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CHAPTER 1

LAW AND LEGAL REASONING

ANSWER TO CRITICAL THINKING QUESTION IN THE FEATURE

ETHICS TODAY—CRITICAL THINKING

When is the Supreme Court justified in* not *following the doctrine of* stare decisis*? The doctrine of *stare decisis* requires a court to adhere to precedent to promote predictability and consistency. To overcome the doctrine of *stare decisis* a precedent must be more than just wrongly decided. There has to be a special reason to overrule it. It is more likely that the Supreme Court waves the doctrine of *stare decisis* when issues unrelated to business are the focus of cases at bar. Specifically, issues that involve discrimination, freedom of speech, privacy, and so on are more likely to involve disregarding of the doctrine of *stare decisis* if the political atmosphere has changed since the original decision.

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

1A. *Parties*

The automobile manufacturers are the plaintiffs, and the state of California is the defendant.

2A. *Remedy*

The plaintiffs are seeking an injunction, an equitable remedy, to prevent the state of California from enforcing its statute restricting carbon dioxide emissions.

3A. *Source of law*

This case involves a law passed by the California legislature and a federal statute; thus the primary source of law is statutory law.

4A. ***Finding the law***
Federal statutes are found in the *United States Code,* and California statutes are published in the *California Code*. You would look in these sources to find the relevant state and federal statutes.

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 100 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. ***Under what circumstances might a judge rely on case law to determine the intent and purpose of a statute?*** Case law includes courts' interpretations of statutes, as well as constitutional provisions and administrative rules. Statutes often codify common law rules. For these reasons, a judge might rely on the common law as a guide to the intent and purpose of a statute.

2A. ***After World War II, several Nazis were convicted of "crimes against humanity" by an international court. Assuming that these convicted war criminals had not disobeyed any law of their country and had merely been following their government's orders, what law had they violated? Explain.*** At the time of the Nuremberg trials, "crimes against humanity" were new international crimes. The laws criminalized such acts as murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population. These international laws derived their legitimacy from "natural law."

Natural law, which is the oldest and one of the most significant schools of jurisprudence, holds that governments and legal systems should reflect the moral and ethical ideals that are inherent in human nature. Because natural law is universal and discoverable by reason, its adherents believe that all other law is derived from natural law. Natural law therefore supersedes laws created by humans (national, or "positive," law), and in a conflict between the two, national or positive law loses its legitimacy.

The Nuremberg defendants asserted that they had been acting in accordance with German law. The judges dismissed these claims, reasoning that the defendants' acts were commonly regarded as crimes and that the accused must have known that the acts would be considered criminal. The judges clearly believed the tenets of natural law and expected that the defendants, too, should have been able to realize that their acts ran afoul of it. The fact that the "positivist law" of Germany at the time required them to commit these acts is irrelevant. Under natural law theory, the international court was justified in finding the defendants guilty of crimes against humanity.

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

1–1A. ***Binding versus 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***

(a) 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.

(b) 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.

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

(d) 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. **Stare decisis**

Stare decisis is a Latin phrase meaning "to stand on decided cases." In the King's Courts of medieval England, it became customary for judges to refer to past decisions (precedents) in deciding cases involving similar issues. Over time, because of application of the doctrine of *stare decisis* to issues that came before the courts, a body of jurisprudence was formed that came to be known as the "common law"—because it was common to the English realm. Common law was applied in the American colonies prior to the War of Independence and was adopted by the American states following the Revolution. Common law continues to be applied today in all cases except those falling under specific state or federal statutory law. The doctrine of *stare decisis* is fundamental to the development of our legal tradition because without the acceptance and application of this doctrine, the evolution of any objective legal concepts—and thus a legal "tradition"—would have been impossible.

1–4A. SPOTLIGHT ON AOL—*Common law*

The doctrine of *stare decisis* is the process of deciding case with reference to former decisions, or precedents. Under this doctrine, judges are obligated to follow the precedents established within their jurisdiction.

In this problem, the enforceability of a forum selection clause is at issue. There are two precedents mentioned in the facts that the court can apply The United States Supreme Court has held that a forum selection clause is unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." And California has declared in other cases that the AOL clause contravenes a strong public policy. If the court applies the doctrine of *stare decisis*, it will dismiss the suit.

In the actual case on which this problem is based, the court determined that the clause is not enforceable under those precedents.

1-5A. BUSINESS CASE PROBLEM WITH SAMPLE ANSWER—*Reading citations*

The court's opinion in this case—*Ryan Data Exchange, Ltd. v. Graco*, 973 F.3d 726 (th Cir. 2019)—can be found in volume 973 of the *Federal Reporter, Third Series* on page 726. The U.S. Court of Appeals for the Eighth Circuit issued this opinion in 2019.

