would require reversal upon a finding of intentional discrimination. *Id.* at 100.

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Eight years later, in *J.E.B.,* the Court extended *Batson* to peremptory strikes made on the basis of gender. While expanding *Batson*'s ambit, *J.E.B.* explained the scope of its expansion. The Court stated that "[p]arties may ... exercise their peremptory challenges to remove from the venire any group or class of individuals normally subject to 'rational basis' review." 511 U.S. at 143, 114 S.Ct. 1419; *accord United States v. Santiago–Martinez,* 58 F.3d 422, 423 (9th Cir.1995). Thus, if sexual orientation is subject to rational basis review, Abbott's strike does not require reversal.

FN5. Citing *Johnson v. Campbell,* Abbott urges us to avoid deciding whether *Batson* applies to sexual orientation by holding that a prima facie showing cannot be demonstrated because " 'an obvious neutral reason for the challenge' appears in the record." As we have explained, there are no "obvious neutral" reasons for Abbott's strike in the record or even in Abbott's brief on appeal. In *Campbell,* we rejected a *Batson* challenge based on sexual-orientation where (1) counsel "made no attempt to show discriminatory motivation on the part of the opposing attorney," (2) there was no showing that opposing counsel was aware of the juror's sexual orientation, (3) there was an obvious neutral reason for the strike, and (4) the juror's sexual orientation had no bearing on the subject matter of the case. *Campbell,* 92 F.3d at 953. All of the factors that were absent in *Campbell* are present here. Because the record shows that there was purposeful discrimination here, the path we took in *Campbell* is not available to us.

We have in the past applied rational basis review to classifications based on sexual orientation. In *High Tech Gays v. Defense Industrial Security Clearance Office,* 895 F.2d 563, 574 (9th Cir.1990), and *Philips v. Perry,* 106 F.3d 1420, 1425 (9th Cir.1997), we applied rational basis review when upholding Department of Defense and military policies that classified individuals on the basis of sexual orientation. More recently, in *Witt v. Department of the Air Force,* 527 F.3d 806 (9th Cir.2008), an Air Force reservist brought due process and equal protection challenges to her suspension from duty on account of her sexual relationship with a woman. *Id.* at 809. We considered the meaning of the Supreme Court's decision in *Lawrence v. Texas,* 539 U.S. 558, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003), and concluded that because *Lawrence* relied only on substantive due process and not on equal protection, it affected our prior *substantive due process* cases, but not our *equal protection* rules. *Witt,* 527 F.3d at 821. As a result, although we applied heightened scrutiny to the substantive due process challenge in *Witt,* we did not change our level of scrutiny for the equal protection challenge. *Id.* We stated that *Lawrence* "declined to address equal protection," and relying on *Philips,* our pre- *Lawrence* decision, we continued to apply rational basis review to equal protection challenges. *Id.* at 821. Thus, we are bound here to apply rational basis review to the equal protection claim in the absence of a post- *Witt* change in the law by the Supreme Court or an en banc court. *See Miller v. Gammie,* 335 F.3d 889, 892–93 (9th Cir.2003) (en banc). Here, we turn to the Supreme Court's most recent case on the relationship between equal protection and classifications based on sexual orientation: *United States v. Windsor,* —— U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). That landmark case was decided just last term and is dispositive of the question of the appropriate level of scrutiny in this case.

Windsor, of course, did not expressly announce the level of scrutiny it applied to the equal protection claim at issue in that case, but an express declaration is not necessary. *Lawrence* presented us with a nearly identical quandary when we confronted the due process claim in *Witt.* Just as *Lawrence* omitted any explicit declaration of its level of scrutiny with respect to due process claims regarding sexual orientation, so does *Windsor* fail to declare what level of scrutiny it applies with respect to such equal protection claims. Nevertheless, we have been told how to resolve the question. *Witt,* 527 F.3d at 816. When the Supreme Court has refrained from identifying its method of

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analysis, we have analyzed the Supreme Court precedent "by considering what the Court actually did, rather than by dissecting isolated pieces of text." *Id.*

[8] In *Witt,* we looked to three factors in determining that *Lawrence* applied a heightened level of scrutiny rather than a rational basis analysis. We stated that *Lawrence* did not consider the possible post-hoc rationalizations for the law, required under rational basis review. *Witt,* 527 F.3d at 817. We further explained that *Lawrence* required a "legitimate state interest" to "justify" the harm that the Texas law inflicted as is traditionally the case in heightened scrutiny. *Witt,* 527 F.3d at 817 (quoting *Lawrence,* 539 U.S. at 578, 123 S.Ct. 2472) (internal quotation marks omitted). Finally, we looked to the cases on which *Lawrence* relied and found that those cases applied heightened scrutiny. *Witt,* 527 F.3d at 817. Applying the *Witt* test here, we conclude that *Windsor* compels the same result with respect to equal protection that *Lawrence* compelled with respect to substantive due process: *Windsor* review is not rational basis review. In its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review. In other words, *Windsor* requires that heightened scrutiny be applied to equal protection claims involving sexual orientation.

[9] Examining *Witt*'s first factor, *Windsor,* like *Lawrence,* did not consider the possible rational bases for the law in question as is required for rational basis review. The Supreme Court has long held that a law must be upheld under rational basis review "if any state of facts reasonably may be conceived to justify" the classifications imposed by the law. *McGowan v. Maryland,* 366 U.S. 420, 426, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). This lowest level of review does not look to the actual purposes of the law. Instead, it considers whether there is some conceivable rational purpose that Congress could have had in mind when it enacted the law.

This rule has been repeated throughout the history of modern constitutional law. In *Williamson v. Lee Optical,* 348 U.S. 483, 75 S.Ct. 461, 99 L.Ed. 563 (1955), the Court repeatedly looked to what the legislature "might have concluded" in enacting the law in question and evaluated these hypothetical reasons. *Id.* at 487, 75 S.Ct. 461. In *United States Railroad Retirement Board v. Fritz,* 449 U.S. 166, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980), the Court emphasized that deference to post-hoc explanations was central to rational basis review:

> Where, as here, there are plausible reasons for Congress' action, our inquiry is at an end. It is, of course, "constitutionally irrelevant whether this reasoning in fact underlay the legislative decision," ... because this Court has never insisted that a legislative body articulate its reasons for enacting a statute. This is particularly true where the legislature must necessarily engage in a process of line-drawing. The "task of classifying persons for ... benefits ... inevitably requires that some persons who have an almost equally strong claim to favored treatment be placed on different sides of the line," ... and the fact the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.

Id. at 179, 101 S.Ct. 453 (internal citations omitted). More recently, the Supreme Court has again stated that under rational basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Fed. Commc'n Comm'n v. Beach Commc'ns, Inc.,* 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

In *Windsor,* instead of conceiving of hypothetical justifications for the law, the Court evaluated the "essence" of

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the law. *Windsor,* 133 S.Ct. at 2693. *Windsor* looked to DOMA's "design, purpose, and effect." *Id.* at 2689. This inquiry included a review of the legislative history of DOMA. *Windsor* quoted extensively from the House Report and restated the House's conclusion that marriage should be protected from the immorality of homosexuality. *Id.* at 2693. Unlike in rational basis review, hypothetical reasons for DOMA's enactment were not a basis of the Court's inquiry. In its brief to the Supreme Court, the Bipartisan Legal Advisory Group offered five distinct rational bases for the law. *See* Brief on the Merits for Respondent the Bipartisan Legal Advisory Group of the U.S. House of Representatives at 28–48, *Windsor,* 133 S.Ct. 2675 (2013) (No. 12–307), 2013 WL 267026. *Windsor,* however, looked behind these justifications to consider Congress's "avowed purpose:" "The principal purpose," it declared, "is to impose inequality, not for other reasons like governmental efficiency." *Windsor,* 133 S.Ct. at 2693, 2694. The result of this more fundamental inquiry was the Supreme Court's conclusion that DOMA's "*demonstrated* purpose" "raise[d] a most serious question under the Constitution's Fifth Amendment." *Id.* at 2693–94 (emphasis added). *Windsor* thus requires not that we conceive of hypothetical purposes, but that we scrutinize Congress's actual purposes. Windsor's "careful consideration" of DOMA's actual purpose and its failure to consider other unsupported bases is antithetical to the very concept of rational basis review. *Id.* at 2693.

Witt's next factor also requires that we conclude that *Windsor* applied heightened scrutiny. Just as *Lawrence* required that a legitimate state interest justify the harm imposed by the Texas law, the critical part of *Windsor* begins by demanding that Congress's purpose "*justify* disparate treatment of the group." *Windsor,* 133 S.Ct. at 2693 (emphasis added). *Windsor* requires a "legitimate purpose" to "overcome[ ]" the "disability" on a "class" of individuals. *Id.* at 2696. As we explained in *Witt,* "[w]ere the Court applying rational basis review, it would not identify a legitimate state interest to 'justify'...." the disparate treatment of the group. *Witt,* 527 F.3d at 817.

[10] Rational basis is ordinarily unconcerned with the inequality that results from the challenged state action. *See McGowan,* 366 U.S. at 425–26, 81 S.Ct. 1101 (applying the presumption that state legislatures "have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality"). Due to this distinctive feature of rational basis review, words like *harm* or *injury* rarely appear in the Court's decisions applying rational basis review. *Windsor,* however, uses these words repeatedly. The majority opinion considers DOMA's "effect" on eight separate occasions. *Windsor* concerns the "resulting injury and indignity" and the "disadvantage" inflicted on gays and lesbians. 133 S.Ct. at 2692, 2693.

Moreover, *Windsor* refuses to tolerate the imposition of a second-class status on gays and lesbians. Section 3 of DOMA violates the equal protection component of the due process clause because "it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition." *Id.* at 2694. *Windsor* was thus concerned with the public message sent by DOMA about the status occupied by gays and lesbians in our society. This government-sponsored message was in itself a harm of great constitutional significance: "Under DOMA, same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways." *Id. Windsor*'s concern with DOMA's message follows our constitutional tradition in forbidding state action from "denoting the inferiority" of a class of people. *Brown v. Bd. of Educ.,* 347 U.S. 483, 494, 74 S.Ct. 686, 98 L.Ed. 873 (1954) (internal quotations omitted) (citation omitted). It is the identification of such a class by the law for a separate and lesser public status that "make[s] them unequal." *Windsor,* 133 S.Ct. at 2694. DOMA was "practically a brand upon them, affixed by the law, an assertion of their inferiority." *Strauder v. West Virginia,* 100 U.S. 303, 308, 25 L.Ed. 664 (1879). *Windsor* requires that classifications based on sexual orientation that impose inequality on gays and lesbians and send a message of second-class status be justified by some legitimate purpose.

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Notably absent from *Windsor*'s review of DOMA are the "strong presumption" in favor of the constitutionality of laws and the "extremely deferential" posture toward government action that are the marks of rational basis review. Erwin Chemerinsky, *Constitutional Law* 695 (4th ed.2013). After all, under rational basis review, "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." *Lee Optical,* 348 U.S. at 487, 75 S.Ct. 461. *Windsor*'s failure to afford this presumption of validity, however, is unmistakable. In its parting sentences, *Windsor* explicitly announces its balancing of the government's interest against the harm or injury to gays and lesbians: "The federal statute is invalid, for no legitimate purpose *overcomes* the purpose and effect to disparage and injure those whom the State, by its marriage laws, sought to protect in personhood and dignity." 133 S.Ct. at 2696 (emphasis added). *Windsor*'s balancing is not the work of rational basis review.

In analyzing its final and least important factor, *Witt* stated that *Lawrence* must have applied heightened scrutiny because it cited and relied on heightened scrutiny cases. *Witt,* 527 F.3d at 817. Part IV, the central portion of *Windsor*'s reasoning, cites few cases, instead scrutinizing Congress's actual purposes and examining in detail the inequality imposed by the law. Among the cases that the Court cites are *Romer v. Evans,* 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), *Department of Agriculture v. Moreno,* 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), and *Lawrence.* In *Witt,* we thought it noteworthy that *Lawrence* did not cite *Romer,* a rational basis case. *Witt,* 527 F.3d at 817. The citation to *Moreno,* however, is significant because the Court recognized in *Lawrence* that *Moreno* applied "a more searching form of rational basis review," despite purporting to apply simple rational basis review. *Lawrence,* 539 U.S. at 580, 123 S.Ct. 2472. Our Court has similarly acknowledged that *Moreno* applied " 'heightened' scrutiny." *See Mountain Water Co. v. Montana Dep't of Pub. Serv. Regulation,* 919 F.2d 593, 599 (9th Cir.1990). Further, the Court cited *Lawrence,* which we have since held applied heightened scrutiny. *Witt,* 527 F.3d at 816. As we stated in *Witt, Lawrence* did not resolve whether to apply heightened scrutiny in equal protection cases, but, nevertheless, *Lawrence* is a heightened scrutiny case. Because *Windsor* relies on one case applying rational basis and two cases applying heightened scrutiny, *Witt*'s final factor does not decisively support one side or the other but leans in favor of applying heightened scrutiny.

[11] At a minimum, applying the *Witt* factors, *Windsor* scrutiny "requires something more than traditional rational basis review." *Witt,* 527 F.3d at 813. *Windsor* requires that when state action discriminates on the basis of sexual orientation, we must examine its actual purposes and carefully consider the resulting inequality to ensure that our most fundamental institutions neither send nor reinforce messages of stigma or second-class status. In short, *Windsor* requires heightened scrutiny. Our earlier cases applying rational basis review to classifications based on sexual orientation cannot be reconciled with *Windsor. See Miller,* 335 F.3d at 892–93. Because we are bound by controlling, higher authority, we now hold that *Windsor*'s heightened scrutiny applies to classifications based on sexual orientation. *See Miller,* 335 F.3d at 892–93; *see also Witt,* 527 F.3d at 816–17, 821.

In sum, *Windsor* requires that we reexamine our prior precedents, and *Witt* tells us how to interpret *Windsor.* Under that analysis, we are required by *Windsor* to apply heightened scrutiny to classifications based on sexual orientation for purposes of equal protection. *Lawrence* previously reached that same conclusion for purposes of due process. *Witt,* 527 F.3d at 816, 821. Thus, there can no longer be any question that gays and lesbians are no longer a "group or class of individuals normally subject to 'rational basis' review." *J.E.B.,* 511 U.S. at 143, 114 S.Ct. 1419.

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IV.

A.

[12] Having established that heightened scrutiny applies to classifications based on sexual orientation, we must now determine whether *Batson* is applicable to that classification or group of individuals. In *J.E.B.,* the Court did not state definitively whether heightened scrutiny is sufficient to warrant *Batson*'s protection or merely necessary. *See J.E.B.,* 511 U.S. at 136 & n. 6, 143, 114 S.Ct. 1419. The Court explained that striking potential jurors on the basis of their gender harms "the litigants, the community, and the individual jurors" because it reinforces stereotypes and creates an appearance that the judicial system condones the exclusion of an entire class of individuals. *Id.* at 140, 114 S.Ct. 1419. It added that, when viewed against the long history of women's exclusion from jury service, gender-based strikes send a message "that certain individuals ... are presumed unqualified by state actors to decide important questions upon which reasonable persons could disagree." *Id.* at 142, 114 S.Ct. 1419. With *J.E.B.*'s concerns in mind and given that classifications on the basis of sexual orientation are subject to heightened scrutiny, we must answer whether equal protection forbids striking a juror on the basis of his sexual orientation. We conclude that it does.

J.E.B. took *Batson,* a case about the use of race in jury selection, and applied its principles to discrimination against women. As the Supreme Court acknowledged, women's experiences differed significantly from the experiences of African Americans. *J.E.B.,* 511 U.S. at 135–36, 114 S.Ct. 1419. The Court did not require that, to warrant the protections of *Batson,* women's experiences had to be identical to those of African Americans. *Id.* Instead, what remained constant in the Court's analysis was its willingness to reason from the actual experiences of the group. For women, a history of exclusion from jury service and the prevalence of "invidious group stereotypes" led the Court to conclude that *Batson* should extend to strikes on the basis of gender. *Id.* at 131–34, 140, 114 S.Ct. 1419. Here also we must reason from the unique circumstances of gays and lesbians in our society.

Gays and lesbians have been systematically excluded from the most important institutions of self-governance. Even our prior cases that rejected applying heightened scrutiny to classifications on the basis of sexual orientation have acknowledged that gay and lesbian individuals have experienced significant discrimination. *See High Tech Gays,* 895 F.2d at 573; *Witt,* 527 F.3d at 824–25 (Canby, J., dissenting in part). In the first half of the twentieth century, public attention was preoccupied with homosexual "infiltration" of the federal government. Gays and lesbians were dismissed from civilian employment in the federal government at a rate of sixty per month. Michael J. Klarman, *From the Closet to the Altar* 5 (2013). Discrimination in employment was not limited to the federal government; local and state governments also excluded homosexuals, and professional licensing boards often revoked licenses on account of homosexuality. *Id.* In 1985, the Supreme Court denied certiorari in a case in which a woman had been fired from her job as a guidance counselor in a public school because of her sexuality. *Rowland v. Mad River Local Sch. Dist.,* 470 U.S. 1009, 105 S.Ct. 1373, 84 L.Ed.2d 392 (1985) (Brennan, J., dissenting from denial of certiorari). Indeed, gays and lesbians were thought to be so contrary to our conception of citizenship that they were made inadmissible under a provision of our immigration laws that required the Immigration and Naturalization Service (INS) to exclude individuals "afflicted with psychopathic personality." *See Boutilier v. INS,* 387 U.S. 118, 120, 87 S.Ct. 1563, 18 L.Ed.2d 661 (1967). It was not until 1990 that the INS ceased to interpret that category as including gays and lesbians. William N. Eskridge, *Gaylaw: Challenging the Apartheid of the Closet* 133–34 (1999). It is only recently that gay men and women gained the right to be open about their sexuality in the course of their military service. As one scholar put it, throughout the twentieth century, gays and lesbians were the "anticitizen." Margot Canaday, *The Straight State* 9 (2009).

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Strikes exercised on the basis of sexual orientation continue this deplorable tradition of treating gays and lesbians as undeserving of participation in our nation's most cherished rites and rituals. They tell the individual who has been struck, the litigants, other members of the venire, and the public that our judicial system treats gays and lesbians differently. They deprive individuals of the opportunity to participate in perfecting democracy and guarding our ideals of justice on account of a characteristic that has nothing to do with their fitness to serve.

Windsor's reasoning reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation. "Responsibilities, as well as rights, enhance the dignity and integrity of the person." *Windsor,* 133 S.Ct. at 2694. Jury service is one of the most important responsibilities of an American citizen. "[F]or most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process." *Powers,* 499 U.S. at 407, 111 S.Ct. 1364. It gives gay and lesbian individuals a means of articulating their values and a voice in resolving controversies that affect their lives as well as the lives of all others. To allow peremptory strikes because of assumptions based on sexual orientation is to revoke this civic responsibility, demeaning the dignity of the individual and threatening the impartiality of the judicial system.

Gays and lesbians may not have been excluded from juries in the same open manner as women and African Americans, but our translation of the principles that lie behind *Batson* and *J.E.B.* requires that we apply the same principles to the unique experiences of gays and lesbians. Gays and lesbians did not identify themselves as such because, for most of the history of this country, being openly gay resulted in significant discrimination. *See* Kenji Yoshino, *Covering,* 111 Yale L.J. 769, 814–36 (2002). The machineries of discrimination against gay individuals were such that explicit exclusion of gay individuals was unnecessary—homosexuality was "unspeakable." *Id.* at 814. In *J.E.B.,* the Court noted that strikes based on gender were a recent phenomenon because women's participation on juries was relatively recent. *J.E.B.,* 511 U.S. at 131, 114 S.Ct. 1419. Being "out" about one's sexuality is also a relatively recent phenomenon. To illustrate how recently the change occurred, in 1985, only one quarter of Americans reported knowing someone who was gay. By 2000, this number increased to 75 percent of Americans. Klarman, *From the Closet,* at 197. As we have indicated, gays and lesbians who were "out" were punished for their openness, sometimes through imprisonment or exclusion from civil society.

Batson must also protect potential jurors, litigants, and the community from the serious dignitary harm of strikes based on sexual orientation because, as in the case of gender, to allow such strikes risks perpetuating the very stereotypes that the law forbids. "It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy." *Miller–El v. Dretke* (*Miller–El II*), 545 U.S. 231, 237, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005) (quoting *Strauder,* 100 U.S. at 309 (internal quotation marks omitted)). These stereotypes and their pernicious effects are not always known to us. "Prejudice ... rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves." *Bd. of Trustees of Univ. of Alabama v. Garrett,* 531 U.S. 356, 374, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001) (Kennedy, J., concurring). Stereotypes of gays and lesbians depict them as wealthy and promiscuous, and as "disease vectors" or child molesters. *Perry v. Schwarzenegger,* 704 F.Supp.2d 921, 982–83 (N.D.Cal.2010). Empirical

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research has begun to show that discriminatory attitudes toward gays and lesbians persist and play a significant role in courtroom dynamics. *See* Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard,* 39:2 J. of Homosexuality 93 (2000).

As illustrated by this case, permitting a strike based on sexual orientation would send the false message that gays and lesbians could not be trusted to reason fairly on issues of great import to the community or the nation. Strikes based on preconceived notions of the identities, preferences, and biases of gays and lesbians reinforce and perpetuate these stereotypes. [FN6] The Constitution cannot countenance "state-sponsored group stereotypes rooted in, and reflective of, historical prejudice." *J.E.B.,* 511 U.S. at 128, 114 S.Ct. 1419.

FN6. True, attitudes toward gays and lesbians are rapidly changing, just as attitudes toward women's role in civic life had changed by the time the Supreme Court decided *J.E.B.* in 1994. The central premise of *J.E.B.,* however, was that the courtroom should not be a site for "ratify [ing] and reinforc[ing] prejudicial views," even if such prejudicial views are on the decline. *J.E.B.,* 511 U.S. at 140, 114 S.Ct. 1419.

The history of exclusion of gays and lesbians from democratic institutions and the pervasiveness of stereotypes about the group leads us to conclude that *Batson* applies to peremptory strikes based on sexual orientation.

B.

Abbott urges us to proceed with caution in light of the significant sensitivities and privacy interests at stake in applying *Batson* to strikes based on sexual orientation. We agree that, as the California Court of Appeal put it when it extended *Wheeler* protection, the state equivalent of *Batson,* to gays and lesbians, "No one should be 'outed' in order to take part in the civic enterprise which is jury duty." *People v. Garcia,* 77 Cal.App.4th 1269, 92 Cal.Rptr.2d 339, 347 (2000). For gays and lesbians, keeping one's sexual orientation private has long been a strategy for avoiding the ramifications—job loss, being disowned by friends and family, or even potential physical danger—that accompanied open acknowledgment of one's sexual orientation for most of the twentieth century and sometimes even today. For some individuals, being forced to announce their sexuality risks intruding into the intimate process of self-discovery that is "coming out," a process that can be at once affirming and emotionally fraught. Equally important, coming out for many gays and lesbians is a life-defining moment of celebrating one's dignity and identity. Deciding when, and how, and to whom one comes out is a vital part of this process, and it should not be co-opted in the name of affording a group that has long been discriminated against the constitutional rights to which it is entitled.

These concerns merit careful consideration, but they do not warrant the conclusion that the Constitution necessitates permitting peremptory strikes based on sexual orientation. Concerns that applying *Batson* to sexual orientation will jeopardize the privacy of gay and lesbian prospective jurors can be allayed by prudent courtroom procedure. Courts can and already do employ procedures to protect the privacy of prospective jurors when they are asked sensitive questions on any number of topics. Further, applying *Batson* to strikes based on sexual orientation creates no requirement that prospective jurors reveal their sexual orientation. A *Batson* challenge would be cognizable only once a prospective juror's sexual orientation was established, voluntarily and on the record. California's successful application of *Wheeler* protections to sexual orientation for the past thirteen years illustrates that problems with administration can be overcome, even in a large judicial system that comes in contact with a diverse population of

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court users. *See Garcia,* 92 Cal.Rptr.2d at 348.

V.

Abbott contends that any exclusion of a juror in violation of *Batson* would have been harmless because none of GSK's claims should have been submitted to the jury. It asserts that there was not sufficient evidence to support any of those claims.

We have held that "[t]here is no harmless error analysis with respect to *Batson* claims," *Turner v. Marshall,* 121 F.3d 1248, 1254 n. 3 (9th Cir.1997); *see also Gray v. Mississippi,* 481 U.S. 648, 668, 107 S.Ct. 2045, 95 L.Ed.2d 622 (1987) (holding that the "right to an impartial adjudicator, be it judge or jury" is among those constitutional rights so basic "that their infraction can never be treated as harmless error"). There are two reasons for this.

First, it is impossible to determine whether a jury verdict would have been different had the jury been constitutionally selected. *See Vasquez v. Hillery,* 474 U.S. 254, 263, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) ("[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained."). Second, even if it were possible to find that a jury verdict had been unaffected by the error, this would not render the error harmless, as the harm from excluding a juror in violation of *Batson* is far greater than simply the effect upon the verdict.

[13] In *Powers v. Ohio,* 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991), the Supreme Court held that a defendant may object to the race-based exclusion of jurors even if the defendant and the excluded jurors are not of the same race. *Id.* at 415, 111 S.Ct. 1364. In so holding, the Court explained that a *Batson* violation injures the unconstitutionally stricken juror as well as the parties: "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Powers,* 499 U.S. at 413–14, 111 S.Ct. 1364. Moreover, a *Batson* violation undermines the integrity of the entire trial:

> [The] wrongful exclusion of a juror by a race-based peremptory challenge is a constitutional violation committed in open court at the outset of the proceedings. The overt wrong, often apparent to the entire jury panel, casts doubt over the obligation of the parties, the jury, and indeed the court to adhere to the law throughout the trial of the cause. The *voir dire* phase of the trial represents the jurors' first introduction to the substantive factual and legal issues in a case. The influence of the *voir dire* process may persist through the whole course of the trial proceedings.

Powers, 499 U.S. at 412, 111 S.Ct. 1364 (internal quotation omitted). In *Powers,* the Court further stated that "discrimination in the selection of jurors casts doubt on the integrity of the judicial process" and "may pervade all the proceedings that follow." *Id.* at 411, 413, 111 S.Ct. 1364; *see also J.E.B.,* 511 U.S. at 140, 114 S.Ct. 1419 ("Discrimination in jury selection ... causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process.... The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders."). Because the effect of excluding a juror in violation of *Batson* is so pervasive, it cannot be deemed harmless, and therefore we do not subject such violations to harmless error review.

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[14] Abbott urges an exception to this rule, citing an unpublished disposition, *United States v. Gonzalez–Largo,* 436 Fed.Appx. 819, 821 (9th Cir.2011), that relies on *Nevius v. Sumner,* 852 F.2d 463, 468 (9th Cir.1988). In *Nevius,* which was decided before *Powers* and *J.E.B.,* we stated that a *Batson* violation is harmless where the challenged juror would have been an alternate who would not have been called to serve as a juror in any event. *Nevius,* 852 F.2d at 468. Here, Abbott argues that the *Batson* error is harmless because none of the claims should have been allowed to go to the jury for various reasons, including insufficiency of evidence. Even were we to accept Abbott's harmlessness exception, it would not apply here.

As agreed by the parties, the contract claim is governed by New York law. Abbott argues, first, that its conduct did not violate any implied covenant in its contract with GSK because that contract contained no agreement as to price. There was evidence, however, from which a jury could find that Abbott's conduct had "injur[ed]" GSK's right to "receive the fruits of the contract," and was meant to have that impact. Such proof is sufficient under New York law to find a breach of an implied covenant. *See 511 W. 232nd Owners Corp. v. Jennifer Realty Co.,* 98 N.Y.2d 144, 746 N.Y.S.2d 131, 773 N.E.2d 496, 500 (2002). Abbott's second argument, that the contract's limitation-of-liability clause bars any damages award, is premised on the "jury['s] reject[ion of] GSK's theories involving tortious gross negligence and intent to harm...." As the jury findings were tainted by the *Batson* violation, we cannot rely on them to support enforcement of the limitation-of-liability clause.[FN7]

FN7. We have considered and rejected Abbott's other arguments with regard to the contract claim.

In conclusion, the district court properly found that GSK's contract claim does not fail as a matter of law.[FN8] Thus, even if *Batson* violations were subject to harmless error analysis where the losing party should have prevailed as a matter of law and no jury verdict should have been rendered, the exclusion of a juror in violation of *Batson* was not harmless here, as a jury was necessary to resolve the case. Therefore, we remand for a new trial.[FN9]

FN8. Abbott has argued only that structural error does not apply because *no* claim should have gone to the jury. As we hold to the contrary with regard to the implied covenant claim, we need not consider whether the district court erred in submitting the UTPA and antitrust claims to the jury.

FN9. Our holding that the contract claim does not fail as a matter of law resolves Abbott's sole contention on direct appeal, that the district court should have granted its 50(b) motion for judgment as a matter of law on this claim. We need not address GSK's remaining claim on cross-appeal—that the UTPA verdict was inconsistent with the jury's findings—as we remand for a new trial and new findings.

VI.

We hold that heightened scrutiny applies to classifications based on sexual orientation and that *Batson* applies to strikes on that basis. Because a *Batson* violation occurred here, this case must be remanded for a new trial.

REVERSED AND REMANDED.

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Chapter 2

Courts and Alternative Dispute Resolution

Case 2.1

2011 WL 30972
United States District Court, N.D. California.

GUCCI AMERICA, Plaintiff,
v.
WANG HUOQING, Defendant.

No. C 09-05969 CRB.
Jan. 5, 2011.

ORDER ADOPTING REPORT AND RECOMMENDATION, GRANTING DEFAULT JUDGMENT AGAINST DEFENDANT, AND ENTERING PERMANENT INJUNCTION
CHARLES R. BREYER, District Judge.

The Court has reviewed Magistrate Judge Spero's Report and Recommendation. The Court finds the Report correct, well-reasoned, and thorough, and ADOPTS it in every respect. Accordingly, the Court GRANTS default judgment against Defendant Wang Huoqing on Plaintiffs' trademark infringement and false designation of origin claims. The Court awards statutory damages to each Plaintiff in the following amounts: for Gucci America, Inc. $440,000; for Bottega Veneta International S.A.R.L. $4,000; and for Balenciaga S.A. $8,000. The Court awards prejudgment interest to each Plaintiff in the following amounts: for Gucci America, Inc. $12,768.92; for Bottega Veneta International S.A.R.L. $116.08; and for Balenciaga S.A. $232.16. Additionally, the Court awards $233.33 in costs to each Plaintiff on the basis of Defendant's trademark infringement.

Further, a permanent injunction is hereby ENTERED against the Defendant as follows:

Defendant and his respective officers, agents, servants, employees, and attorneys, and all persons acting in concert and participation with him are hereby permanently restrained and enjoined from:

(a) manufacturing or causing to be manufactured, importing, advertising, or promoting, distributing, selling or offering to sell

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counterfeit and infringing goods using the Plaintiffs' Marks;

(b) using the Plaintiffs' Marks in connection with the sale of any unauthorized goods;

(c) using any logo, and/or layout which may be calculated to falsely advertise the services or products of Defendant offered for sale or sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop. com, myokshop.com, and myrshop.com and/or any other website or business, as being sponsored by, authorized by, endorsed by, or in any way associated with Plaintiffs;

(d) falsely representing himself as being connected with Plaintiffs, through sponsorship or association;

(e) engaging in any act which is likely to falsely cause members of the trade and/or of the purchasing public to believe any goods or services of Defendant offered for sale o[r] sold via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business are in any way endorsed by, approved by, and/or associated with Plaintiffs;

(f) using any reproduction, counterfeit, copy or colorable imitation of the Plaintiffs' Marks in connection with the publicity, promotion, sale or advertising of any goods sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop .net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, including, without limitation, footwear, belts, sunglasses, handbags, wallets, hats, necklaces, bracelets, scarves, ties, and/or umbrellas;

(g) affixing, applying, annexing or using in connection with the sale of any goods, a false description or representation, including words or other symbols tending to falsely describe or represent goods offered for sale or sold by Defendant via the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com and/or any other website or business, as being those of Plaintiffs or in any way endorsed by Plaintiffs;

(h) offering such goods in commerce;

(i) otherwise unfairly competing with Plaintiffs;

(j) secreting, destroying, altering, removing, or otherwise dealing with the unauthorized products or any books or records which contain any information relating to the importing, manufacturing, producing, distributing, circulation, selling, marketing, offering for sale, advertising, promoting, renting or displaying of all unauthorized products which infringe the Plaintiffs' Marks; and

(k) effecting assignments or transfers, forming new entities or associations or utilizing any other device for the purpose of circumventing or otherwise avoiding the prohibitions set forth above.

Finally, the Court orders as follows:

(l) In order to give practical effect to the Permanent Injunction, the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com, and myrshop.com are hereby ordered to be immediately transferred by Defendant, his assignees and/or successors in interest or title, and the Registrars to Plaintiff Gucci's control. To the extent the current Registrars do not facilitate the transfer of the domain names to Plaintiffs' control within ten (10) days of receipt of this judgment, the United States based Registry shall, within thirty (30) days, transfer the Subject Domain Names to a United States based Registrar of Plaintiffs' choosing, and that Registrar shall transfer the Subject Domain Names to Plaintiff Gucci; and

(m) Upon Plaintiffs' request, the top level domain (TLD) Registries for the websites: b2do.com, bag2do.cn, bag2do.com, bagdo.com, bagdo.net, bagdo2.com, bagdo2.net, bagpo.com, bagxo.com, bagxp.com, do2bag.com, do2bag.net, ebagdo.com, ibagdo.com, ibagto.com, my4shop.com, my4shop.net, my5shop.com, my5shop.net, myamart.com, myamart.net, myashop.cn, myashop.com, myashop.net, myhshop.com, mynshop.com, myokshop.com and myrshop.com shall place the websites on Registry Hold status within thirty (30) days of receipt of this Order, thus removing them from the TLD zone files maintained by the Registries which link the websites to the IP addresses where the associated websites are hosted.

IT IS SO ORDERED.

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Case 2.2

533 S.W.3d 395
Court of Appeals of Texas, Houston (14th Dist.).

Jennifer JOHNSON, Appellant
v.
OXY USA, INC. and Texas Workforce Commission, Appellees

NO. 14–14–00831–CV
Opinion filed January 7, 2016
Rehearing Denied February 5, 2016

OPINION
Ken Wise, Justice
Appellant, Jennifer Johnson, appeals the trial court's order granting appellees Oxy USA, Inc. ("Oxy") and the Texas Workforce Commission's ("the TWC") Joint Motion for Summary Judgment and Partial Plea to the Jurisdiction. We affirm in part and reverse and remand in part.
Background
Oxy employed Johnson as a finance analyst from 2002 to 2013. According to Johnson, Oxy notified her in 2011 that the requirements of her position had changed. As a result, Johnson enrolled in courses to obtain a CPA license. Oxy reimbursed Johnson for the cost of the courses. After Johnson voluntarily left her position at Oxy in February 2013, Oxy withheld the cost of the CPA courses from Johnson's final paycheck. Johnson subsequently filed a claim for unpaid wages with the TWC.
Both Oxy and Johnson admit that the parties signed an agreement regarding reimbursement from Oxy to Johnson for the cost of the courses. Oxy argues that pursuant to the agreement, it was entitled to withhold the cost of the courses from Johnson's final check because she worked less than one year from the date of reimbursement. Johnson contends that the agreement does not apply because the funds should have been classified as a business expense, which did not have to be repaid upon resignation under Oxy's Educational Assistance Policy.
The TWC issued a Preliminary Wage Determination Order on June 3, 2013, concluding that Johnson was not entitled to unpaid wages or unpaid vacation pay because "the withheld wages were authorized by the claimant in writing." Johnson appealed the preliminary determination on June 17, 2013, but the TWC denied her appeal in a "Texas Payday Law Decision" mailed on July 26, 2013. The Payday Law Decision clearly stated: "The attached decision *398 will become final **fourteen (14)** calendar days after the date mailed shown above, unless within that time a party to the appeal files a written request for reopening or a written appeal to the Commission." Johnson attempted to appeal the decision, but her appeal was received late.[1] As a result, on October 18, the TWC dismissed Johnson's appeal as untimely. Johnson filed a Motion for Rehearing with the TWC, but that motion was also denied. Johnson then filed this lawsuit against Oxy and the TWC on February 7, 2014.
Johnson's original petition named Oxy and the TWC as defendants and included four causes of action: (1) "Oxy's Violation of the Texas Payday Law;" (2) "Review of TWC's Application of the Texas Payday Law;" (3) breach of contract; and (4) declaratory judgment. In her petition, Johnson demanded payment of $4,542.78 from the defendants, plus costs and attorney's fees. After answering Johnson's suit separately, Oxy and the TWC filed "Defendants' Joint Special Exception, Partial Plea to the Jurisdiction, and Motion for Summary Judgment."
The trial court issued an order granting Oxy and the TWC's partial plea to the jurisdiction and motion for summary judgment. In its order, the trial court concluded that res judicata barred Counts One, Three, and Four of Johnson's petition. The trial court also concluded that its jurisdiction was limited to whether Johnson's appeal to the TWC was timely and affirmed the TWC's decision in that regard. Johnson appeals.
Issues and Analysis

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On appeal, Johnson alleges the following: (1) the trial court erred in granting summary judgment based on res judicata; and (2) the trial court erred in granting the partial plea to the jurisdiction based on the finding that its jurisdiction was limited to a consideration of whether Johnson's appeal was timely. Before turning to the res judicata issue, we must first determine whether the trial court correctly granted the partial plea to the jurisdiction. *See* *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443 (Tex.1993); *Hull v. Davis,* 211 S.W.3d 461, 463 (Tex.App.–Houston [14th Dist.] 2006, no pet.).

I. Defendants' Partial Plea to the Jurisdiction

12345A party may challenge a trial court's subject-matter jurisdiction by a plea to the jurisdiction. *Tex. Dep't of Transp. v. Jones,* 8 S.W.3d 636, 637 (Tex.1999) (per curiam). Whether a trial court has subject-matter jurisdiction is a question of law; therefore, we review the trial court's order de novo. *Tex. Natural Res. Conservation Comm'n v. IT–Davy,* 74 S.W.3d 849, 855 (Tex.2002). In deciding a plea to the jurisdiction, we look to whether the plaintiff has alleged facts in her pleadings that affirmatively demonstrate the trial court's jurisdiction to hear the cause. *Tex. Dep't of Parks and Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004). We consider only the plaintiff's pleadings and the evidence pertinent to the judicial inquiry, and we do not consider the claim's merits. *County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002).

Oxy and the TWC argue that this court's jurisdiction is limited to a review of "whether Plaintiff timely appealed a previous decision to the Commission." To support their contention, Oxy and the TWC rely on our decision in *399 *Tex. Workforce Comm'n v. City of Houston,* No. 14–07–00407–CV, 2009 WL 396208 (Tex.App.–Houston [14th Dist.] Feb. 19, 2009, no pet.) (mem.op.). In that case, the TWC hearing examiner determined that the city's protest to a former employee's wage claim was filed late. *Id.* at *1. The examiner's decision only concerned the timeliness issue and whether the city had been given an extension to the deadline as it claimed. *Id.* The examiner's decision was subsequently affirmed by the appeals tribunal and the commission. *Id.* The city then appealed the commission's decision to the district court. *Id.* After the district court reversed the commission, the commission appealed to this court. *Id.* On appeal, we agreed with the commission that we could only address the timeliness issue:

The courts have subject-matter jurisdiction to review only a final decision by the commission. *See* Tex. Lab.Code § 212.201 (Vernon 2006). The examiner determined on February 21 that the city filed its protest one day late and therefore waived its rights to appeal the decision on the protest. The February 21 decision did not address whether the employee was eligible to receive unemployment benefits. Because timeliness was the only issue addressed in the February 21 decision, that was the only issue properly before the appeals tribunal when it affirmed the February 21 decision on April 11, and it was likewise the only issue before the commission when it affirmed the April 11 tribunal decision on June 2. The case before us now concerns only the city's appeal of the commission's decision on June 2. The scope of this court's jurisdiction only extends as far as the language of the decision being appealed. Therefore, we have subject-matter jurisdiction only over the June 2 decision regarding the timeliness of the city's protest, and not over the April 11 decision by the commission on the city's motion to rehear Adams's unemployment-benefits claim.

Id. at *2. We conclude that *City of Houston* is controlling in this case. Like in *City of Houston,* the October 18 decision here only addressed the timeliness of Johnson's appeal. The decision stated in relevant part:

Section 61.061 of the Texas Labor code provides that a decision of the Wage Claim Appeal Tribunal shall be final unless an appeal is filed within fourteen (14) days from the date of mailing such decision.

The statutory period in which an appeal could be filed expired August 9, 2013. This appeal was filed August 13, 2013, and is therefore late. The Commission is without jurisdiction to hear the appeal, and it is dismissed.