1–6A. A QUESTION OF ETHICS—*The doctrine of precedent*

(a) In this problem, White operated a travel agency. To obtain low fares for her clients, she submitted fake military identification cards to the airlines. She was charged with the crime of identity theft, which requires the "use" of another's identification. In a previous case, David Miller, to obtain a loan, represented that certain investors approved of the loan when they did not. Miller's conviction for identity theft was overturned on the ground that he had not "used" the investors' identities—he had only *said* that they had done something when they had not. In a second case, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician's signature. White's actions most closely resemble Medlock's forgery. White not only told the airlines that her clients were members of the military—she created false identification cards and sent them to the airlines.

In all of these cases, the defendants lied about their actions. Whether or not their conduct fell within the meaning of a word within a statute, or matched the actions of a perpetrator in another case, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful about their actions.

In the actual case on which this problem is based, the court concluded that White's actions were most similar to Medlock's. White was convicted of identity theft. On appeal, the U.S. Court of Appeals for the Sixth Circuit affirmed the conviction.

(b) No, in the two cases cited by the *White* court—and in the *White* case—there were no ethical differences in the actions of the parties.

Almost any definition of ethics, and any set of ethical standards, includes honesty as a component. In the *White* case, Sandra White lied to the airlines that her clients were members of the military, and created false identification cards to obtain cheaper fares. In the first case cited by the *White* court, David Miller, to obtain a loan, represented that certain investors approved of the loan when they did not. In the second case cited by the *White* court, Kathy Medlock, the operator of an ambulance service, obtained payment for transporting patients for whom there was no medical necessity to do so by forging a physician's signature.

In all of these cases, the defendants lied. Whether or not their conduct fell within the meaning of a word within a statute, or matched the unlawful actions of each other, none of these parties can claim to have acted ethically. Honesty is a part of ethical behavior in any set of circumstances, and none these defendants were truthful.

ANSWERS TO TIME-LIMITED GROUP ASSIGNMENT QUESTIONS AT THE END OF THE CHAPTER

1–7A. ***Court opinions***

(a) 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.

(b) 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.

(c) Obviously, a concurring or dissenting opinion will not affect the case involved—because it has already been decided by majority vote—but such opinions may be used by another court later to support its position on a similar issue.

Chapter 1

Law and Legal Reasoning

INTRODUCTION

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

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

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

CHAPTER OUTLINE

I. Business Activities and the Legal Environment

A. MANY DIFFERENT LAWS MAY AFFECT A SINGLE BUSINESS DECISION
Various areas of the law can affect different aspects of a business (such as Facebook). A businessperson should know enough about the law to know when to ask for advice.

B. ETHICS AND BUSINESS DECISION MAKING
Ethics can influence business decisions.

II. 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

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

1. Uniform Laws

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

2. The Uniform Commercial Code

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

Additional Background—

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

As explained in the text, the Uniform Commercial Code (UCC) is an ambitious codification of commercial common law principles. The UCC has been the most widely adopted, and thus the most successful, of the many uniform and model acts that have been drafted.

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.

1. Federal Agencies

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.

2. **State and Local Agencies**
These agencies are often parallel federal agencies in areas of expertise and subjects of regulation. Federal rules that conflict with state rules take precedence.

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.

III. The Common Law Tradition

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

A. **EARLY ENGLISH COURTS**
The English system unified its local courts in 1066. This unified system, based on the decisions judges make in cases, is the common law system.

1. **Courts of Law and Remedies at Law**
A court of law is limited to awarding payments of money or property as compensation.

2. **Courts of Equity**
Equity is a branch of unwritten law, which was founded in justice and fair dealing, and seeks to supply a fairer and more adequate remedy than a remedy at law.

3. **Remedies in Equity**
A court of equity can order specific performance, an injunction, or rescission of a contract.

4. **Equitable Maxims**
These guide the application of equitable remedies.

B. **LEGAL AND EQUITABLE REMEDIES TODAY**
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.

C. **THE DOCTRINE OF *STARE DECISIS***

1. **Case Precedents and Case Reporters**
The common law system involves the application, in current cases, of principles applied in earlier cases with similar facts.

2. ***Stare Decisis* and the Common Law Tradition**
The use of precedent forms the basis for the doctrine of *stare decisis*.

3. **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.

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 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 Supreme 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).

4. *Stare Decisis* and Legal Stability

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

5. When There Is No Precedent

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

D. *STARE DECISIS* AND LEGAL REASONING

1. Basic Steps in Legal Reasoning

Through the use of legal reasoning, judges harmonize their decisions with those that have been made before, as the doctrine of *stare decisis* requires. The IRAC method of legal reasoning is an acronym for *Issue*, *Rule, Application*, and *Conclusion.*

2. There Is No One "Right" Answer

Of course, there is no one "right" answer to every legal question.