6Therefore, because the decision only focused on the timeliness issue, our jurisdiction is likewise limited. *City of Houston,* 2009 WL 396208 at *2. Contrary to Johnson's argument, we are unable to review the Wage Claim Appeal Tribunal's decision dated July 26, 2013. As we noted in *City of Houston,* in order for this court to have jurisdiction to review a commission decision, the party claiming to be aggrieved by a final decision of the commission must first have exhausted the available administrative remedies. *City of Houston,* 2009 WL 396208 at *2; *see also* Tex. Lab.Code § 212.203(a). Here, Johnson failed to exhaust her administrative remedies with regard to the July 26 decision because she filed her appeal late. *See* *Hull,* 211 S.W.2d at 465 (concluding that claimant failed to exhaust administrative remedies under Payday Law when he failed to seek a hearing on Preliminary Wage Determination Order within 21 days as required by § 61.054). As a result, we are unable to review the July 26 decision. However, we can review the October 18 *400 decision because Johnson did exhaust her administrative remedies by timely appealing that decision. We hold that the trial court correctly found its jurisdiction was limited to the timeliness consideration, and we overrule Johnson's first issue.

II. Defendants' Motion for Summary Judgment

In her second issue, Johnson argues that the trial court erred in granting the defendants' joint motion for summary judgment. In its order, the trial court first determined that the TWC's October 18 decision regarding the timeliness issue was supported by substantial evidence.[2] The court then held that res judicata barred Johnson's three remaining claims. We first review the trial court's ruling on the October 18 decision and then turn to the res judicata question.

A. Count Two—Review of TWC's Application of the Texas Payday Law

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789In the October 18 decision, the TWC concluded that Johnson's appeal was filed late. We review a TWC decision de novo to determine whether substantial evidence supports the ruling. *See* Tex. Lab.Code § 212.202(a); *McCrory v. Henderson,* 431 S.W.3d 140, 142 (Tex.App.–Houston [14th Dist.] 2013, no pet.). The TWC's action is presumed valid, and the party seeking to set aside the decision has the burden to show that it was not supported by substantial evidence. *McCrory,* 431 S.W.3d at 142. Whether there is substantial evidence to support an administrative decision is a question of law. *Tex. Dep't of Pub. Safety v. Alford,* 209 S.W.3d 101, 103 (Tex.2006). "Substantial evidence is not proof beyond a reasonable doubt or even a preponderance of the evidence; it need only be more than a scintilla." *Garza v. Tex. Alcoholic Beverage Comm'n,* 138 S.W.3d 609, 613 (Tex.App.–Houston [14th Dist.] 2004, no pet.).

We review the trial court's judgment by comparing the TWC's decision with the evidence presented to the trial court and the governing law. *McCro ry,* 431 S.W.3d at 142. We determine whether the summary judgment evidence established as a matter of law that substantial evidence existed to support the TWC's decision. *Id.*;*see also Alford,* 209 S.W.3d at 103.

Applying this standard of review, we begin by summarizing the evidence supporting the TWC's decision. Pursuant to Section 61.061(c) of the Texas Labor Code, an order from the wage claim appeal tribunal becomes final 14 days after the day it is mailed. Tex. Lab.Code § 61.061(c). Here, the Payday Law Decision was mailed on July 26, 2013; thus, Johnson had until August 9 to timely appeal. Her appeal acknowledges that she received the Payday Law Decision on July 31, several days before the deadline expired. However, Johnson did not send her appeal to the TWC until August 12. She admits the same in her motion for rehearing. Johnson has not offered any evidence to controvert the TWC's finding that her appeal was late. Furthermore, Johnson states in her brief that she "does not appeal the trial court's decision regarding the TWC" and "does not take issue with the determination that her appeal was untimely." For these reasons, we conclude that the summary judgment record shows as a matter of law that substantial evidence supports the TWC's decision. We therefore affirm the trial court's grant of summary judgment with regard to Count Two.

*401 *B. Counts One, Three, and Four—Oxy's Violation of the Texas Payday Law, Breach of Contract, and Declaratory Judgment*

10111213We next consider whether the trial court correctly held that Johnson's remaining claims were barred by res judicata. In a court of law, a claimant typically cannot pursue one remedy to an unfavorable outcome and then seek the same remedy in another proceeding before the same or a different tribunal. "Res judicata bars the relitigation of claims that have been finally adjudicated or that could have been litigated in the prior action." *Igal v. Brightstar Info. Tech. Grp., Inc.,* 250 S.W.3d 78, 86 (Tex.2008), *superseded by statute on other grounds,* Act of Apr. 28, 2009, 81st Leg., R.S., ch. 21, §§ 1–2, 2009, Tex. Gen. Laws 40, 40 (codified at Tex. Lab.Code § 61.052(b-l) and as an amendment to Tex. Lab.Code § 61.051(c)), *as recognized in Prairie View A & M Univ. v. Chatha,* 381 S.W.3d 500, 512 n. 17 (Tex.2012). To obtain summary judgment on the ground that the plaintiff's claims are barred by res judicata, a defendant must establish that: (1) a court of competent jurisdiction previously rendered a final judgment on the merits, (2) the prior action involved the same parties or those in privity with them; and (3) the claims now raised are the same as those litigated or that could have been litigated in the first action. *Igal,* 250 S.W.3d at 86.

Johnson argues that res judicata does not apply here because the TWC did not render a final judgment on the merits of her claim that Oxy misinterpreted its Educational Assistance Policy. Specifically, Johnson claims she was "denied the right of full adjudication of her claims because the TWC refused to consider her arguments at the administrative level as beyond its jurisdiction." To support this contention, Johnson points to the following excerpt from the Payday Law Decision:

As explained during the hearing, the TWC does not interpret contracts between employers and employee but only enforces the Texas Payday Law ... The question of whether the employer properly interpreted their policy on reimbursed educational expenses versus a business expense is a question for a different forum.

According to Johnson, this language shows that the TWC refused to consider the merits of the issues she raised as "beyond its reach." In contrast, the defendants contend that Johnson's claims are barred by res judicata because they are based on claims previously decided by the TWC. The defendants argue that Johnson's position "fails to properly consider the evidence, argument [,] and findings made by the TWC." Oxy and the TWC maintain that *Igal* is controlling in Johnson's case.

In *Igal,* the claimant filed a wage claim with the TWC, arguing that his employer breached their employment agreement and owed him unpaid wages, bonuses, and benefits. *Id.* at 81. The TWC dismissed Igal's claim in a preliminary wage determination order. *Id.* Igal then requested a hearing, and the TWC issued its decision, finding that his claim failed on the merits and that the TWC lacked jurisdiction because Igal filed his claim more than 180 days after his wages were due. *Id.*

Instead of filing a motion for rehearing or seeking judicial review of the TWC's decision, Igal sued his employer in district court for breach of contract and declaratory judgment. *Id.* The employer argued that Igal's common law claims were barred by res judicata, and the district court, court of appeals, and Texas Supreme Court all agreed. *Id.* The supreme court first examined the language of the TWC decision at issue, and then concluded that the order should be considered final for purposes of res judicata. *Id.* at 89. In *402 reaching this determination, the court focused on the fact that the TWC's order "plainly resolved disputed facts and determined that Igal's claim for unpaid wages was without merit." *Id.* The court noted that the TWC "decided the key questions of

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fact in dispute in Igal's payday claim: when Igal's employment contract expired, that he had sufficient notice that the contract was not being renewed, that he was not terminated without cause, and that he was not entitled to any additional compensation." *Id.*

In Johnson's case, however, the TWC did not decide the key question of fact in dispute—whether Oxy violated its own Educational Assistance Policy when it withheld Johnson's final wages as reimbursement for the CPA courses. In fact, the TWC explicitly refused to do so, stating that the agency "does not interpret contracts between employers and employee." As Johnson has repeatedly pointed out, the TWC advised her that "[t]he question of whether the employer properly interpreted their policy on reimbursed educational expenses versus a business expense is a question for a different forum." Because this question goes to the heart of Johnson's breach of contract and declaratory judgment claims, we hold that res judicata does not bar those claims, and we remand the case for a consideration of the merits of both causes of action.

The defendants argue that because Johnson seeks to recover the same wages in this suit as she did in her claim with the TWC, res judicata must bar her common law causes of action. *See Igal*, 250 S.W.3d at 81 (holding that "when a claimant pursues a wage claim to a final adjudication before TWC, res judicata bars the claimant from later filing a lawsuit for the same damages in a Texas court of law"). However, the *Igal* court made an important qualification—res judicata would only bar a claim "*if* TWC's order is considered final for the purposes of res judicata." *Igal*, 250 S.W.3d at 89 (emphasis added). The defendants ignore the subsequent portion of the court's opinion analyzing the preclusive effect of the TWC order in Igal's case. As mentioned above, the *Igal* court first determined that the order "plainly resolved disputed facts" before concluding res judicata barred Igal's common law claims. Here, the order in Johnson's case made no such findings with regard to the Educational Assistance Policy. The order expressly declined to address that issue. Therefore, *Igal* is distinguishable, and res judicata will not bar Johnson's breach of contract and declaratory judgment claims.

14However, the TWC hearing officer did resolve the disputed facts with respect to Count One of Johnson's petition, "Oxy's Violation of the Texas Payday Law." First, the hearing officer outlined the portion of the Payday Law relevant to the withholding of wages. The officer noted that pursuant to Section 61.018 of the Payday Law, an employer can withhold wages if he "has written authorization from the employee to deduct part of the wages for a lawful purpose." The officer then concluded: "I find that the employer properly deducted the tuition reimbursement. The employer had a written authorization from the claimant that complies with the Texas Payday Law." Therefore, because Count One of Johnson's petition has already been "finally adjudicated by a competent tribunal," we conclude that res judicata effectively bars that claim. *See Igal*, 250 S.W.3d at 86. We thus affirm the trial court's grant of summary judgment with respect to Count One.

Conclusion

We overrule Johnson's first issue and hold that with respect to Count Two of Johnson's petition, our jurisdiction is limited to a review of whether her appeal to the TWC was timely filed. We thus affirm the *403 trial court's grant of defendants' partial plea to the jurisdiction. Applying the substantial evidence standard of review, we determine that Johnson's appeal was filed late. Therefore, we affirm the trial court's grant of summary judgment with respect to Count Two of Johnson's Petition. As a result, no claims remain against the TWC.[3]

As for Johnson's second issue, we affirm the trial court's grant of summary judgment in part and reverse in part. We hold that the trial court correctly granted summary judgment based on res judicata with respect to Count One of Johnson's petition. However, we hold that summary judgment was improperly granted as to Counts Three and Four of Johnson's petition, because the TWC did not consider the merits of those claims. We therefore reverse the trial court's grant of summary judgment on Johnson's breach of contract and declaratory judgment claims and remand the case for a new trial on the merits.

Case 2.3

880 F.3d 620
United States Court of Appeals, Second Circuit.

KLIPSCH GROUP, INC., Plaintiff–Appellee–Cross–Appellant, ABC, Plaintiff,
v.
EPRO E-COMMERCE LIMITED, DBA DealExtreme, DBA Dealextreme.com, DBA DX, DBA Dx.com, Defendant–Appellant–Cross–Appellee, Def; Big Box Store Limited, DBA Bigboxstore.com, DBA Bigboxsave.com; Zhongren Cao, DBA United Pacific Connections

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Company, DBA Atechport.com, DBA Wirelessspycamera.biz; Dandan Wu, DBA Pandawill.com; D201.Com, AKA Phonell.com, AKA SinoPro.com; Shang Tao, DBA Pingu International Limited, DBA Airaccent.com; Shiming Zhang, DBA Best Discount Store; Kingspec SSD, DBA EEEPCSSD.com; EZU Energy Limited, DBA Beebond Co., DBA Beebond.com, DBA James Collen, DBA Beebond.co.UK; Mag Simon, DBA Bulkordering.com; McBub.com, AKA Sinadeal.com; Li Jin, DBA Kan72D7GB; Alex Chaow, DBA Advanced Plus Int'l Share Ltd., DBA Superluckymart.com; Yaoyao Mai, DBA Shenzhen Taobaodao Technology Co., Ltd.; Eachgame International (HK) Stock Co., Ltd., DBA Eachgame.com; Technoplus International Co., Limited, DBA Sertec, DBA SZSertec.com, DBA Dealingsmart.com; Yuedajie888999; Escalongtb, AKA Guderianygm; GH6G8YUH6; Zhaohua Luo, AKA Xu Yong Luo, DBA wholesalewill.com; XYZ Companies, 1–10; John Does 1–10; Jane Does 1–10, Defendants.*

Docket Nos. 16-3637-cv, 16-3726-cv
August Term, 2017
Argued: October 26, 2017
Decided: January 25, 2018

Opinion
Gerard E. Lynch, Circuit Judge:
In the course of defending against claims that it sold counterfeit products, defendant-appellant ePRO E-Commerce Limited ("ePRO") engaged in persistent discovery misconduct: it failed to timely disclose the majority of the responsive documents in its possession, restricted a discovery vendor's access to its electronic data, and failed to impose an adequate litigation hold even after the court directed it to do so, which omission allowed custodians of relevant electronic data to delete thousands of documents and significant quantities of data, sometimes permanently. As a result, the United States District Court for the Southern District of New York (Vernon S. Broderick, *J.*) concluded that ePRO had willfully engaged in spoliation. It accordingly granted in substantial part plaintiff-appellee Klipsch Group, Inc.'s ("Klipsch") motion for discovery sanctions, including a $2.7 million monetary sanction to compensate Klipsch for its corrective discovery efforts and a corresponding asset restraint in that amount, permissive and mandatory jury instructions, and an additional $2.3 million bond to preserve Klipsch's ability to recover damages and fees at the end of the case. ePRO now brings this interlocutory appeal, raising various challenges to the evidentiary rulings and factual findings undergirding those sanctions. It also contends that the resulting sanctions are impermissibly punitive, primarily because they are disproportionate to the likely value of the case. Klipsch, on cross-appeal, argues that the district court erred by failing to infer that ePRO destroyed relevant sales data from the fact that it failed to retain backup copies of its live sales database.
We find no error in the district court's factual findings, and we conclude that the monetary sanctions it awarded properly compensated Klipsch for the corrective discovery efforts it undertook with court permission in response to ePRO's misconduct. In particular, we emphasize that discovery sanctions should be commensurate with the costs unnecessarily created by the sanctionable behavior. A monetary sanction in the amount of the cost of discovery efforts that appeared to be reasonable to undertake *ex ante* does not become impermissibly punitive simply because those efforts did not ultimately uncover more significant spoliation and fraud, or increase the likely damages in the underlying case. The district court's orders imposing sanctions *624 are accordingly AFFIRMED in all respects.
BACKGROUND
The facts presented below are drawn principally from the district court's findings of fact.
I. Initial Steps in the Litigation
In August 2012, Klipsch, a manufacturer of sound equipment including headphones, sued DealExtreme.com, a subsidiary of ePRO, a Chinese corporation, alleging that it was selling counterfeit Klipsch headphones. ePRO does not dispute that some infringing sales occurred; however, throughout the proceedings, the parties have insisted on vastly different estimates of the extent of such sales. Klipsch alleged that ePRO sold at least $5 million in counterfeit or otherwise infringing Klipsch products. ePRO, on the other hand, has consistently presented evidence that the sales of the relevant products amounted to less than $8,000 worldwide. The district court initially found ePRO's evidence persuasive and did not substantially revise its view of the case's value

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even after Klipsch's investigators uncovered two other counterfeit Klipsch products being sold on ePRO's sites a few months into the litigation.

As the case proceeded, however, ePRO's failure to comply with its discovery obligations began to cast doubt on the reliability of its representations. By March 2013, as Klipsch was preparing to take depositions of ePRO's employees in Hong Kong, ePRO had produced fewer than 500 documents. ePRO insisted that it did not possess any original sales documents, and instead turned over spreadsheets created specifically for this litigation that purported to list all relevant sales. In support of its contention that those sales records were complete, ePRO points out that each of the undercover purchases made by Klipsch's investigators was accounted for therein, even though ePRO would have had no *a priori* means of identifying those transactions.

During a deposition of ePRO's CEO, Daniel Chow, it became clear that ePRO had not placed a litigation hold on a substantial portion of its electronic data, including any emails or faxes. Around the same time, ePRO also admitted that it did possess transactional sales documents that should have been disclosed. In order to remedy those problems, ePRO agreed to retain a discovery vendor, FTI Consulting, to conduct a keyword search of its electronic documents. FTI's search resulted in the production of an additional 40,000 documents, including 1,236 original sales documents. Some of the documents that were produced contradicted Chow's testimony, suggesting that ePRO had misidentified the suppliers of the counterfeit products. And although the new production was voluminous, there were also indications that ePRO had artificially limited FTI's investigation into its electronic records. In light of the new discovery, the magistrate judge supervising discovery (Michael H. Dolinger, *M.J.*) deemed it necessary for Klipsch to re-depose ePRO's employees.[1] At Chow's second deposition in November 2013, it became clear that, despite the magistrate judge's clear directive, ePRO still had not imposed an adequate litigation hold. It is not contested that ePRO's counsel had advised compliance and warned that noncompliance would bring consequences.

*625 **II. The Motion for Discovery Sanctions**

In December 2013, Klipsch moved for discovery sanctions, asserting that as a result of ePRO's failure to initiate a proper litigation hold or to promptly disclose documents, large quantities of relevant documents that would have reflected a larger volume of infringing sales had been lost. The magistrate judge agreed in large part, observing that ePRO's "trail of false and misleading representations" throughout the discovery process had created "evident uncertainty about the plausibility, as well as the accuracy, of the defendants' current factual assertions about the scope of infringing sales and resultant profits." Joint App. at 1184. But although the magistrate judge determined that ePRO had "substantially failed to meet [its] obligation to preserve, search for and timely produce documents," *id.* at 1182, he declined to impose sanctions against ePRO at that time. Instead, he authorized Klipsch to undertake an independent forensic examination of ePRO's computer systems. The magistrate judge instructed that Klipsch would pay for the examination in the first instance, and could apply for the apportionment or reallocation of those costs after obtaining the results.

Klipsch hired iDiscovery Services ("iDS"), led by Daniel Regard, to conduct its investigation. Regard's initial report determined that ePRO employees who were custodians of responsive information had deleted files, emails, and other potentially relevant data. With respect to the actual sales data and documents, which the parties refer to as "Structured ESI,"[2] Regard concluded that ePRO's live sales databases showed evidence of editing and omissions and therefore offered unreliable evidence of historical sales data. Because ePRO had not preserved the backup copies of its databases that it routinely generated for disaster recovery purposes, Regard concluded that no reliable record of historical data was available.

With respect to the information stored on employees' computers and email accounts, which the parties refer to as "Unstructured ESI," Regard found that the custodians had engaged in various forms of spoliation, including manually deleting thousands of files and emails, using data-wiping software shortly before iDS's forensic examination was scheduled to begin, and updating their operating systems during the litigation period, which had the result of clearing out data regarding their program usage. Regard and his team were also denied access to several custodians' email and private messenger accounts, despite ePRO's admission that those accounts were sometimes used for business purposes.

After the search was completed, Klipsch filed an *ex parte* motion along with Regard's initial report, asking the court to increase the hold on ePRO's assets and enter a default judgment in Klipsch's favor. Klipsch's briefing suggested that Regard's report showed evidence that ePRO had engaged in massive amounts of data-deletion and tampering. The district court increased the hold on ePRO's assets from $20,000 to $5 million and ordered ePRO to show cause why a default judgment should not be entered against it.

In opposition, ePRO submitted expert reports from Michael Jelen, an expert in Structured ESI forensics, and Erik Hammerquist, an expert in Unstructured ESI. Klipsch then submitted an additional declaration from Regard that modified some *626 of his conclusions in response to ePRO's experts' critiques. The district court held a four-day evidentiary hearing on Klipsch's motion in January 2015, following which the parties submitted proposed findings of fact and conclusions of law as well as further declarations from Regard and Hammerquist. The district court considered the final Regard report but excluded Hammerquist's proposed sur-rebuttal.

III. The District Court's Sanctions Rulings

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In November 2015, the district court issued an order granting in part and denying in part Klipsch's motion. In summary, it found that Klipsch failed to demonstrate that ePRO had destroyed or tampered with its sales documents. The court accordingly denied Klipsch's motion for default judgment and reduced the asset restraining order to $25,000, reflecting its view of the likely valuation of actual damages in the case.

The court concluded that Klipsch had shown that ePRO had willfully spoliated relevant Unstructured ESI. Although many of the improperly deleted documents were recovered and no smoking gun was found among them, the district court emphasized that spoliation had resulted in some permanently unrecoverable files and data, and inferred from ePRO's willful misconduct that the missing documents were relevant and that their absence prejudiced Klipsch. As a result, it imposed the following sanctions: (1) an instruction requiring the jury to find that ePRO had destroyed relevant Unstructured ESI after its duty to preserve those documents had been triggered; (2) an instruction permitting the jury to presume that the destroyed evidence would have been favorable to Klipsch; and (3) reasonable costs and fees associated with the discovery motion, beginning with Klipsch's second round of depositions in Hong Kong.

Both parties moved for reconsideration. Other than a small revision to one aspect of its Unstructured ESI findings, however, the district court's ruling remained unchanged. After a careful examination of Klipsch's fee submissions, the court awarded Klipsch a total of $2.68 million as compensation for the additional discovery efforts occasioned by ePRO's misconduct.[3] The court rejected ePRO's arguments that the amount was excessive either as compared to the small amount of actual compensatory damages likely at issue in the case, or as a result of Klipsch's failure to uncover evidence of any additional infringing sales or spoliation of sales records.

The court deemed ePRO to be a dissipation risk in light of its persistent failure to comply with court orders or discovery protocols. It accordingly imposed a restraint on ePRO's assets in the amount of the monetary sanctions. It also imposed an additional $2.3 million restraint, which amount it determined would be appropriate to secure Klipsch's likely recovery of treble damages and attorney's fees at the conclusion of the case. At ePRO's request, the court permitted the parties to determine whether the resulting $5 million in total restraints would be held in a restraint, a separate bond, or some combination thereof.

The parties now appeal those rulings.

DISCUSSION

1As a preliminary matter, we note that the restraint on ePRO's assets is a form of injunctive relief that provides the basis for our jurisdiction to hear this interlocutory *627 appeal. 28 U.S.C. § 1292(a)(1). Because the remainder of the parties' arguments concern matters that are inextricably bound up with the validity of that injunction, we also have jurisdiction to resolve those disputes. *See* *Amador v. Andrews*, 655 F.3d 89, 95 (2d Cir. 2011).

23We review each of the issues raised in these cross-appeals for abuse of discretion. *See* *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999) (discovery sanctions); *United States v. Fabian*, 312 F.3d 550, 557 (2d Cir. 2002), abrogated on other grounds by *United States v. Parkes*, 497 F.3d 220 (2d Cir. 2007) (evidentiary determinations); *EEOC v. KarenKim, Inc.*, 698 F.3d 92, 99 (2d Cir. 2012) (grant of injunctive relief). "A district court abuses its discretion if it (1) bases its decision on an error of law or uses the wrong legal standard; (2) bases its decision on a clearly erroneous factual finding; or (3) reaches a conclusion that, though not necessarily the product of a legal error or a clearly erroneous factual finding, cannot be located within the range of permissible decisions." *KarenKim*, 698 F.3d at 99–100 (internal quotation marks omitted).

We determine that the district court did not err in its careful factual findings, nor did it base any aspect of its decision on an incorrect legal standard. The primary engine of ePRO's appeal appears to be the fact that the district court imposed $2.7 million in sanctions in a case that it agreed will likely result in about $20,000 in damages. We hold that the district court's award properly reflects the additional costs ePRO imposed on its opponent by refusing to comply with its discovery obligations. Because we conclude that the remainder of the parties' arguments are also without merit, we affirm the district court's rulings.

I. Evidentiary and Factual Arguments

The parties raise an assortment of evidentiary and factual challenges to the district court's rulings. We assume the parties' familiarity with the issues and we commend the district court for its cogent explanation of the highly technical factual details underpinning these debates.

A. Evidence Considered by the District Court

ePRO argues that the district court abused its discretion by admitting Regard's supplemental reports and declarations, and by relying on any of his reports for the truth of the matter asserted therein. None of those evidentiary challenges has merit.

First, ePRO argues that some of Klipsch's evidence should not have been considered because it was not timely submitted. The materials ePRO contends should have been excluded, however, were provided to ePRO before the January 2015 hearing. Although it is unclear from the record before us whether ePRO has adequately preserved its objection to the admission of that evidence, the district court was aware of ePRO's concerns about the timing of the disclosures, and, indeed, granted ePRO's motion to strike (other) evidence that was submitted only days before the hearing. We see no abuse of discretion in those rulings.

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4Next, ePRO argues that the district court abused its discretion when it considered Klipsch's post-hearing supplemental expert report, but rejected ePRO's response. It is not an abuse of discretion to give one party the last word, particularly after the court has already permitted the parties to exchange multiple expert reports and to cross-examine witnesses during a multi-day evidentiary hearing. In any event, striking the portions of the district *628 court's factual findings that relied solely on Regard's final report would have no impact on the validity of its overall ruling.

Finally, ePRO argues that Regard's reports should not have been relied on for the truth of the matters asserted therein because the district court allegedly sustained ePRO's objection to the admission of his initial report for that purpose. But ePRO did not object to the acceptance of Regard as an expert, and his reports simply provided the factual details supporting his expert opinions. Thus, we conclude that challenge, too, lacks merit.

B. Spoliation of Unstructured ESI

ePRO argues that the district court erred when it found that ePRO had willfully spoliated Unstructured ESI. The district court found evidence of five methods of spoliation: (1) 4,596 responsive files or emails were manually deleted, although all of these documents were eventually recovered;[4] (2) seven employees used data-wiping programs shortly before the forensic examination began, resulting in 31 permanently unrecoverable files; (3) eighteen employees ran operating systems upgrades during the litigation hold period, which resulted in the loss of their program usage data; (4) ePRO failed to provide access to the email accounts of seven employees who had worked on its email direct marketing homepage but were no longer employed with the company, and deleted or failed to provide access to the email accounts of twelve other custodians of discoverable data; and (5) 32 out of 36 identified custodians, including ePRO's CFO and the employee coordinating Regard's access to ePRO's data for his examination, refused to permit access to their accounts on a private messaging system, which, although primarily used for personal communication, were listed on their corporate email signatures.

5The party seeking discovery sanctions on the basis of spoliation must show by a preponderance of the evidence: "(1) that the party having control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind; and (3) that the destroyed evidence was relevant to the party's claim or defense such that a reasonable trier of fact could find that it would support that claim or defense." *Chin v. Port Auth. of N.Y. & N.J.*, 685 F.3d 135, 162 (2d Cir. 2012) (internal quotation marks omitted).

6The district court did not clearly err in determining that each of those elements had been met here. ePRO's arguments to the contrary with respect to the manually deleted emails and the operating system reinstallations fail to recognize that the district court did not find that each instance of spoliation was equally probative of willfulness, nor that every method resulted in the permanent destruction of presumptively relevant data. Instead, the district court inferred relevance and prejudice only from the unrecoverable data, and viewed the various means of deleting data as cumulative proof that ePRO's spoliation was willful.

ePRO also spends significant effort trying to undermine the district court's factual *629 findings regarding exactly which employee used which data-wiping program at which time. But ePRO does not contest that the district court properly made the following findings: multiple custodians of discoverable data had data-wiping software on their devices during the litigation hold period; at least some of those programs were last used at a time very close to the initiation of Klipsch's forensic examination; and the use of those programs resulted in the permanent deletion of 31 files. Those facts are sufficient to support the district court's finding of willful spoliation, and ePRO's expert's opinion that some of the specific data had been commingled and therefore could not reliably be attributed to any particular individual does not change that conclusion. Moreover, ePRO's evidence on commingling was contested and to some extent incomplete because ePRO's expert testified that commingling was only one possible explanation for the duplicative data. Accordingly, the district court did not clearly err when it declined to adopt ePRO's view of the evidence.

Finally, ePRO contends that its inability to provide access to certain email and messaging accounts should not have been construed as evidence of willful spoliation because those accounts were primarily for private use. But the district court determined that ePRO was required to provide access to all of those accounts because they were also sanctioned for business use. As the district court noted, it was undisputed that ePRO's employees included their private messaging addresses in their work email signatures, installed the messaging software on their work computers, and sometimes used the specified private email accounts for business reasons. That ePRO did not have a software usage policy in place requiring its employees to segregate personal and business accounts or to otherwise ensure that professional communications sent through personal accounts could be preserved by the company for litigation purposes was the company's own error. ePRO cannot use that oversight as an excuse to avoid discovery, nor can it complain because the resulting and wholly foreseeable deletion of material that could well have contained relevant evidence gave rise to sanctions.

Thus, we find no clear error in the district court's factual findings regarding the spoliation of Unstructured ESI.[5]

C. Lack of Spoliation of Structured ESI

In what has been styled a cross-appeal but might be better understood as advocating an additional or alternative ground on which to affirm the sanctions, Klipsch argues that the district court erred when it declined to find that ePRO had willfully spoliated direct evidence of sales, which the parties refer to as "Structured ESI." Klipsch concedes that its examination did not uncover any direct

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evidence that ePRO's sales data had actually been tampered with, nor that ePRO was otherwise concealing a greater volume of infringing sales. Instead, Klipsch argues that ePRO's *630 failure to preserve static backup copies of its sales databases deprived Klipsch of a crucial means of verifying the historical accuracy of its live sales data.

ePRO maintains a live sales database that extracts and cross-references data from separate modules tracking inventory, orders, and shipments. Regard observed that the sales records in the live database were consistent with what had previously been produced, but because he found evidence that the database had been subject to editing, he nevertheless concluded that the sales records were unreliable. Jelen, ePRO's Structured ESI expert, agreed that it was possible to edit the live database and noted that some such edits would be expected in the normal course of business; however, he opined that it would be extremely difficult to completely remove evidence of a transaction from all three modules, and noted there was no evidence of such an effort nor of any inconsistency across the modules.

In addition to the live database, ePRO's policies also require it to generate backup copies of the sales database for disaster recovery purposes on a regular basis as well as every time the system undergoes a specified "major event." Those copies presumably would not have been subject to editing in the normal course, and therefore could have been used as references against which to check the accuracy of the live data. Klipsch asserts that ePRO had an obligation to preserve the backup copies of its sales databases as unique sources of historical sales data.

78But even where a party has shown that its opponent had an obligation to preserve certain evidence and willfully failed to do so, sanctions need not automatically follow; instead, we have simply held that such conduct *may* provide sufficient circumstantial evidence that relevant and prejudicial data was lost. *See, e.g.*, *Fujitsu Ltd. v. Fed. Exp. Corp.*, 247 F.3d 423, 436 (2d Cir. 2001) ("Once a court has concluded that a party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was intentionally destroyed, and the likely contents of that evidence. The determination of an appropriate sanction for spoliation, if any, is confined to the discretion of the trial judge[.]") (internal citations omitted). That is to say, the district court retains its discretion to impose discovery sanctions—or not—so long as that determination is not based on a legal or factual error. *See id.* We conclude that the district court did not abuse its discretion here when it chose not to infer that the lost backups would have included information that was relevant or that its unavailability prejudiced Klipsch. Jelen's testimony provided adequate support for a determination that the otherwise undetectable destruction of sales data was unlikely, and, as the district court pointed out, even Klipsch's own expert was unwilling to affirmatively endorse the theory that such conduct had actually occurred.

In sum, we find no clear error with respect to the district court's factual findings, nor any abuse of discretion with respect to its evidentiary rulings.

II. Amount of Monetary Sanction

9ePRO argues that the monetary sanctions imposed against it are so out of proportion to the value of the evidence uncovered by Klipsch's efforts or to the likely ultimate value of the case as to be impermissibly punitive and a violation of due process. That position, although superficially sympathetic given the amount of the sanction, overlooks the fact that ePRO caused Klipsch to accrue those costs by failing to comply with its discovery obligations. Such compliance is not optional or negotiable; rather, the integrity of our civil *631 litigation process requires that the parties before us, although adversarial to one another, carry out their duties to maintain and disclose the relevant information in their possession in good faith.

The extremely broad discovery permitted by the Federal Rules depends on the parties' voluntary participation. The system functions because, in the vast majority of cases, we can rely on each side to preserve evidence and to disclose relevant information when asked (and sometimes even before then) without being forced to proceed at the point of a court order. *See Cine Forty–Second St. Theatre Corp. v. Allied Artists Pictures Corp.*, 602 F.2d 1062, 1068 (2d Cir. 1979) (observing that "embroil[ing] trial judges in day-to-day supervision of discovery" is "a result directly contrary to the overall scheme of the federal discovery rules"). The courts are ill-equipped to address parties that do not voluntarily comply: we do not have our own investigatory powers, and even if we did, the spoliation of evidence would frequently be extremely difficult for any outsider to detect.

10Moreover, noncompliance vastly increases the cost of litigation by drawing out deadlines and necessitating motion practice. But "[a]n undertaking on the scale of the large contemporary suit brooks none of the dilation, posturing, and harassment once expected in litigation." *Id.* at 1067–68. Accordingly, we have held that discovery sanctions are proper even against parties who have belatedly complied with their obligations, because an alternative rule "would encourage dilatory tactics, and compliance with discovery orders would come only when the backs of counsel and the litigants were against the wall." *Id.* at 1068; *see also S. New Eng. Tel. Co. v. Glob. NAPs Inc.*, 624 F.3d 123, 149 (2d Cir. 2010). When, as a result of an opponent's persistently uncooperative behavior, it appears reasonable *ex ante* to conduct expensive corrective discovery efforts, we see no reason why the party required to undertake those efforts should not be compensated simply because it eventually turned out that the obstructive conduct had hidden nothing of real value to the case. Those costs must be placed on the uncooperative opponent in order to deter recalcitrant parties from the cavalier destruction or concealment of materials that the law requires them to retain and disclose.

11When we apply those principles to the case at hand, it is clear that the district court did not abuse its discretion by imposing monetary sanctions calculated to make Klipsch whole for the extra cost and efforts it reasonably undertook in response to ePRO's

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recalcitrance. Even accepting the district court's conclusion that Klipsch's forensic review failed to uncover proof that evidence of additional infringing sales had been destroyed, neither Klipsch nor the magistrate judge was in any position to know that such would prove to be the case before Klipsch undertook its review. On the contrary, ePRO's persistent refusal to comply with the discovery process provided ample grounds to suspect that the degree of its obstructive conduct would be commensurate with the value of the evidence it was hiding from its adversary and the court.

ePRO's principal objections to that conclusion fall into two buckets: first, it invokes Rule 37 of the Federal Rules of Civil Procedure to suggest that the district court has rewarded Klipsch for engaging in unnecessary and excessive discovery; and second, it argues that the sanctions are disproportionate either to the degree of success Klipsch achieved on its motion or to the ultimate value of the case. We find both arguments unconvincing.

*632 *A. Rule 37's Limitations on Unnecessary Discovery Sanctions*

ePRO challenges the fee amount as failing to adhere to the principles provided by Rule 37(e) of the Federal Rules of Civil Procedure, which governs when a court may impose sanctions for the spoliation of electronically stored information. The district court did not, in fact, rely on Rule 37 as the grounds for the monetary sanctions; instead, the sanctions were imposed under the court's inherent power to manage its own affairs.[6] Nevertheless, ePRO argues that the monetary sanctions were inappropriate under either source of authority. It argues that the monetary sanctions imposed here improperly reward Klipsch for excessive discovery efforts, suggesting Klipsch was not justified in taking such expensive measures to obtain the documents to which it was entitled because it should have known that the ultimate recovery on the merits would remain small in any event. Alternatively, ePRO argues that Klipsch should not be compensated for these efforts because it would have undertaken them regardless of ePRO's conduct. Neither of those arguments finds support in the record before us.

First, we note that there is no special rule requiring parties to suffer an opponent's open and notorious discovery misconduct in small value cases. Moreover, it is important to recognize the context in which Klipsch undertook its forensic examination of ePRO's files. At that point, the magistrate judge supervising discovery observed that ePRO's evasive conduct had created “evident uncertainty” about the accuracy of its representations regarding the likely value of the case. Joint App. at 1184. Klipsch had every reason to suspect that the documents its search would uncover were likely to be even more damaging than the ones ePRO had already grudgingly disclosed, which suggested that ePRO had misled Klipsch and the court about the provenance of the infringing products and the nature of its business.

Second, the history of the case makes clear that the sanctions and fees awarded in this case were carefully limited to costs Klipsch incurred in direct response to ePRO's misconduct. Klipsch obtained approval from the magistrate judge prior to each of its substantive efforts, and in each case, that approval was given only after ePRO had already squandered an opportunity to correct its own errors. For example, ePRO's failure to implement a litigation hold was first discovered in March 2013, during Klipsch's first round of depositions with ePRO employees, but ePRO was not sanctioned at that time, nor was Klipsch given carte blanche to explore ePRO's files. Instead, ePRO was permitted to hire its own discovery expert to correct the error, which resulted in the production of substantial additional discovery. Klipsch then spent approximately $550,000 on a second round of depositions occasioned by that late production. It is evident that the district court did not detect any abusive conduct on the part of Klipsch, such as the piling on of discovery demands and investigatory initiatives in order to burden its *633 adversary with wasteful expenses, motions practice, and sanctions. ePRO does not appear to contest the reasonableness of permitting Klipsch to take those remedial depositions, nor can it plausibly assert that Klipsch would have insisted on doing so even if ePRO's initial production had been complete or timely. And only in March 2014, after ePRO had repeatedly shown itself to be an untrustworthy participant in the discovery process, did the magistrate judge determine that Klipsch was “fully justified” in seeking to undertake an independent forensic examination. Joint App. at 1187.

12Because the costs for which Klipsch is being compensated were reasonably incurred in direct response to ePRO's misconduct, we cannot conclude that the district court abused its discretion by requiring ePRO to pay monetary sanctions in that amount.[7]

B. Proportionality

Even assuming that Klipsch reasonably undertook these efforts, ePRO contends that the monetary sanctions should nevertheless be reduced on the basis of a principle of proportionality putatively borrowed from fee-shifting cases in the civil rights context.

13ePRO first argues that Klipsch should not be completely compensated for its efforts because it did not achieve complete success on its motion. The district court did, however, grant Klipsch substantial relief: it upheld Klipsch's contention that ePRO willfully failed to fulfill its discovery obligations after several court warnings, and it determined that ePRO's spoliation of its Unstructured ESI was sufficiently serious to warrant adverse jury instructions. *See Metrokane, Inc. v. Built NY, Inc.*, No. 06 CIV. 14447(LAK)(MHD), 2009 WL 637111, at *4 n.3 (S.D.N.Y. Mar. 6, 2009) (determining a discovery sanctions motion to be substantially successful where “the court upheld the movant's contention that Metrokane had failed to fulfill its discovery obligations in the very manner suggested by Built N.Y. and awarded a full range of appropriate relief”). That the district court chose not to view Klipsch's failure to demonstrate willful spoliation of Structured ESI as a lack of success sufficient to justify a proportional reduction of the monetary sanctions was a decision soundly within its discretion.

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ePRO also takes various tacks to assert that the sanction should be reduced in light of the small amount of money likely at issue on the merits. But it has not identified any authority limiting a district court's discretion to award a compensatory discovery sanction on the basis of the ultimate damages award. Instead, because discovery sanctions are typically decided independently from the ultimate outcome of the case, it appears that courts routinely award such sanctions without any discussion of the ultimate merits recovery. *See, e.g.*, *634 *E. I. DuPont de Nemours & Co. v. Kolon Indus., Inc.*, No. 3:09-CV-058, 2013 WL 458532, at *3 & n.2 (E.D. Va. Feb. 6, 2013) (observing that there was no need to consider the amount in controversy as a factor in setting a proper discovery sanction); *Qualcomm Inc. v. Broadcom Corp.*, No. 05-CV-1958-B (BLM), 2008 WL 66932, at *17 (S.D. Cal. Jan. 7, 2008), vacated in part on other grounds, No. 05-CV-1958-RMB (BLM), 2008 WL 638108 (S.D. Cal. Mar. 5, 2008) (making no reference to the ultimate recovery in the case). And in the present circumstance, the discovery motion at issue was decided before the case has concluded; accordingly, tethering monetary sanctions to the ultimate amount in controversy would restrict the court's discretion to a number that remains speculative and indeterminate.

It is hardly clear, in any event, that the civil rights cases provide an appropriate analogy for discovery sanctions.[8] Congress has provided for fee-shifting in that context in order to provide an incentive to qualified counsel to undertake representation of impecunious plaintiffs with meritorious cases. *See Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 552, 130 S.Ct. 1662, 176 L.Ed.2d 494 (2010). But that provision was also intended to avoid "windfalls to attorneys" that would result from granting them fees no sane, paying client would expend in pursuit of the same relief. *Id.* Accordingly, courts have sometimes held that claims seeking large fees for minuscule success should be reduced or denied. *See, e.g.*, *Farrar v. Hobby*, 506 U.S. 103, 115, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992) (observing that a nominal damages award usually will not support any accompanying attorney's fee award); *Husain v. Springer*, 579 Fed.Appx. 3, 5 (2d Cir. 2014) (reducing fee award in light of the plaintiffs' limited success and recovery).