E. THE COMMON LAW TODAY

1. Courts Interpret Statutes

Through the courts, the common law governs all areas *not* covered by statutory or administrative law, as well as interpretations of the application of statutes and rules.

2. *Restatements of the Law* Clarify and Illustrate the Common Law

The common law principles are summarized in the American Law Institute's *Restatements of the Law*, which do not have the force of law but are an important secondary source on which judges often rely.

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.

Chapter 1
MEANING OF TERMS

* * * *

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.

IV. Schools of Legal Thought

A. THE NATURAL LAW SCHOOL

Adherents of the *natural law* school believe that government and the legal system should reflect universal moral and ethical principles that are inherent in the nature of human life.

B. THE POSITIVIST SCHOOL

Followers of the *legal positivism* believe that there can be no higher law than a nation's positive law (the law created by a particular society at a particular point in time).

C. THE HISTORICAL SCHOOL

Those of the *historical school* emphasize legal principles that were applied in the past.

D. LEGAL REALISM

Legal realists believe that judges are influenced by their unique individual beliefs and attitudes, that the application of precedent should be tempered by each case's specific circumstances, and that extra-legal sources should be considered in making decisions. This influenced the sociological school of jurisprudence, which views law as a tool to promote social justice.

V. 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. One of the broadest classification systems divides law into national law and international law.

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. CYBERLAW

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

VI. How to Find Primary Sources of Law

A brief introduction to case reporting systems and legal citations is included in the text. Also discussed are publications collecting statutes and administrative regulations.

A. FINDING STATUTORY AND ADMINISTRATIVE LAW

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

B. FINDING CASE LAW

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

VII. How to Read and Understand Case Law

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

ADDITIONAL BACKGROUND—

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 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.

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.

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.

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 Cen-tennial, 29 N.Y.S.2d 56.

Risks of particular sports or 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.

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 according to 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—

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
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.)

ADDITIONAL BACKGROUND—

Code of Federal Regulations

Created by Congress in 1937, the **Code of Federal Regulations** is a set of softcover 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.

(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.

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

Published by West Publishing Company, 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.

(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.

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.

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

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CODE OF FEDERAL REGULATIONS

1973 Main Volume Code of Federal Regulations

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.

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.

....

Notes and Questions

Did the court hold that Yeasin had a right to post his tweets without being disciplined by the university? 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.

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 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 man-made, 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. You might want to remind your students that the facts in a case should be accepted as given. For example, under some circumstances, an oral contract may be enforceable. If there is a statement in a case about the existence of oral contract, it should be accepted that there was an oral contract. Arguing with the statement ("How could you prove that there was an *oral* contract?" for instance) will only undercut their learning. Once they have learned the principle for which a case is presented, then they can ask, "What if the facts were different?"

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.

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. ***Which of the schools of legal thought matches the U.S. system?*** None of the approaches mentioned in these sections is an exact model of the American legal system. They represent frameworks that can be used in evaluating the moral and ethical considerations that are an integral part of the law.

3. ***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.

4. ***What is the supreme law of the land?*** The federal constitution is the supreme law of the land. ***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.

5. ***What is the Uniform Commercial Code?*** A uniform law drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, 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). Uniform laws are often adopted in whole or in substantial part by the states. The UCC has been adopted by all states (except Louisiana which has not adopted Article 2).

6. ***Discuss the differences within the classification of law as civil law and criminal law.*** Civil law concerns rights and duties of individuals between themselves; criminal law concerns offenses against society as a whole. (Civil law is a term that is also used to refer to a legal system based on a code rather than on case law.)

7. ***Discuss the differences between remedies at law and in equity.*** Remedies at law were once limited to payments of money or property (including land) as damages. Remedies in equity were available only when there was no adequate remedy at law. Today, in most states, either or both may be granted in the same action. Remedies in equity are still discretionary, guided by equitable principles and maxims. Remedies at law still include payments of money or property as damages. Today, the major practical difference between actions at law and actions in equity is the right to demand a jury trial in an action at law.

8. ***Identify and describe remedies available in equity.*** Three are discussed briefly in the text. 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.

9. ***What is the primary function of law?*** The primary function of law is to simultaneously maintain stability and permit change. The law does this by providing for dispute resolution, the preservation of political, economic, and social institutions, and the protection of property.

10. ***What is* stare decisis*? Why is it important?*** *Stare decisis* is a doctrine that prescribes following earlier judicial decisions in deciding a current case if the facts and questions are similar. Courts attempt to be consistent with their own prior decisions and with the decisions of courts superior to them. *Stare decisis* is important because part of the function of law is to maintain stability. If the application of the law was unpredictable, there would be no consistent rules to follow and no stability.

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. If legal materials are not easily available, assign a list of citations for students to decipher.

3. Ask students to read newspapers and magazines, listen to radio news, watch television news, and search online 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.