Discovery sanctions are different. As we have emphasized above, a party that disregards its obligations may create a reasonable suspicion that further investigation is warranted, and thereby imposes costs on its adversary that would never have been incurred had the party complied with its obligations in the first instance. In that situation, the offended adversary's counsel is not being rewarded for its success in the litigation; rather, the adversary is simply being compensated for costs it should not have had to bear.

Moreover, to whatever extent that civil rights fee-shifting cases might provide a useful comparison, they do not provide unequivocal support for ePRO's proportionality arguments. Because success in some meritorious civil rights cases will reasonably require attorney's fees in excess of the plaintiff's ultimate recovery, we have stated in that context that "[a] presumptively correct 'lodestar' figure should not be reduced simply because a plaintiff recovered a low damage award." *Cowan v. Prudential Ins. Co. of Am.*, 935 F.2d 522, 526 (2d Cir. 1991). And we have recognized that the conduct of the opposing party *635 commonly justifies the award of such "disproportionate" fees. In *Kassim v. City of Schenectady*, 415 F.3d 246 (2d Cir. 2005), we explained:

[I]n litigating a matter, an attorney is in part reacting to forces beyond the attorney's control, particularly the conduct of opposing counsel and of the court. If the attorney is compelled to defend against frivolous motions and to make motions to compel compliance with routine discovery demands, or to respond to unreasonable demands of the court for briefing or for wasteful, time-consuming court appearances, the hours required to litigate even a simple matter can expand enormously. It is therefore difficult to generalize about the appropriate size of the fee in relation to the amount in controversy.

Id. at 252; *see also* *Serin v. N. Leasing Sys., Inc.*, 501 Fed.Appx. 39, 41 (2d Cir. 2012) (same).

In sum, we see nothing in ePRO's proportionality arguments compelling us to conclude that the district court abused its discretion by awarding full compensation for efforts that were *ex ante* a reasonable response to ePRO's own evasive conduct.[9] The proportionality that matters here is that the amount of the sanctions was plainly proportionate—indeed, it was exactly equivalent—to the costs ePRO inflicted on Klipsch in its reasonable efforts to remedy ePRO's misconduct.

III. Amount of Asset Restraints

14The district court concluded that ePRO, a foreign company with few ties to the United States, had shown itself to be a dissipation risk by repeatedly failing to comply with court orders or its own attorneys' instructions. It therefore imposed two mechanisms to ensure Klipsch's full recovery: first, it restrained $2.7 million of ePRO's assets to cover the amount of the monetary sanctions; and second, it required ePRO to post a bond for $2.3 million, a sum representing what the court deemed to be Klipsch's likely recovery on the merits as well as its remaining attorney's fees, which would be recoverable under the Lanham Act. At ePRO's request, however, it permitted ePRO to hold the full $5 million in either an asset restraint, a bond, or some combination thereof.

ePRO now contends that the district court's rulings are contradictory because the court determined that the infringing sales were unlikely to exceed $8,000, but nevertheless imposed a $5 million asset restraint. That argument simply ignores the district court's explanation that the total sum is intended to cover the monetary sanctions and remaining attorney's fees in the case in addition to the merits award, and, as the court pointed out, there is ample precedent for requiring the posting of a bond in these circumstances. *See* *Johnson v. Kassovitz*, No. 97 CIV. 5789 DLC, 1998 WL 655534, at *1 (S.D.N.Y. Sept. 24, 1998) (in the context of the Lanham Act, observing that security of attorney's fees may be included in a bond for costs under S.D.N.Y. Local Rule 54.2) (collecting cases).

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* * *
Nothing that we say in this opinion should be taken as condoning excessive and disproportionate discovery demands, countenancing the tactical use of discovery sanction motions to inflict gratuitous costs on adversaries, or derogating from the responsibility *636 of district courts to ensure that litigation proceeds in a responsible and cost-efficient manner. *See* Fed. R. Civ. P. 1 (directing that the Rules of Civil Procedure "should be construed, administered, and employed by the court and the parties to secure the just, speedy, and *inexpensive* determination of every action") (emphasis added); Fed. R. Civ. P. 26(b)(1) (scope of discovery should be "proportional to the needs of the case, considering [*inter alia*] the amount in controversy"). If it turns out, as the district court has estimated, that the amount of actual damages in this case is modest in relation to the costs spent on the litigation, that would be a highly regrettable outcome.
But the question before the district court, and before us, is which party should be held responsible for those costs. ePRO does not ever contend that Klipsch's initial discovery demands were unreasonable or disproportionate to the merits of the case. Nor does it seriously argue that the magistrate judge erred in allowing Klipsch to take the steps it took to remedy ePRO's refusal to comply with those demands. The district court reasonably concluded, after a full and fair hearing, that it was ePRO's noncompliance with its legal obligations that occasioned the excessive costs in this case, and we find no reason why ePRO should not therefore be required to pay them.
CONCLUSION
We have considered ePRO's remaining arguments and found them unpersuasive. For the reasons stated above, the judgment of the district court is AFFIRMED.

Supplemental Case Printout for: *Business Web Log*

845 F.3d 1279
United States Court of Appeals, Ninth Circuit.

Daniel NORCIA, on his own behalf and on behalf of all others similarly situated, Plaintiff–Appellee,
v.
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a New York Corporation; Samsung Electronics America, Inc., a New Jersey corporation, Defendants–Appellants.

No. 14–16994
Argued and Submitted October 17, 2016 San Francisco, California
Filed January 19, 2017

OPINION
IKUTA, Circuit Judge:
Daniel Norcia filed a class action complaint against Samsung Telecommunications America, LLC, and Samsung Electronics America, Inc., (collectively, "Samsung"), alleging that Samsung made misrepresentations as to the performance of the Galaxy S4 phone. Samsung moved to compel arbitration of the dispute on the ground that an arbitration provision, which was contained in a warranty brochure included in the Galaxy S4 box, was binding on Norcia. We affirm the district court's denial of Samsung's motion.
*1282 I
On May 23, 2013, Norcia entered a Verizon Wireless store in San Francisco, California, to purchase a Samsung Galaxy S4 phone. Norcia paid for the phone at the register, and a Verizon Wireless employee provided a receipt entitled "Customer Agreement" followed by the name and address of the Verizon Wireless store. The receipt stated the order location, Norcia's mobile number, the

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product identification number, and the contract end date. Under the heading "Items," the receipt stated "WAR6002 1 YR. MFG. WARRANTY." Under the heading "Agreement," the receipt included three provisions, including a statement (in all capital letters):

I agree to the current Verizon Wireless Customer Agreement, including the calling plan, (with extended limited warranty/service contract, if applicable), and other terms and conditions for services and selected features I have agreed to purchase as reflected on the receipt, and which have been presented to me by the sales representative and which I had the opportunity to review.

The receipt also stated (in all capital letters): "I understand that I am agreeing to ... settlement of disputes by arbitration and other means instead of jury trials, and other important terms in the Customer Agreement." The Customer Agreement did not reference Samsung or any other party. Norcia signed the Customer Agreement, and Verizon Wireless emailed him a copy.

After signing the Customer Agreement, Norcia and a Verizon Wireless employee took the Galaxy S4 phone, still in its sealed Samsung box, to a table. The front of the product box stated "Samsung Galaxy S4." The back of the box stated: "Package Contains ... Product Safety & Warranty Brochure." The Verizon Wireless employee opened the box, unpacked the phone and materials, and helped Norcia transfer his contacts from his old phone to the new phone. Norcia took the phone, the phone charger, and the headphones with him as he left the store, but he declined the offer by the Verizon Wireless employee to take the box and the rest of its contents.

The Samsung Galaxy S4 box contained, among other things, a "Product Safety & Warranty Information" brochure. The 101–page brochure consisted of two sections. Section 1 contained a wide range of health and safety information, while Section 2 contained Samsung's "Standard Limited Warranty" and "End User License Agreement for Software." The Standard Limited Warranty section explained the scope of Samsung's express warranty. In addition to explaining Samsung's obligations, the procedure for obtaining warranty service, and the limits of Samsung's liability, the warranty section included the following (in all capital letters):

All disputes with Samsung arising in any way from this limited warranty or the sale, condition or performance of the products shall be resolved exclusively through final and binding arbitration, and not by a court or jury.

Later in the section, a paragraph explained the procedures for arbitration and stated that purchasers could opt out of the arbitration agreement by providing notice to Samsung within 30 calendar days of purchase, either through email or by calling a toll-free telephone number. It also stated that opting out "will not affect the coverage of the Limited Warranty in any way, and you will continue to enjoy the benefits of the Limited Warranty." Norcia did not take any steps to opt out.

In February 2014, Norcia filed a class action complaint against Samsung, alleging that Samsung misrepresented the Galaxy S4's storage capacity and rigged the phone to operate at a higher speed when it was *1283 being tested. The complaint alleged that these deceptive acts constituted common law fraud and violated California's Consumers Legal Remedies Act (Cal. Civ. Code §§ 1750–1784), California's Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200–17210), and California's False Advertising Law (Cal. Bus. & Prof. Code §§ 17500–17509). The complaint sought certification of the case as a class action for all purchasers of the Galaxy S4 phone in California. Norcia did not bring any claims for breach of warranty.

Instead of filing an answer to the complaint, Samsung moved to compel arbitration by invoking the arbitration provision in the Product Safety & Warranty Information brochure. The district court denied Samsung's motion. It held that even though Norcia should be deemed to have received the Galaxy S4 box, including the Product Safety & Warranty Information brochure, the receipt of the brochure did not form an agreement to arbitrate non-warranty claims. Samsung timely appealed the district court's order.

12The district court had jurisdiction under 28 U.S.C. § 1332(d)(2), because the parties satisfied minimal diversity and the amount in controversy exceeded $5 million. We have jurisdiction under the Federal Arbitration Act, 9 U.S.C. § 16. "We review the district court's decision to deny the motion to compel arbitration de novo." *Davis v. Nordstrom, Inc.*, 755 F.3d 1089, 1091 (9th Cir. 2014). "Factual findings are reviewed for clear error, but where no facts are in dispute our entire review is de novo." *Id.* (internal citation omitted).

II

3"[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)). Therefore, to evaluate the district court's denial of Samsung's motion to compel arbitration, we must first determine "whether a valid agreement to arbitrate exists." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000); *see also Kilgore v. KeyBank, Nat'l Ass'n*, 718 F.3d 1052, 1058 (9th Cir. 2013) (en banc). As the party seeking to compel arbitration, Samsung bears "the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014) (citing *Rosenthal v. Great W. Fin. Sec. Corp.*, 14 Cal.4th 394, 413, 58 Cal.Rptr.2d 875, 926 P.2d 1061 (1996)).

Samsung raises two theories of contract formation to support its argument that Norcia entered into a binding contract with Samsung to arbitrate his claims. First, Samsung claims that the inclusion of the arbitration provision in the Product Safety & Warranty Information brochure created a valid contract between Samsung and Norcia to arbitrate all claims related to the Galaxy

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S4 phone. Second, Samsung contends that the Customer Agreement signed by Norcia incorporated the terms of its Product Safety & Warranty Information brochure by reference and created a binding contract between Norcia and Samsung.

45In analyzing these arguments, we "apply ordinary state-law principles that govern the formation of contracts" to decide whether an agreement to arbitrate exists. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995). Here, the parties *1284 agree that California law governs the issue of contract formation. In discerning California law, we are bound by the decisions of the California Supreme Court, "including reasoned dicta." *Muniz v. United Parcel Serv., Inc.*, 738 F.3d 214, 219 (9th Cir. 2013). If the California Supreme Court has not directly addressed the question before us, we must predict how it would decide the issue. *See Glendale Assocs., Ltd. v. NLRB*, 347 F.3d 1145, 1154 (9th Cir. 2003) (internal quotation marks omitted). We generally will "follow a published intermediate state court decision regarding California law unless we are convinced that the California Supreme Court would reject it." *Muniz*, 738 F.3d at 219. Applying California law, we address each of Samsung's theories in turn.

A

6We first evaluate whether the Product Safety & Warranty Information brochure in the Galaxy S4 box created a binding contract between Norcia and Samsung to arbitrate the claims in Norcia's complaint. Although the brochure is in the form of an express consumer warranty from Samsung to Norcia, the arbitration provision states that arbitration is required not only for "[a]ll disputes with Samsung arising in any way from this limited warranty" but also for all disputes arising from "the sale, condition or performance of the products." Norcia's complaint involves a non-warranty dispute. Thus, our analysis is governed by contract law—not warranty law.

78We begin with the basic principles of California contract law. Generally, under California law, "the essential elements for a contract are (1) '[p]arties capable of contracting;' (2) '[t]heir consent;' (3) '[a] lawful object;' and (4) '[s]ufficient cause or consideration.' " *United States ex rel. Oliver v. Parsons Co.*, 195 F.3d 457, 462 (9th Cir. 1999) (alterations in original) (quoting Cal. Civ. Code § 1550). A party who is bound by a contract is bound by all its terms, whether or not the party was aware of them. "A party cannot avoid the terms of a contract on the ground that he or she failed to read it before signing." *Marin Storage & Trucking, Inc. v. Benco Contracting & Eng'g, Inc.*, 89 Cal.App.4th 1042, 1049, 107 Cal.Rptr.2d 645 (2001).

9"A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." Cal. Com. Code § 2204(1). "Courts must determine whether the outward manifestations of consent would lead a reasonable person to believe the offeree has assented to the agreement." *Knutson*, 771 F.3d at 565 (citing *Meyer v. Benko*, 55 Cal.App.3d 937, 942–43, 127 Cal.Rptr. 846 (1976)).

10As a general rule, "silence or inaction does not constitute acceptance of an offer." *Golden Eagle Ins. Co. v. Foremost Ins. Co.*, 20 Cal.App.4th 1372, 1385, 25 Cal.Rptr.2d 242 (1993); *see also Sorg v. Fred Weisz & Assocs.*, 14 Cal.App.3d 78, 81, 91 Cal.Rptr. 918 (1970). California courts have long held that "[a]n offer made to another, either orally or in writing, cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent, for the offerer cannot prescribe conditions of rejection so as to turn silence on the part of the offeree into acceptance." *Leslie v. Brown Bros. Inc.*, 208 Cal. 606, 621, 283 P. 936 (1929); *see also* 1 Witkin, Summary of California Law, Contracts § 193 (10th ed. 2005) (collecting California cases).

11There are exceptions to this rule, however. An offeree's silence may be deemed to be consent to a contract when *1285 the offeree has a duty to respond to an offer and fails to act in the face of this duty. *Golden Eagle*, 20 Cal.App.4th at 1386, 25 Cal.Rptr.2d 242; *see also Beatty Safway Scaffold, Inc. v. Skrable*, 180 Cal.App.2d 650, 655, 4 Cal.Rptr. 543 (1960). For example, in *Gentry v. Superior Court*, an employee signed an "easily readable, one-page form" acknowledging that he would be required to arbitrate all employment-related legal disputes unless he opted out. 42 Cal.4th 443, 468, 64 Cal.Rptr.3d 773, 165 P.3d 556 (2007), *abrogated on other grounds by AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742 (2011). By signing this agreement, the employee "manifested his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." *Id.* Therefore, the California Supreme Court held that the employee's failure to act constituted acceptance of the agreement. *Id.*

12An offeree's silence may also be treated as consent to a contract when the party retains the benefit offered. *See Golden Eagle*, 20 Cal.App.4th at 1386, 25 Cal.Rptr.2d 242; *see also* Cal. Civ. Code § 1589 ("A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."). In *Golden Eagle*, a couple received a renewal certificate from their insurance company, and retained the benefit of the renewed insurance policy without paying the premium. 20 Cal.App.4th at 1386, 25 Cal.Rptr.2d 242. The court held that in light of the existing relationship between the couple and the insurance company, the couple's retention of the renewal certification was "sufficient evidence of acceptance of the renewal policy" under California law. *Id.* at 1386–87, 25 Cal.Rptr.2d 242. Even if there is an applicable exception to the general rule that silence does not constitute acceptance, courts have rejected the argument that an offeree's silence constitutes consent to a contract when the offeree reasonably did not know that an offer had been made. *See Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal.App.3d 987, 993, 101 Cal.Rptr. 347 (1972). In *Windsor Mills*,

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a buyer ordered yarn from a supplier, and the supplier acknowledged the order on a printed form which stated "in small print" on the reverse side of the form, "15. Arbitration: Any controversy arising out of or relating to this contract shall be settled by arbitration in the City of New York...." *Id.* at 989–90, 101 Cal.Rptr. 347. The court concluded that the buyer was not bound by this provision because "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Id.* at 993, 101 Cal.Rptr. 347; *see also* *Marin Storage*, 89 Cal.App.4th at 1049–50, 107 Cal.Rptr.2d 645 (noting that a party is not bound by a document that "does not appear to be a contract and the terms are not called to the attention of the recipient").

13We now apply these principles of California law to determine whether Norcia engaged in any conduct sufficient to show that he agreed to be bound by the arbitration agreement in the Product Safety & Warranty Information brochure. There is no dispute that Norcia did not expressly assent to any agreement in the brochure. Nor did Norcia sign the brochure or otherwise act in a manner that would show "his intent to use his silence, or failure to opt out, as a means of accepting the arbitration agreement." *Gentry*, 42 Cal.4th at 468, 64 Cal.Rptr.3d 773, 165 P.3d 556. Under California law, an offeree's *1286 inaction after receipt of an offer is generally insufficient to form a contract. *Leslie*, 208 Cal. at 621, 283 P. 936. Therefore, Samsung's offer to arbitrate all disputes with Norcia "cannot be turned into an agreement because the person to whom it is made or sent makes no reply, even though the offer states that silence will be taken as consent," *id.* unless an exception to this general rule applies.

Samsung fails to demonstrate the applicability of any exception to the general California rule that an offeree's silence does not constitute consent. Samsung has not pointed to any principle of California law that imposed a duty on Norcia to act in response to receiving the Product Safety & Warranty Information brochure. *Gentry*, 42 Cal.4th at 468, 64 Cal.Rptr.3d 773, 165 P.3d 556. Nor was there any previous course of dealing between the parties that might impose a duty on Norcia to act. *See* *Beatty Safway Scaffold*, 180 Cal.App.2d at 655, 4 Cal.Rptr. 543. Moreover, Samsung has not alleged that Norcia retained any benefit by failing to act. *See* Cal. Civ. Code § 1589. Indeed, the brochure states that Norcia was entitled to "the benefits of the Limited Warranty" regardless whether Norcia opted out of the arbitration agreement.

In the absence of an applicable exception, California's general rule for contract formation applies. Because Norcia did not give any "outward manifestations of consent [that] would lead a reasonable person to believe the offeree has assented to the agreement," *Knutson*, 771 F.3d at 565, no contract was formed between Norcia and Samsung, and Norcia is not bound by the arbitration provision contained in the brochure.

To counter this conclusion, Samsung argues that Norcia was bound by the terms set forth in the brochure because the brochure is analogous to a shrink-wrap license, which we held was enforceable in California, *see* *Wall Data Inc. v. L.A. Cty. Sheriff's Dep't*, 447 F.3d 769, 782 (9th Cir. 2006), or is analogous to terms included in a box sent to the consumer (referred to here as an "in-the-box" contract), which the Seventh Circuit has held to be enforceable, *see* *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148 (7th Cir. 1997). We consider each of these arguments in turn.

In *Wall Data*, we considered a software manufacturer's claim that a sheriff's department had violated the terms of its shrink-wrap license, click-through license, and volume license booklets, and infringed the manufacturer's copyright, by installing software on 6,007 computers when the department was licensed to install the software on only 3,663 computers. 447 F.3d at 773–75. We defined a "shrink-wrap license" as "a form on the packing or on the outside of the CD–ROM containing the software which states that by opening the packaging or CD–ROM wrapper, the user agrees to the terms of the license." *Id.* at 775 n.4. In connection with upholding an evidentiary ruling by the district court, we stated that such licenses are enforceable in California, *id.* at 782, citing *Lozano v. AT&T Wireless*, 216 F.Supp.2d 1071, 1073 (C.D. Cal. 2002).[1] We did not address the question whether the license created a contract; rather, we held that the sole issue to be resolved at trial was whether the sheriff's department violated the terms of the *1287 software licenses, and therefore the district court did not err in declining to provide an instruction on contract formation. *Wall Data*, 447 F.3d at 786.

In light of this limited analysis, *Wall Data* at most stands for the proposition that a shrink-wrap license of intellectual property is enforceable in California. This prediction of how California courts would rule is not untenable: Where a notice on a package states that the user agrees to certain terms by opening the package, a court could reasonably conclude, consistent with California contract law, that the user has a duty to act in order to negate the conclusion that the consumer had accepted the terms in the notice. This principle does not help Samsung, however. Even if a license to copy software could be analogized to a brochure that contains contractual terms, the outside of the Galaxy S4 box did not notify the consumer that opening the box would be considered agreement to the terms set forth in the brochure. *Cf.* *id.* at 775 n.4. Under these circumstances, California's general rule that silence or inaction does not constitute acceptance is binding. Accordingly, *Wall Data* does not support Samsung's argument that Norcia was bound by the brochure contained in the Galaxy S4 box.

14We next consider Samsung's argument that the Product Safety & Warranty Information brochure is enforceable as an in-the-box contract, as the Seventh Circuit held in *Hill*, 105 F.3d 1147. In *Hill*, consumers ordered a computer over the phone. *Id.* at 1148. When the box arrived, it contained the computer and "a list of terms, said to govern unless the customer return[ed] the computer within 30 days." *Id.* The terms included an arbitration provision. *Id.* The Seventh Circuit stated that "[p]ractical considerations

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support allowing vendors to enclose the full legal terms with their products," *id.* at 1149, and concluded that "[b]y keeping the computer beyond 30 days, the [buyers] accepted [the seller's] offer, including the arbitration clause," *id.* at 1150.[2]

Samsung claims that California courts have adopted the reasoning expressed in *Hill*, citing *Weinstat v. Dentsply International Inc.*, 180 Cal.App.4th 1213, 103 Cal.Rptr.3d 614 (2010). In *Weinstat*, dentists brought an action for breach of express warranty (among other claims) against the manufacturer of a tooth-cleaning device. 180 Cal.App.4th at 1217–18, 103 Cal.Rptr.3d 614. The warranties at issue were contained in an instruction booklet sealed in the box containing the device. *Id.* at 1228, 103 Cal.Rptr.3d 614. The manufacturer argued that such statements were not express warranties because the dentists were not aware of them before they bought the product. *Id.* The court rejected that argument, holding that absent proof to the contrary, any affirmation made by the manufacturer before the delivery of the product to a consumer, including statements contained in the product box, constituted an express warranty. *Id.* at 1229, 103 Cal.Rptr.3d 614. Although section 2313 of the California Commercial Code provides that express warranties are comprised of affirmations by the manufacturer that become "part of the basis of the bargain," the court stated that the parties' bargain "is distinguishable from the 'contract' " so a manufacturer's affirmations could become "part of the basis of the bargain" for purposes of warranty law even after a contract was formed. *Id.* at 1230, 103 Cal.Rptr.3d 614. Therefore, the dentists could state a cause of action for breach of the *1288 express warranties contained in the instruction booklet. *Id.*

Samsung argues that *Weinstat*, read in light of *Hill*, stands for the proposition that terms and conditions included in a brochure in a product box constitute a binding contract between the manufacturer and the consumer. Therefore, Samsung claims, Norcia accepted Samsung's offer contained in the Product Safety & Warranty Information brochure, including the arbitration clause, which became a binding agreement between Norcia and Samsung.

15161718We disagree. Samsung's reliance on *Weinstat* is misplaced, because it is based on a misunderstanding of the difference between California warranty law and contract law, which are governed by different sets of rules. *Compare* Cal. Com. Code §§ 2201–2210 (governing contract formation), *with* Cal. Com. Code §§ 2313–2317 *and* Cal. Civ. Code §§ 1790–1795.8 (governing the formation of express and implied warranties). A seller is bound by any express warranties given to the buyer, including statements in written warranty agreements, advertisements, oral representations, or presentations of samples or models. *See Keith v. Buchanan*, 173 Cal.App.3d 13, 20, 220 Cal.Rptr. 392 (1985); *see also* 4 Witkin, Summary of California Law, Sales §§ 56–62 (10th ed. 2005). Language in a written warranty agreement is "contractual" in the sense that it creates binding, legal obligations on the seller, *see Daugherty v. Am. Honda Motor Co.*, 144 Cal.App.4th 824, 830, 51 Cal.Rptr.3d 118 (2006), but a warranty does not impose binding obligations on the buyer. Rather, warranty law "focuses on *the seller's* behavior and obligation—his or her affirmations, promises, and descriptions of the goods—all of which help define what the seller in essence agreed to sell." *Weinstat*, 180 Cal.App.4th at 1228, 103 Cal.Rptr.3d 614 (internal quotation marks omitted); *see also* Cal. Com. Code § 2313. A buyer may have to fulfill certain statutory conditions to obtain the benefit of a warranty. *See, e.g.*, Cal. Civ. Code § 1793.02(c) (stating that "[i]f the buyer returns the [assistive device for an individual with a disability] *within the period specified in the written warranty*," the seller must adjust or replace the device (emphasis added)). But a warranty generally does not impose any independent obligation on the buyer outside of the context of enforcing the seller's promises. *Weinstat*, 180 Cal.App.4th at 1228, 103 Cal.Rptr.3d 614 ("[T]he whole purpose of warranty law is to determine what it is that the seller has in essence agreed to sell...." (internal quotation marks omitted)); Cal. Com. Code § 2313(1)(a) (stating that an express warranty is a "promise made by the seller to the buyer which relates to the goods"). A condition that must be satisfied before a consumer can enforce a warranty is not equivalent to a freestanding obligation that limits a buyer's rights outside of the scope of warranty itself.

Weinstat focused on warranty formation under section 2313 of the California Commercial Code, not on contract formation. Accordingly, *Weinstat* did not adopt the rule stated in *Hill*, that statements in a brochure enclosed in a product box create a contract between the seller and consumer that can limit the consumer's rights to bring legal actions against the manufacturer for claims not involving an express warranty.[3]

*1289 Samsung also relies on a Second Circuit case, *Schnabel v. Trilegiant Corp.*, 697 F.3d 110 (2d Cir. 2012), to support its argument that California courts have adopted the reasoning in *Hill* for enforcing in-the-box contracts. In *Schnabel*, the Second Circuit considered a complaint involving defendants who encouraged website visitors to enroll for a free trial period of an entertainment service, and then continued to bill those customers each month if they failed to cancel the service. 697 F.3d at 114–17. The defendants moved to compel arbitration of the complaint. *Id.* at 117. They argued that they had presented an arbitration provision to the customers through a hyperlink on their website, as well as by sending the customers a follow-up email. *Id.* at 113. By failing to cancel the service, the defendants argued, the customers had agreed to be bound by the arbitration provision. *Id.* at 121. In responding to this argument, *Schnabel* noted that some recent cases had held that licenses included in a product box may "become enforceable contracts upon the customer's purchase and receipt of the package and the failure to return the product after reading, or at least having a realistic opportunity to read, the terms and conditions of the contract included with the product." *Id.* at 122 (citing *Hill*, 105 F.3d at 1150). But even cases applying these principles, *Schnabel* noted, "do not nullify the requirement that a consumer be on notice of the existence of a term before he or she can be legally held to have assented to it." *Id.* at 124. Because

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the information provided to the customers did not give them inquiry notice of the arbitration provision included in the email, *Schnabel* rejected the defendants' arguments as a matter of both California and Connecticut contract law (without resolving the dispute as to which state's law was applicable). *Id.* at 128.

We used similar reasoning in *Knutson*. *See* 771 F.3d at 566–67. This case raised the question whether a plaintiff who bought a Toyota vehicle that included a 90–day trial subscription to a satellite radio service was bound by a customer agreement in a "Welcome Kit" that he received a month later from the radio service. *Id.* at 561–62. Applying California law, we held that the plaintiff was not bound because a reasonable person in the plaintiff's position would not understand that receiving the Welcome Kit and failing to cancel the trial subscription to the radio service constituted assent to the arbitration provision. *Id.* at 565. We rejected the defendant's argument that its customer agreement was a valid shrink-wrap agreement, holding that while "a party cannot avoid the terms of a contract by failing to read them before signing," *id.* at 567, no contract is formed "when the writing does not appear to be a contract and the terms are not called to the attention of the recipient," *id.* (quoting *Marin Storage*, 89 Cal.App.4th at 1049–50, 107 Cal.Rptr.2d 645).

Neither *Schnabel* nor *Knutson* held that California courts enforce in-the-box contracts. Rather, they concluded that even if a customer may be bound by an in-the-box contract under certain circumstances, such a contract is ineffective where the customer does not receive adequate notice of its existence. Even under this analytic approach, Samsung's arguments would fail. In this case, Samsung gave a brochure entitled "Product Safety & Warranty Information." Such a brochure indicates that it contains safety information and the seller's warranty, which constitutes the seller's "affirmation of fact[s] or promise" relating to the Galaxy S4 phone. Cal. Com. Code § 2313(1)(a). A reasonable person in Norcia's position would not be on notice that the brochure contained a freestanding obligation outside the scope of the warranty. *1290 Nor would a reasonable person understand that receiving the seller's warranty and failing to opt out of an arbitration provision contained within the warranty constituted assent to a provision requiring arbitration of all claims against the seller, including claims not involving the warranty. Because "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious," *Windsor Mills, Inc.*, 25 Cal.App.3d at 993, 101 Cal.Rptr. 347, Norcia was not bound by the arbitration provision even if the in-the-box contract were otherwise enforceable under California law.[4]

In the absence of support from California courts, Samsung urges us to conclude, as the Seventh Circuit did in *Hill*, that the practicalities of consumer transactions require the enforcement of in-the-box contracts and that consumers expect that products will come with additional terms. We decline this request. Even if we were persuaded by Samsung's argument, "the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state." *Green v. Ralee Eng'g Co.*, 19 Cal.4th 66, 71, 78 Cal.Rptr.2d 16, 960 P.2d 1046 (1998). If the California Legislature believes that its current commercial code fails to strike an appropriate balance between consumer expectations and the burden on commerce, it can amend the law.

Because California courts have not adopted the principle set forth in *Hill*, but have made clear that silence alone does not constitute assent, *see* *Golden Eagle*, 20 Cal.App.4th at 1385, 25 Cal.Rptr.2d 242, we reject Samsung's argument that Norcia reasonably assented to the arbitration provision because he failed to opt out of the arbitration provision contained in the product box. Under the circumstances in this case, we conclude that Samsung's inclusion of a brochure in the Galaxy S4 box, and Norcia's failure to opt out, does not make the arbitration provision enforceable against Norcia.

B

19We next turn to Samsung's second argument, that Norcia agreed to arbitrate his claims by signing the Customer Agreement with Verizon Wireless. This argument is meritless.

The Customer Agreement is an agreement between Verizon Wireless and its customer. Samsung is not a signatory. While the agreement itself includes a number of terms governing the relationship between Norcia and Verizon Wireless, including an arbitration provision, nothing in the agreement references Samsung or any other party.

20Samsung argues that it may enforce the arbitration agreement because it is a third-party beneficiary of the agreement between Verizon Wireless and Norcia. Under California law, "[t]he mere fact that a contract results in benefits to a third party does not render that party a 'third party beneficiary' "; rather, the parties to the contract must have intended the third party to benefit. *1291 *Matthau v. Superior Court*, 151 Cal.App.4th 593, 602, 60 Cal.Rptr.3d 93 (2007); *see also* *Hess v. Ford Motor Co.*, 27 Cal.4th 516, 524, 117 Cal.Rptr.2d 220, 41 P.3d 46 (2002); 1 Witkin, Summary of California Law, Contracts § 689 (10th ed. 2005). In this case, Samsung does not point to any evidence in the record indicating that Norcia and Verizon Wireless intended the Customer Agreement to benefit Samsung. Therefore, we conclude that Samsung fails to bear its burden of establishing that it was a third-party beneficiary.

III

21The Federal Arbitration Act "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006). But the "liberal federal policy regarding the scope of arbitrable issues is inapposite" when the question is "whether a particular party is bound by the arbitration agreement." *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006) (emphasis omitted); *see also* *Volt Info. Scis., Inc. v. Bd. of Trs. of the Leland Stanford Jr. Univ.*,

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489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so...."). Because Samsung failed to carry its burden of proving the existence of a contract with Norcia to arbitrate as a matter of California law, the district court did not err in denying Samsung's motion to compel arbitration.
AFFIRMED.

Supplemental Case Printout for: *Landmark in the Law*

1 Cranch 137, 5 U.S. 137, 1803 WL 893 (U.S.Dist.Col.), 2 L.Ed. 60
Supreme Court of the United States

William MARBURY
v.
James MADISON, Secretary of State of the United States.

Feb. 1803.
MARSHALL.
****1 *138** The supreme court of the U. States has not power to issue a mandamus to a secretary of state of the U. States, it being an exercise of *original* jurisdiction not warranted by the constitution. Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution. An act of congress repugnant to the constitution cannot become a law. The courts of the U. States are bound to take notice of the constitution. A commission is not necessary to the appointment of an officer by the executive-Semb. A commission is only *evidence* of an appointment.
Delivery is not necessary to the validity of letters patent. The President cannot authorize a secretary of state to omit the performance***139** of those duties which are enjoined by law.
A justice of peace in the district of Columbia is not removable at the will of the President. When a commission for an officer not holding his office at the will of the President, is by him signed and transmitted to the secretary of state to be sealed and recorded, it is irrevocable; the appointment is complete. A mandamus is the proper remedy to compel a secretary of state to deliver a commission to which the party is entitled.
***137** At the last term, viz. December term, 1801, William Marbury, Dennis Ramsay, Robert Townsend Hooe, and William Harper, by their counsel, Charles Lee, esq. late attorney general of the United States, severally moved the court for a rule to James Madison, secretary of state of the United States, to shew cause why a mandamus should not issue commanding him to cause to be delivered to them respectively their several commissions as justices of the peace in the district of Columbia. This motion was supported by affidavits of the following facts; that notice of this motion had been given to Mr. Madison; that Mr. Adams, the late president of the United States, nominated the applicants to the senate for their advice and consent to be appointed justices of the peace of the district of Columbia; that the senate advised and consented to the appointments; that commissions in due form were signed by the said president appointing them justices, &c. and that the seal of the United States was in due form affixed to the said commissions by the secretary of state; that the applicants have requested Mr. Madison to deliver them their said commissions, who has not complied with that request; and that their said commissions are withheld from them; that the applicants have made application to Mr. Madison as secretary of state of the United States at his office, for information whether the commissions were signed and sealed as aforesaid; that explicit and satisfactory information has not been given in answer to that inquiry, either by the secretary of state or any officer in the department of state; that application has been made to the secretary of the Senate for a certificate of the nomination of the applicants, and of the advice and consent of the senate, who has declined giving such a certificate; whereupon a rule was laid to shew cause on the 4th day of this term. This rule having been duly served,
Mr. Lee, in support of the rule, observed that it was important to know on what ground a justice of peace in the district of Columbia holds his office, and what proceedings are necessary to constitute an appointment to an office not held at the will of the president. However notorious the facts are, upon the suggestion of which this rule has been laid, yet the applicants have been much

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embarrassed in obtaining evidence of them. Reasonable information has been denied at the office of the department of state. Although a respectful memorial has been made to the senate praying them to suffer their secretary to give extracts from their executive journals respecting the nomination of the applicants to the senate, and of their advice and consent to the appointments, yet their request has been denied, and their petition rejected. They have therefore been compelled to summon witnesses to attend in court, whose voluntary affidavits they could not obtain. Mr. Lee here read the affidavit of Dennis Ramsay, and the printed journals of the senate of 31 January, 1803, respecting the refusal of the senate to suffer their secretary to give the information requested. He then called Jacob Wagner and Daniel Brent, who had been summoned to attend the court, and who had, as it is understood, declined giving a voluntary affidavit. They objected to being sworn, alleging that they were clerks in the department of state and not bound to disclose any facts relating to the business or transactions in the office.

****2** Mr. Lee observed, that to shew the propriety of examining these witnesses, he would make a few remarks on the nature of the office of secretary of state. His duties are of two kinds, and he exercises his functions in two distinct capacities; as a public ministerial officer of the United States, and as agent of the President. In the first his duty is to the United States or its citizens; in the other his duty is to the President; in the one he is an independent, and an accountable officer; in the other he is dependent upon the President, is his agent, and accountable to him alone. In the former capacity he is compellable by mandamus to do his duty; in the latter he is not. This distinction is clearly pointed out by the two acts of congress upon this subject. The first was passed 27th July, 1789, vol. 1. p. 359, entitled "an act for establishing an executive department, to be denominated the department of foreign affairs."The first section ascertains the duties of the secretary so far as he is considered as a mere executive agent. It is in these words, "Be it enacted, &c. that there shall be an executive department, to be denominated the department of foreign affairs, and that there shall be a principal officer therein, to be called the secretary of the department of foreign affairs, who shall perform and execute such duties as shall from time to time be enjoined on, or intrusted to him by the President of the United States, agreeable to the constitution, relative to correspondencies, commissions***140** or instructions to or with public ministers or consuls from the United States; or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers, or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the said department; and furthermore, that the said principal officer shall conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct."

The second section provides for the appointment of a chief clerk; the third section prescribes the oath to be taken which is simply, "well and faithfully to execute the trust committed to him;" and the fourth and last section gives him the custody of the books and papers of the department of foreign affairs under the old congress. Respecting the powers given and the duties imposed by this act, no mandamus will lie. The secretary is responsible only to the President. The other act of congress respecting this department was passed at the same session on the 15th September 1789, vol. 1, p. 41, c. 14, and is entitled "An act to provide for the safe keeping of the acts, records, and seal of the United States, and for other purposes."The first section changes the name of the department and of the secretary, calling the one the department and the other the secretary of state. The second section assigns new duties to the secretary, in the performance of which it is evident, from their nature, he cannot be lawfully controlled by the president, and for the non-performance of which he is not more responsible to the president than to any other citizen of the United States. It provides that he shall receive from the president all bills, orders, resolutions and votes of the senate and house of representatives, which shall have been approved and signed by him; and shall cause them to be published, and printed copies to be delivered to the senators and representatives and to the executives of the several states; and makes it his duty carefully to preserve the originals; and to cause them to be recorded in books to be provided for that purpose. The third section provides a seal of the United States. The fourth makes it his duty to keep the said seal, and to make out and record, and to affix the seal of the United States to all civil commissions, after they ***141** shall have been signed by the President. The fifth section provides for a seal of office, and that all copies of records and papers in his office, authenticated under that seal, shall be as good evidence as the originals. The sixth section establishes fees for copies, &c. The seventh and last section gives him the custody of the papers of the office of the secretary of the old congress. Most of the duties assigned by this act are of a public nature, and the secretary is bound to perform them, without the control of any person. The President has no right to prevent him from receiving the bills, orders, resolutions and votes of the legislature, or from publishing and distributing them, or from preserving or recording them. While the secretary remains in office the President cannot take from his custody the seal of the United States, nor prevent him from recording, and affixing the seal to civil commissions of such officers as hold not their offices at the will of the President, after he has signed them and delivered them to the secretary for that purpose. By other laws he is to make out and record in his office patents for useful discoveries, and patents of lands granted under the authority of the United States. In the performance of all these duties he is a public ministerial officer of the United States. And the duties being enjoined upon him by law, he is, in executing them, uncontrollable by the President; and if he neglects or refuses to perform them, he may be compelled by mandamus, in the same manner as other persons holding offices under the authority of the United States. The President is no party to this case. The secretary is called upon to perform a duty over which the President has no control, and in regard to which he has no dispensing power, and for the neglect of which he is in no manner responsible. The secretary alone is the person to whom they are entrusted,

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and he alone is answerable for their due performance. The secretary of state, therefore, being in the same situation, as to these duties, as every other ministerial officer of the United States, and equally liable to be compelled to perform them, is also bound by the same rules of evidence. These duties are not of a confidential nature, but are of a public kind, and his clerks can have no exclusive privileges. There are undoubtedly facts, which may come to their knowledge by means of their connection with the secretary of state, respecting which ***142** they cannot be bound to answer. Such are the facts concerning foreign correspondencies, and confidential communications between the head of the department and the President. This, however, can be no objection to their being sworn, but may be a ground of objection to any particular question. Suppose I claim title to land under a patent from the United States. I demand a copy of it from the secretary of state. He refuses. Surely he may be compelled by mandamus to give it. But in order to obtain a mandamus, I must shew that the patent is recorded in his office. My case would be hard indeed if I could not call upon the clerks in the office to give evidence of that fact. Again, suppose a private act of congress had passed for my benefit. It becomes necessary for me to have the use of that act in a court of law. I apply for a copy. I am refused. Shall I not be permitted, on a motion for a mandamus, to call upon the clerks in the office to prove that such an act is among the rolls of the office, or that it is duly recorded? Surely it cannot be contended that although the laws are to be recorded, yet no access is to be had to the records, and no benefit to result therefrom.

****3** The court ordered the witnesses to be sworn and their answers taken in writing, but informed them that when the questions were asked they might state their objections to answering each particular question, if they had any.

****4** Mr. Wagner being examined upon interrogatories, testified, that at this distance of time he could not recollect whether he had seen any commission in the office, constituting the applicants, or either of them justices of the peace. That Mr. Marbury and Mr. Ramsay called on the secretary of state respecting their commissions. That the secretary referred them to him; he took them into another room and mentioned to them, that two of the commissions had been signed, but the other had not. That he did not know that fact of his own knowledge, but by the information of others. Mr. Wagner declined answering the question “who gave him that information;” and the court decided that he was not bound to answer it, because it was not pertinent to this cause. He further testified that some of the commissions of the justices, but he believed not all, were recorded. He did not know whether the commissions of the applicants were ***143** recorded, as he had not had recourse to the book for more than twelve months past.

Mr. Daniel Brent testified, that he did not remember certainly the names of any of the persons in the commissions of justices of the peace signed by Mr. Adams; but believed, and was almost certain, that Mr. Marbury's and col. Hooe's commissions were made out, and that Mr. Ramsay's was not; that he made out the list of names by which the clerk who filled up the commissions was guided; he believed that the name of Mr. Ramsay was pretermitted by mistake, but to the best of his knowledge it contained the names of the other two; he believed none of the commissions for justices of the peace signed by Mr. Adams, were recorded. After the commissions for justices of the peace were made out, he carried them to Mr. Adams for his signature. After being signed he carried them back to the secretary's office, where the seal of the United States was affixed to them. That commissions are not usually delivered out of the office before they are recorded; but sometimes they are, and a note of them only is taken, and they are recorded afterwards. He believed none of those commissions of justices were ever sent out, or delivered to the persons for whom they were intended; he did not know what became of them, nor did he know that they are now in the office of the secretary of state.

Mr. Lincoln, attorney general, having been summoned, and now called, objected to answering. He requested that the questions might be put in writing, and that he might afterwards have time to determine whether he would answer. On the one hand he respected the jurisdiction of this court, and on the other he felt himself bound to maintain the rights of the executive. He was acting as secretary of state at the time when this transaction happened. He was of opinion, and his opinion was supported by that of others whom he highly respected, that he was not bound, and ought not to answer, as to any facts which came officially to his knowledge while acting as secretary of state.

The questions being written were then read and handed to him. He repeated the ideas he had before suggested, and said his objections were of two kinds.

****5 *144** 1st. He did not think himself bound to disclose his official transactions while acting as secretary of state; and

2d. He ought not to be compelled to answer any thing which might tend to criminate himself.

Mr. Lee, in reply, repeated the substance of the observations he had before made in answer to the objection of Mr. Wagner and Mr. Brent. He stated that the duties of a secretary of state were two-fold. In discharging one part of those duties he acted as a public ministerial officer of the United States, totally independent of the President, and that as to any facts which came officially to his knowledge, while acting in this capacity, he was as much bound to answer as a marshal, a collector, or any other ministerial officer. But that in the discharge of the other part of his duties, he did not act as a public ministerial officer, but in the capacity of an agent of the President, bound to obey his orders, and accountable to him for his conduct. And that as to any facts which came officially to his knowledge in the discharge of this part of his duties, he was not bound to answer. He agreed that Mr. Lincoln was not bound to disclose any thing which might tend to criminate himself.

Mr. Lincoln thought it was going a great way to say that every secretary of state should at all times be liable to be called upon to appear as a witness in a court of justice, and testify to facts which came to his knowledge officially. He felt himself delicately

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situated between his duty to this court, and the duty he conceived he owed to an executive department; and hoped the court would give him time to consider of the subject.
The court said, that if Mr. Lincoln wished time to consider what answers he should make, they would give him time; but they had no doubt he ought to answer. There was nothing confidential required to be disclosed. If there had been he was not obliged to answer it; and if he thought that any thing was communicated to him in confidence he was not bound to disclose it; nor was he obliged to state any thing which would criminate himself; but that the fact whether such commissions had been in the office or not, could not be a confidential fact; it ***145** is a fact which all the world have a right to know. If he thought any of the questions improper, he might state his objections.
Mr. Lincoln then prayed time till the next day to consider of his answers under this opinion of the court.
The court granted it and postponed further consideration of the cause till the next day.
At the opening of the court on the next morning, Mr. Lincoln said he had no objection to answering the questions proposed, excepting the last which he did not think himself obliged to answer fully. The question was, what had been done with the commissions. He had no hesitation in saying that he did not know that they ever came to the possession of Mr. Madison, nor did he know that they were in the office when Mr. Madison took possession of it. He prayed the opinion of the court whether he was obliged to disclose what had been done with the commissions.
The court were of opinion that he was not bound to say what had become of them; if they never came to the possession of Mr. Madison, it was immaterial to the present cause, what had been done with them by others.
****6** To the other questions he answered that he had seen commissions of justices of the peace of the district of Columbia, signed by Mr. Adams, and sealed with the seal of the United States. He did not recollect whether any of them constituted Mr. Marbury, col. Hooe, or col. Ramsay, justices of the peace; there were when he went into the office several commissions for justices of peace of the district made out; but he was furnished with a list of names to be put into a general commission, which was done, and was considered as superseding the particular commissions; and the individuals whose names were contained in this general commission were informed of their being thus appointed. He did not know that any one of the commissions was ever sent to the person for whom it was made out, and did not believe that any one had been sent.
***146** Mr. Lee then read the affidavit of James Marshall, who had been also summoned as a witness. It stated that on the 4th of March 1801, having been informed by some person from Alexandria that there was reason to apprehend riotous proceedings in that town on that night, he was induced to return immediately home, and to call at the office of the secretary of state, for the commissions of the justices of the peace; that as many as 12, as he believed, commissions of justices for that county were delivered to him for which he gave a receipt, which he left in the office. That finding he could not conveniently carry the whole, he returned several of them, and struck a pen through the names of those, in the receipt, which he returned. Among the commissions so returned, according to the best of his knowledge and belief, was one for colonel Hooe, and one for William Harper.
Mr. Lee then observed, that having proved the existence of the commissions, he should confine such further remarks as he had to make in support of the rule to three questions;
1st. Whether the supreme court can award the writ of mandamus in any case.
2d. Whether it will lie to a secretary of state in any case whatever.
3d. Whether in the present case the court may award a mandamus to James Madison, secretary of state.
The argument upon the 1st question is derived not only from the principles and practice of that country, from whence we derive many of the principles of our political institutions, but from the constitution and laws of the United States.
This is the *supreme* court, and by reason of its supremacy must have the superintendance of the inferior tribunals and officers, whether judicial or ministerial. In this respect there is no difference between a judicial and a ministerial officer. From this principle alone the court of king's bench in England derives the power of issuing the writs of mandamus and prohibition. 3. Inst. 70, 71. ***147** Shall it be said that the court of king's bench has this power in consequence of its being the supreme court of judicature, and shall we deny it to this court which the constitution makes the *supreme* court? It is a beneficial, and a necessary power; and it can never be applied where there is another *adequate, specific, legal remedy.*
The second section of the third article of the constitution gives this court appellate jurisdiction in all cases in law and equity arising under the constitution and laws of the United States (except the cases in which it has original jurisdiction) with such exceptions, and under such regulations as congress shall make. The term “appellate jurisdiction” is to be taken in its largest sense, and implies in its nature the right of superintending the inferior tribunals.
****7** Proceedings in nature of appeals are of various kinds, according to the subject matter. 3 Bl. com. 402. It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress. 3 Bl. com. 109. There are some injuries which can only be redressed by a writ of mandamus, and others by a writ of prohibition. There must then be a jurisdiction some where competent to issue that kind of process. Where are we to look for it but in that court which the constitution and laws have made supreme, and to which they have given appellate jurisdiction? Blackstone, vol. 3, p. 110, says that a writ of mandamus is “a command issuing in the king's name from the court of king's bench, and directed to any *person,* corporation or

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inferior court, requiring them to do some particular thing therein specified, *which appertains to their office and duty,* and which the court has previously determined, or at least supposes, to be consonant to right and justice. It is a writ of a most extensively remedial nature, and issues in all cases where the party has a right to have any thing done, *and has no other specific means of compelling its performance."*

In the Federalist, vol. 2, p. 239, it is said, that the word "appellate" is not to be taken in its technical sense, as used in reference to appeals in the course of the *civil* law, but in its broadest sense, in which it denotes nothing more than the power of one tribunal to review the proceedings***148** of another, either as to law or fact, or both. The writ of mandamus is in the nature of an appeal as to fact as well as law. It is competent for congress to prescribe the forms of process by which the supreme court shall exercise its appellate jurisdiction, and they may well declare a mandamus to be one. But the power does not depend upon implication alone. It has been recognized by legislative provision as well as in judicial decisions in this court.

Congress, by a law passed at the very first session after the adoption of the constitution, vol. 1, p. 58, sec. 13, have expressly given the supreme court the power of issuing writs of mandamus. The words are, "The supreme court shall also have appellate jurisdiction from the circuit courts, and courts of the several states, in the cases herein after specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction; and writs of *mandamus,* in cases warranted by the principles and usages of law, to any courts appointed, or *persons holding office,* under the authority of the United States."

Congress is not restrained from conferring original jurisdiction in other cases than those mentioned in the constitution. 2 Dal. Rep. 298.

****8** This court has entertained jurisdiction on a mandamus in one case, and on a prohibition in another. In the case of the United States v. judge Lawrence, 3. Dal. Rep. 42, a mandamus was moved for by the attorney general at the instance of the French minister, to compel judge Lawrence to issue a warrant against captain Barre, commander of the French ship of war Le Perdrix, grounded on an article of the consular convention with France. In this case the power of the court to issue writs of mandamus, was taken for granted in the arguments of counsel on both sides, and seems to have been so considered by the court. The mandamus was refused, because the case in which it was required, was not a proper one to support the motion. In the case of the United States v. judge Peters a writ of prohibition was granted, 3. Dal. Rep. 121, 129. This was the celebrated case of the French ***149** corvette the Cassius, which afterwards became a subject of diplomatic controversy between the two nations. On the 5th Feb. 1794, a motion was made to the supreme court in behalf of one John Chandler, a citizen of Connecticut, for a mandamus to the *secretary at war,* commanding him to place Chandler on the invalid pension list. After argument, the court refused the mandamus, because the two acts of congress respecting invalids, did not support the case on which the applicant grounded his motion. The case of the United States v. Hopkins, at February term, 1794, was a motion for a mandamus to Hopkins, loan officer for the district of Virginia, to command him to admit a person to subscribe to the United States loan. Upon argument the mandamus was refused because the applicant had not sufficiently established his title. In none of these cases, nor in any other, was the power of this court to issue a mandamus ever denied. Hence it appears there has been a legislative construction of the constitution upon this point, and a judicial practice under it, for the whole time since the formation of the government.

2d. The second point is, can a mandamus go to a secretary of state in any case? It certainly cannot in *all* cases; nor to the President in *any* case. It may not be proper to mention this position; but I am compelled to do it. An idea has gone forth, that a mandamus to a secretary of state is equivalent to a mandamus to the President of the United States. I declare it to be my opinion, grounded on a comprehensive view of the subject, that the President is not amenable to any court of judicature for the exercise of his high functions, but is responsible only in the mode pointed out in the constitution. The secretary of state acts, as before observed, in two capacities. As the agent of the President, he is not liable to a mandamus; but as a recorder of the laws of the United States; as keeper of the great seal, as recorder of deeds of land, of letters patent, and of commissions, &c. he is a ministerial officer of the people of the United States. As such he has duties assigned him by law, in the execution of which he is independent of all control, but that of the laws. It is true he is a high officer, but he is not above law. It is not consistent with the policy of our political institutions, or the manners of the citizens of the United States, that any ministerial officer having public duties to perform, ***150** should be above the compulsion of law in the exercise of those duties. As a ministerial officer he is compellable to do his duty, and if he refuses, is liable to indictment. A prosecution of this kind might be the means of punishing the officer, but a specific civil remedy to the injured party can only be obtained by a writ of mandamus. If a mandamus can be awarded by this court in any case, it may issue to a secretary of state; for the act of congress expressly gives the power to award it, "in cases warranted by the principles and usages of law, *to any person holding offices under the authority of the United States."*

Many cases may be supposed, in which a secretary of state ought to be compelled to perform his duty specifically. By the 5th and 6th sections of the act of congress, vol. 1, p. 43, copies under seal of the office of the department of state are made evidence in courts of law, and fees are given for making them out. The intention of the law must have been, that every person needing a copy should be entitled to it. Suppose the secretary refuses to give a copy, ought he not to be compelled? Suppose I am entitled to a patent for lands purchased of the United States; it is made out and signed by the President who gives a warrant to the secretary to

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affix the great seal to the patent; he refuses to do it; shall I not have a mandamus to compel him? Suppose the seal is affixed, but the secretary refuses to record it; shall he not be compelled? Suppose it recorded, and he refuses to deliver it; shall I have no remedy?

****9** In this respect there is no difference between a patent for lands, and the commission of a judicial officer. The duty of the secretary is precisely the same.

Judge Patterson inquired of Mr. Lee whether he understood it to be the duty of the secretary to deliver a commission, unless ordered so to do by the President.

Mr. Lee replied, that after the President has signed a commission for an office not held at his will, and it comes to the secretary to be sealed, the President has done with it, and nothing remains, but that the secretary perform those ministerial acts which the law imposes upon him. It immediately becomes his duty to seal, record, and deliver***151** it on demand. In such a case the appointment becomes complete by the signing and sealing; and the secretary does wrong if he withholds the commission.

3d. The third point is, whether in the present case a writ of mandamus ought to be awarded to James Madison, secretary of state.

The justices of the peace in the district of Columbia are judicial officers, and hold their office for five years. The office is established by the act of Congress passed the 27th of Feb. 1801, entitled "An act concerning the district of Columbia," ch. 86, sec. 11 and 14; page 271, 273. They are authorized to hold courts and have cognizance of personal demands of the value of 20 dollars. The act of May 3d, 1802, ch. 52, sec. 4, considers them as judicial officers, and provides the mode in which execution shall issue upon their judgments. They hold their offices independent of the will of the President. The appointment of such an officer is complete when the President has nominated him to the senate, and the senate have advised and consented, and the President has signed the commission and delivered it to the secretary to be sealed. The President has then done with it; it becomes irrevocable. An appointment of a judge once completed, is made forever. He holds under the constitution. The requisites to be performed by the secretary are ministerial, ascertained by law, and he has no discretion, but must perform them; there is no dispensing power. In contemplation of law they are as if done.

These justices exercise part of the judicial power of the United States. They ought therefore to be independent. Mr. Lee begged leave again to refer to the Federalist, vol. 2, Nos. 78 and 79, as containing a correct view of this subject. They contained observations and ideas which he wished might be generally read and understood. They contained the principles upon which this branch of our constitution was constructed. It is important to the citizens of this district that the justices should be independent; almost all the authority immediately exercised over them is that of the justices. They wish to know whether the justices of this district are to hold their commissions at the will of a secretary of state. ***152** This cause may seem trivial at first view, but it is important in principle. It is for this reason that this court is now troubled with it. The emoluments or the dignity of the office, are no objects with the applicants. They conceive themselves to be duly appointed justices of the peace, and they believe it to be their duty to maintain the rights of their office, and not to suffer them to be violated by the hand of power. The citizens of this district have their fears excited by every stretch of power by a person so high in office as the secretary of state.

****10** It only remains now to consider whether a mandamus to compel the delivery of a commission by a public ministerial officer, is one of "the cases warranted by the principles and usages of law."

It is the general principle of law that a mandamus lies, if there be no other *adequate, specific, legal* remedy; 3 *Burrow,* 1067, *King v. Barker, and al.* This seems to be the result of a view of all the cases on the subject.

The case of Rex.v. Borough of Midhurst, 1. Wils. 283, was a mandamus to compel the presentment of certain conveyances to purchasers of burgage tenements, whereby they would be entitled to vote for members of parliament. In the case of Rex v. Dr. Hay, 1. W.Bl.Rep. 640, a mandamus issued to admit one to administer an estate.

A mandamus gives no right, but only puts the party in a way to try his right. Sid. 286.

It lies to compel a ministerial act which concerns the public. 1. Wilson, 283, 1. Bl.Rep. 640-although there be a more tedious remedy, Str. 1082, 4 Bur. 2188, 2 Bur. 1045; So if there be a legal right, and a remedy in equity, 3. Term Rep. 652. A mandamus lies to obtain admission into a trading company.Rex v. Turkey Company, 2 Bur. 1000.Carthew 448. 5 Mod. 402; So it lies to put the corporate seal to an instrument. 4. Term.Rep. 699; to commissioners of the excise to grant a permit, 2 Term.Rep. 381; to admit to an office, 3 Term.Rep. 575; to deliver papers which concern the public, 2 Sid. 31. A mandamus will sometimes lie in a ***153** doubtful case, 1 Levinz 123, to be further considered on the return, 2 Levinz, 14. 1 Sidersin, 169.

It lies to be admitted a member of a church, 3. Bur. 1265, 1043.

****11** The process is as ancient as the time of Ed.2d. 1 Levinz 23.

The first writ of mandamus is not peremptory, it only commands the officer to do the thing or shew cause why he should not do it. If the cause returned be sufficient, there is an end of the proceeding, if not, a peremptory mandamus is then awarded.

It is said to be a writ of discretion. But the discretion of a court always means a found, legal discretion, not an arbitrary will. If the applicant makes out a proper case, the court are bound to grant it. They can refuse justice to no man.

On a subsequent day, and before the court had given an opinion, Mr. Lee read the affidavit of Hazen Kimball, who had been a clerk in the office of the Secretary of State, and had been to a distant part of the United States, but whose return was not known to

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the applicant till after the argument of the case.
It stated that on the third of March, 1801, he was a clerk in the department of state. That there were in the office, on that day, commissions made out and signed by the president, appointing William Marbury a justice of peace for the county of Washington; and Robert T. Hooe a justice of the peace for the county of Alexandria, in the district of Columbia.
Afterwards, on the 24th of February the following opinion of the court was delivered by the chief justice.
Opinion of the court.
At the last term on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the secretary of state to shew cause why a mandamus ***154** should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the district of Columbia.
No cause has been shewn, and the present motion is for a mandamus. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles, on which the opinion to be given by the court, is founded.
These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court, there will be some departure in form, though not in substance, from the points stated in that argument.
In the order in which the court has viewed this subject, the following questions have been considered and decided.
1st. Has the applicant a right to the commission he demands?
2dly. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3dly. If they do afford him a remedy, is it a *mandamus* issuing from this court?
The first object of inquiry is,
1st. Has the applicant a right to the commission he demands?
His right originates in an act of congress passed in February 1801, concerning the district of Columbia.
After dividing the district into two counties, the 11th section of this law, enacts, "that there shall be appointed in and for each of the said counties, such number of discreet persons to be justices of the peace as the president of the United States shall, from time to time, think expedient, to continue in office for five years.
***155** It appears, from the affidavits, that in compliance with this law, a commission for William Marbury as a justice of peace for the county of Washington, was signed by John Adams, then president of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.
****12** In order to determine whether he is entitled to this commission, it becomes necessary to enquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.
The 2d section of the 2d article of the constitution, declares, that, "the president shall nominate, and, by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, and all other officers of the United States, whose appointments are not otherwise provided for."
The third section declares, that "he shall commission all the officers of the United States."
An act of congress directs the secretary of state to keep the seal of the United States, "to make out and record, and affix the said seal to all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the senate, or by the President alone; provided that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."
These are the clauses of the constitution and laws of the United States, which affect this part of the case. They seem to contemplate three distinct operations:
1st. The nomination. This is the sole act of the President, and is completely voluntary.
2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the senate.
***156** 3d. The commission. To grant a commission to a person appointed, might perhaps be deemed a duty enjoined by the constitution. "He shall," says that instrument, "commission all the officers of the United States."
The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and the same; since the power to perform them is given in two separate and distinct sections of the constitution. The distinction between the appointment and the commission will be rendered more apparent, by adverting to that provision in the second section of the second article of the constitution, which authorizes congress "to vest, by law, the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.
Although that clause of the constitution which requires the President to commission all the officers of the United States, may never

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have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer, who has been appointed, remains the same as if in practice the President had commissioned officers appointed by an authority other than his own.

****13** It follows too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act, other than the commission, the performance of such public act would create the officer; and if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

***157** This is an appointment made by the President, by and with the advice and consent of the senate, and is evidenced by no act but the commission itself. In such a case therefore the commission and the appointment seem inseparable; it being almost impossible to shew an appointment otherwise than by proving the existence of a commission; still the commission is not necessarily the appointment; though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment being the sole act of the President, must be completely evidenced, when it is shewn that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself; still it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President, is the signature of the commission. He has then acted on the advice and consent of the senate to his own nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the senate concurring with his nomination, has been made, and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer, not removable at his will, must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act, required from the person possessing the power, has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the legislature, when the act passed, converting the department ***158** of foreign affairs into the department of state. By that act it is enacted, that the secretary of state shall keep the seal of the United States, “and shall make out and record, and shall affix the said seal to all civil commissions to officers of the United States, to be appointed by the President:”“Provided that the said seal shall not be affixed to any commission, before the same shall have been signed by the President of the United States; nor to any other instrument or act, without the special warrant of the President therefore.”

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

****14** It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of the secretary of state is prescribed by law, and not to be guided by the will of the President. He is to affix the seal of the United States to the commission, and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible; but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the secretary of state to conform to the law, and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed, that the solemnity of affixing the seal, is necessary not only to the validity of the commission, but even to the completion of an appointment, still when the seal is affixed the appointment is made, and ***159** the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office, is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest, have been very deliberately examined, and after allowing them all the weight which it appears possible to give them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which, delivery is essential.

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This idea is founded on the supposition that the commission is not merely *evidence* of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded, that the principle, claimed for its support, is established.

The appointment being, under the constitution, to be made by the President *personally,* the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the livery should be made personally to the grantee of the office: It never is so made. The law would seem to contemplate that it should be made to the secretary of state, since it directs the secretary to affix the seal to the commission *after* it shall have been signed by the President. If then the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the secretary for the purpose of being sealed, recorded, and transmitted to the party.

But in all cases of letters patent, certain solemnities are required by law, which solemnities are the evidences ***160** of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign manual of the President, and the seal of the United States, are those solemnities. This objection therefore does not touch the case.

****15** It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission, is a practice directed by convenience, but not by law. It cannot therefore be necessary to constitute the appointment which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office, should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter enclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point, to enquire, whether the possession of the original commission be indispensably necessary to authorize a person, appointed to any office, to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individual of his office. In such a case, I presume it could not be doubted, but that a copy from the record of the office of the secretary of state, would be, to every intent and purpose, equal to the original. The act of congress has expressly made it so. To give that copy validity, it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but, not that the original had been transmitted. If indeed it should appear that ***161** the original had been mislaid in the office of state, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labour of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions, the law orders the secretary of state to record them. When therefore they are signed and sealed, the order for their being recorded is given; and whether inserted in the book or not, they are in law recorded.

A copy of this record is declared equal to the original, and the fees, to be paid by a person requiring a copy, are ascertained by law. Can a keeper of a public record, erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

****16** Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment; still less is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept: but neither the one, nor the other, is capable of rendering the appointment a non-entity.

That this is the understanding of the government, is apparent from the whole tenor of its conduct.

A commission bears date, and the salary of the officer commences from his appointment; not from the transmission or acceptance of his commission. When a person, appointed to any office, refuses to accept that office, the successor is nominated in the place of the person who ***162** has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is therefore decidedly the opinion of the court, that when a commission has been signed by the President, the appointment is made; and that the commission is complete, when the seal of the United States has been affixed to it by the secretary of state.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

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The discretion of the executive is to be exercised until the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases, where, by law, the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional, power of accepting or rejecting it.
Mr. Marbury, then, since his commission was signed by the President, and sealed by the secretary of state, was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable; but vested in the officer legal rights, which are protected by the laws of this country.
To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.
This brings us to the second inquiry; which is,
2dly. If he has a right, and that right has been violated, do the laws of this country afford him a remedy?
****17 *163** The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.
In the 3d vol. of his commentaries, p. 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.
"In all other cases," he says, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded."
And afterwards, p. 109, of the same vol. he says, "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark, that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military, or maritime tribunals, are for that very reason, within the cognizance of the common law courts of justice; for it is a settled and invariable principle in the laws of England, that every right, when withheld, must have a remedy, and every injury its proper redress."
The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.
If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.
It behoves us then to enquire whether there be in its composition any ingredient which shall exempt it from legal investigation, or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself, is, whether this can be arranged ***164** with that class of cases which come under the description of *damnum absque injuria* -a loss without an injury.
This description of cases never has been considered, and it is believed never can be considered, as comprehending offices of trust, of honor or of profit. The office of justice of peace in the district of Columbia is such an office; it is therefore worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of congress, and has been secured, so far as the laws can give security to the person appointed to fill it, for five years. It is not then on account of the worthlessness of the thing pursued, that the injured party can be alleged to be without remedy.
Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act, belonging to the executive department alone, for the performance of which, entire confidence is placed by our constitution in the supreme executive; and for any misconduct respecting which, the injured individual has no remedy.
That there may be such cases is not to be questioned; but that every act of duty, to be performed in any of the great departments of government, constitutes such a case, is not to be admitted.
****18** By the act concerning invalids, passed in June, 1794, vol. 3. p. 112, the secretary at war is ordered to place on the pension list, all persons whose names are contained in a report previously made by him to congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that where the law in precise terms, directs the performance of an act, in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?
Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained.***165** No act of the legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone, vol. 3. p. 255, says, " but injuries to the rights of property can scarcely be committed by the crown without the intervention of its officers; for whom, the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors and misconduct of those agents, by whom the king has been deceived and induced to do a temporary injustice."
By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol.3d. p. 299) the purchaser, on paying his purchase money, becomes completely entitled to the property purchased; and on producing to the secretary of state, the receipt of the treasurer upon a certificate required by the law, the president of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the secretary of state, and recorded in his office. If the secretary of state should choose to withhold this patent; or the patent being lost, should refuse a copy of it; can it be imagined that the law furnishes to the injured person no remedy?

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It is not believed that any person whatever would attempt to maintain such a proposition.
It follows then that the question, whether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act.
If some acts be examinable, and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.
In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.
By the constitution of the United States, the President is invested with certain important political powers, in the ***166** exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.
In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of congress for establishing the department of foreign affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer, as an officer, can never be examinable by the courts.
****19** But when the legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are dependent on the performance of those acts; he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.
The conclusion from this reasoning is, that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured, has a right to resort to the laws of his country for a remedy.
If this be the rule, let us enquire how it applies to the case under the consideration of the court.
***167** The power of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment, he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and consequently if the officer is by law not removable at the will of the President; the rights he has acquired are protected by the law, and are not resumable by the President. They cannot be extinguished by executive authority, and he has the privilege of asserting them in like manner as if they had been derived from any other source.
The question whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one; in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate; the validity of his appointment must have been determined by judicial authority.
So, if he conceives that, by virtue of his appointment, he has a legal right, either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.
****20** That question has been discussed, and the opinion is, that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the president, the seal of the United States was affixed to the commission.
It is then the opinion of the court,
1st. That by signing the commission of Mr. Marbury, the president of the United States appointed him a justice ***168** of peace, for the county of Washington in the district of Columbia; and that the seal of the United States, affixed thereto by the secretary of state, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appointment conferred on him a legal right to the office for the space of five years.
2dly. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which, is a plain violation of that right, for which the laws of his country afford him a remedy.
It remains to be inquired whether,
3dly. He is entitled to the remedy for which he applies. This depends on,
1st. The nature of the writ applied for, and,
2dly. The power of this court.

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1st. The nature of the writ.
Blackstone, in the 3d volume of his commentaries, page 110, defines a mandamus to be, “a command issuing in the king's name from the court of king's bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of king's bench has previously determined, or at least supposes, to be consonant to right and justice.”
Lord Mansfield, in 3d Burrows 1266, in the case of the *King v. Baker, et al.* states with much precision and explicitness the cases in which this writ may be used.
“Whenever,” says that very able judge, “there is a right to execute an office, perform a service, or exercise a franchise (more especially if it be in a matter of public concern, or attended with profit) and a person is kept out of possession, or dispossessed of such right, and ***169** has no other specific legal remedy, this court ought to assist by mandamus, upon reasons of justice, as the writ expresses, and upon reasons of public policy, to preserve peace, order and good government.”In the same case he says, “this writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.”
In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.
This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, “to do a particular thing therein specified, which appertains to his office and duty and which the court has previously determined, or at least supposes, to be consonant to right and justice.”Or, in the words of Lord Mansfield, the applicant, in this case, has a right to execute an office of public concern, and is kept out of possession of that right.
****21** These circumstances certainly concur in this case.
Still, to render the mandamus a proper remedy, the officer to whom it is to be directed, must be one to whom, on legal principles, such writ may be directed; and the person applying for it must be without any other specific and legal remedy.
1st. With respect to the officer to whom it would be directed. The intimate political relation, subsisting between the president of the United States and the heads of departments, necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome, as well as delicate; and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without much reflection or examination, and it is not wonderful that in such a case as this, the assertion, by an individual, of his legal claims in a court of justice; to which claims it is the duty of that court to attend; should at first view be considered ***170** by some, as an attempt to intrude into the cabinet, and to intermeddle with the prerogatives of the executive.
It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.
But, if this be not such a question; if so far from being an intrusion into the secrets of the cabinet, it respects a paper, which, according to law, is upon record, and to a copy of which the law gives a right, on the payment of ten cents; if it be no intermeddling with a subject, over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer, which shall bar a citizen from asserting, in a court of justice, his legal rights, or shall forbid a court to listen to the claim; or to issue a mandamus, directing the performance of a duty, not depending on executive discretion, but on particular acts of congress and the general principles of law?
If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How then can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process?
It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done that the propriety or impropriety of issuing a mandamus, is to be determined. Where the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is ***171** again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.
****22** But where he is the head of a good department is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which, the President cannot lawfully forbid, and therefore is never presumed to have forbidden; as for example, to record a commission, or a patent for land, which has received all the legal solemnities; or to give a copy of such record; in such cases, it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment, that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.
This opinion seems not now, for the first time, to be taken up in this country.

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It must be well recollected that in 1792, an act passed, directing the secretary at war to place on the pension list such disabled officers and soldiers as should be reported to him, by the circuit courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.
This law being deemed unconstitutional at the circuits, was repealed, and a different system was established; but the question whether those persons, who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension list, was a legal question, properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.
That this question might be properly settled, congress passed an act in February, 1793, making it the duty of the secretary of war, in conjunction with the attorney general, to take such measures, as might be necessary to obtain an adjudication of the supreme court of the United ***172** States on the validity of any such rights, claimed under the act aforesaid.
After the passage of this act, a mandamus was moved for, to be directed to the secretary at war, commanding him to place on the pension list, a person stating himself to be on the report of the judges.
There is, therefore, much reason to believe, that this mode of trying the legal right of the complainant, was deemed by the head of a department, and by the highest law officer of the United States, the most proper which could be selected for the purpose.
When the subject was brought before the court the decision was, not that a mandamus would not lie to the head of a department, directing him to perform an act, enjoined by law, in the performance of which an individual had a vested interest; but that a mandamus ought not to issue in that case-the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.
****23** The judgment in that case, is understood to have decided the merits of all claims of that description; and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension list.
The doctrine, therefore, now advanced, is by no means a novel one.
It is true that the mandamus, now moved for, is not for the performance of an act expressly enjoined by statute.
It is to deliver a commission; on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right, of which the executive cannot deprive him. He has been appointed to an office, from which he is not removable, at the will of the executive; and being so ***173** appointed, he has a right to the commission which the secretary has received from the president for his use. The act of congress does not indeed order the secretary of state to send it to him, but it is placed in his hands for the person entitled to it; and cannot be more lawfully withheld by him, than by any other person.
It was at first doubted whether the action of *detinue* was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a mandamus would be improper. But this doubt has yielded to the consideration that the judgment in *detinue* is for the thing itself, *or* its value. The value of a public office not to be sold, is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.
This, then, is a plain case for a mandamus, either to deliver the commission, or a copy of it from the record; and it only remains to be inquired,
Whether it can issue from this court.
The act to establish the judicial courts of the United States authorizes the supreme court "to issue writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States."
The secretary of state, being a person holding an office under the authority of the United States, is precisely within the letter of the description; and if this court is not authorized to issue a writ of mandamus to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority, and assigning the duties which its words purport to confer and assign.
The constitution vests the whole judicial power of the United States in one supreme court, and such inferior courts as congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present ***174** case; because the right claimed is given by a law of the United States.
****24** In the distribution of this power it is declared that "the supreme court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the supreme court shall have appellate jurisdiction."
It has been insisted, at the bar, that as the original grant of jurisdiction, to the supreme and inferior courts, is general, and the clause, assigning original jurisdiction to the supreme court, contains no negative or restrictive words; the power remains to the

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legislature, to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

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

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

It cannot be presumed that any clause in the constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

***175** If the solicitude of the convention, respecting our peace with foreign powers, induced a provision that the supreme court should take original jurisdiction in cases which might be supposed to affect them; yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as congress might make, is no restriction; unless the words be deemed exclusive of original jurisdiction.

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

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

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

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to ***176** appellate, but to original jurisdiction. Neither is it necessary in such a case as this, to enable the court to exercise its appellate jurisdiction.

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

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

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

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

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited***177** and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by

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ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.
****26** If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.
Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.
This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of this subject.
If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.
It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
***178** So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.
Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void; is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed as pleasure.
That it thus reduces to nothing what we have deemed the greatest improvement on political institutions-a written constitution-would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.
****27** The judicial power of the United States is extended to all cases arising under the constitution.
***179** Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
This is too extravagant to be maintained.
In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?
There are many other parts of the constitution which serve to illustrate this subject.
It is declared that “no tax or duty shall be laid on articles exported from any state.” Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.
The constitution declares that “no bill of attainder or *ex post facto* law shall be passed.”
If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavors to preserve?
“No person,” says the constitution, “shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.”
Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out of* court, sufficient for conviction, must the constitutional principle yield to the legislative act?
From these, and many other selections which might be made, it is apparent, that the framers of the constitution***180** contemplated that instrument, as a rule for the government of *courts,* as well as of the legislature.
Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing

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instruments, for violating what they swear to support?
The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words, "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as according to the best of my abilities and understanding, agreeably to *the constitution,* and laws of the United States."
Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?
****28** If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.
It is also not entirely unworthy of observation, that in declaring what shall be the *supreme* law of the land, the *constitution* itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in *pursuance* of the constitution, have that rank.
Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts,* as well as other departments, are bound by that instrument.
The rule must be discharged.

Supplemental Case Printout for: *Adapting the Law to the Online Environment*

2016 WL 5725002
United States District Court, N.D. California,
San Francisco Division.

ST. FRANCIS ASSISI, Plaintiff,
v.
KUWAIT FINANCE HOUSE; Kuveyt- Turk Participation Bank Inc., Hajjaj Al Ajmi; and Does 1 to 200, Defendants.

Case No. 3:16-cv-3240-LB
Signed 09/30/2016

LAUREL BEELER, United States Magistrate Judge
INTRODUCTION
*1 The plaintiff, St. Francis Assisi (a non-profit corporation), sued the defendants, Kuwait Finance House, Kuveyt-Turk Participation Bank Inc., and Hajjaj al-Ajmi (an individual) for damages and equitable relief arising from the defendants' financing of the terrorist organization known as the Islamic State of Iraq and Syria (ISIS), which resulted in the targeted murder of Assyrian Christians in Iraq and Syria. (*See* Compl., ECF No. 1.)
St. Francis has not been successful in serving process on al-Ajmi. (*See* ECF No. 10.) Al-Ajmi is a Kuwaiti national and efforts to locate him have been unsuccessful. (*Id.*) St. Francis now asks to serve al-Ajmi by alternative means under Federal Rule of Civil Procedure 4(f)(3) via the social-media platform, Twitter. (*Id.*) The court grants St. Francis's request because service via Twitter is reasonably calculated to give notice and is not prohibited by international agreement.

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STATEMENT

On June 13, 2016, St. Francis filed the complaint. (*See* Compl., ECF No. 1.) The summons too was issued on June 13, 2016. (*See* Summons, ECF No. 6.) Service has not been effected on al-Ajmi. (*See* ECF No. 10.) St. Francis attempted to locate al-Ajmi through a skip trace; however, St. Francis was unable to determine al-Ajmi's whereabouts. (*Id.*) Kuwait is not a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; previous attempts to serve defendant Kuwait Finance House through Kuwait's Central Authority (Kuwait's specified means of international service) were unsuccessful, as Kuwait's Central Authority refused to accept the summons and complaint. (*Id.*)

Al-Ajmi has a large following on Twitter and has used the social-media platform to fundraise large sums of money for terrorist organizations by providing bank-account numbers to make donations. (*Id.*) Al-Ajmi frequently travels from Kuwait to deliver money to Al-Nusrah Front (another terrorist group) in Syria. U.S. Dep't of Treasury, *Treasury Designates Three Key Supporters of Terrorists in Syria and Iraq* (2014). On August 6, 2014, the U.S. Treasury Department sanctioned al-Ajmi as a key supporter of terrorists in Syria by freezing his U.S. assets and banning American entities from doing business with him. *Id.*

ANALYSIS

Federal Rule of Civil Procedure 4(f) establishes three mechanisms for serving an individual in a foreign country: 1) by an internationally agreed means of service that is reasonably calculated to give notice, such as those provided by the Hague Convention; 2) if there is no international means or no means specified then by means reasonably calculated to give notice; or 3) by other means not prohibited by international agreement, as the court orders. *See* Fed. R. Civ. P. 4(f).

Courts have applied Rule 4(f) to allow the order of any means of service as long as it comports with due process and: 1) it provides "notice reasonably calculated, under all circumstances to apprise interested parties of the pendency of the action and afford[s] them an opportunity to present their objections"; and 2) it is not prohibited by international agreement. *Rio Props., Inc v. Rio Int'l Interlink*, 284 F.3d 1007, 1014, 1016 (9th Cir. 2002) (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

*2 Courts have authorized service by social media in similar cases. For example, in *WhosHere, Inc. v. Gokhan Orun*, the district court authorized service on a defendant residing in and having his principal place of business in Turkey by email and the social-media platforms, Facebook and LinkedIn. 2014 WL 670817 (E.D. Va. Feb. 20, 2014). Defendant did business under the trade names "WhoNear" and "whonearme" in violation of the plaintiff's trademarked name, "WhosHere." *Id.* at 1. Plaintiff Orun attempted to serve process through Turkey's Ministry of Justice in accordance with Rule 4(f)(1) and the Hague Convention; however, the summons and complaint were returned because the defendant could not be located with the address on record. *Id.* at 1-2. The court granted service by email, Facebook, and LinkedIn because notice through these accounts was reasonably calculated to notify the defendant of the pendency of the action and was not prohibited by international agreement. *Id.* at 3-4. The three accounts were under defendant Orun's name and contained information about his "WhoNear" business. *Id.* at 4.

In *Federal Trade Commission v. PCCare Inc.*, the court also authorized service by email and Facebook to defendants located in India. 2013 WL 841037 (S.D.N.Y. March 7, 2013). According to the FTC, the five defendants employed a scheme tricking American consumers into spending money to fix alleged problems with their computers. *Id.* at 1. The FTC attempted to serve the defendants through the Indian Central Authority in accordance with Rule 4(f)(1) and the Hague Convention. *Id.* The Indian Central Authority did not serve the defendants and did not respond to the FTC's status inquiries. *Id.* The court granted service by email and Facebook because these channels were reasonably calculated to notify the defendants and were not prohibited by international agreement. *Id.* at 3-4. The email addresses and Facebook accounts were registered under the defendants' names and used frequently for communication. *Id.*at 4.

As in *WhosHere* and *PCCare*, service by the social-media platform, Twitter, is reasonably calculated to give notice to and is the "method of service most likely to reach" al-Ajmi. *See Rio Properties*, 284 F.3d at 1017. Al-Ajmi has an active Twitter account and continues to use it to communicate with his audience. Service by Twitter is not prohibited by international agreement with Kuwait.

CONCLUSION

The court grants St. Francis's motion to serve of process by Twitter. St. Francis may use Twitter to serve process on al-Ajmi.

IT IS SO ORDERED.

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