EXPLANATIONS OF SELECTED FOOTNOTES IN THE TEXT

Footnote 4: 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 5: 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."

ALTERNATE CASE PROBLEM ANSWERS

CHAPTER 2

BUSINESS AND THE CONSTITUTION

2-1A. ***Commerce clause***
The court did not agree with Inland-Rome that the contract related to interstate commerce. Therefore, the Federal Arbitration Act did not apply and the arbitration clause was not enforceable. The court found that the contract between the parties did not in itself relate to the interstate shipment of any product. "To the contrary," the court stated, "it relates solely to the sale of standing timber located exclusively in Georgia." Interstate commerce was affected but only *after* Inland-Rome's performance under the contract with the landowners was completed. Therefore, federal law did not apply, and the contract was subject to Georgia law. The state of Georgia enforced arbitration clauses, but only if they were contained in construction contracts. Therefore, arbitration of the contract could not be compelled.

2-2A. ***Freedom of speech***
The court dismissed Holland's complaint, and he appealed. The state intermediate appellate court affirmed the lower court's decision. The state intermediate appellate court initially determined that, in playing a car sound system loud enough to violate the ordinance, Holland was not actually expressing himself. (He was only listening.) This meant that, as to Holland, the ordinance regulated only his conduct, not his expression. The court held that the First Amendment "protect[s] the communication and expression of someone attempting to broadcast music or another type of message, but that noise is subject to regulation." The court concluded that Holland failed to show "a real and substantial threat to expression in relation to the ordinance's legitimate sweep." The court also pointed out that "[t]his ordinance has clear guidelines. A person of ordinary intelligence knows what it means for sound to be 'audible' at more than 50 feet away."

2-3A. ***Equal protection***
The district court dismissed the plaintiffs' complaint. The plaintiffs appealed. The U.S. Court of Appeals for the Second Circuit affirmed the lower court's decision. The plaintiffs argued that because the ordinance applied to female topless entertainment, but not to male topless entertainment, it violated the equal protection clause. As a gender-based distinction, this ordinance's classification was subject to intermediate scrutiny. The appellate court pointed out

that gender-based distinctions are acceptable in circumstances in which the two genders are not similarly situated. The court concluded that "New York City's objectives of preventing crime, maintaining property values, and preserving the quality of urban life, are important. We also believe that the [ordinance's] regulation of female, but not male, topless dancing, in the context of its overall regulation of sexually explicit commercial establishments, is substantially related to the achievement of New York City's objectives." The court noted that, in drafting the ordinance, the city regulated "only the types of establishments that have been found to produce negative impacts on the communities in which they are located." Male topless establishments were not among those found to have negative effects. "The male chest is routinely exposed on beaches, in public sporting events and the ballet, and in general consumption magazine photography without involving any sexual suggestion. In contrast, public exposure of the female breast is rare under the conventions of our society, and almost invariably conveys sexual overtones. It is therefore permissible for New York City * * * to classify female toplessness differently from the exhibition of the naked male chest. This does not constitute a denial of equal protection."

2-4A. ***Freedom of speech***

The court held that the state constitutional provision establishing English as the official language for state employees was invalid because it was overbroad and gave rise to substantial potential for inhibiting constitutionally protected free speech rights. The court stated that "Article XXVIII, by its literal wording, is capable of reaching expression protected by the First Amendment, such as Gutierrez's [a co-plaintiff's] right to communicate in Spanish with his Spanish-speaking constituents." To determine whether the Article XXVIII reached a substantial amount of constitutionally protected conduct, the court had to first interpret the meaning of Article XXVIII. The plaintiffs (Yniguez and others) claimed that it was a blanket prohibition on the use of any language other than English in the state workplace. The defendants, however, considered the article to be merely a directive for state and local governmental entities to act in English when acting in their sovereign capacities. The court held that the article's plain language indicated that with limited exceptions, the article prohibited the use of any language other than English by all officers and employees of all political subdivisions in Arizona while performing their official duties. Given this interpretation, the court concluded that "there is a realistic danger of, and a substantial potential for, the unconstitutional application of Article XXVIII." The article was therefore voided by the court.

2-5A. ***Equal protection***

The court agreed with Izquierdo. Mercado appealed to the U.S. Court of Appeals for the First Circuit, which reversed this decision. Under the rational-basis test, the question was whether there was any rational basis under which Mercado's actions related to a legitimate state interest. Mercado's ostensible objective was to replace Ms. Izquierdo with someone with greater audience appeal. The court stated that "Mr. Mercado could have rationally believed that having 'new [and young] faces' would maximize audience drawing power." The purpose of public television "includes serving the public by providing increased access to information and enhanced opportunities for education. Benefit to the public as a whole is maximized the more people take advantage of the services provided. Thus, to maximize viewership by making programs as appealing as possible is a legitimate objective in the operation of government-owned television stations."

2-6A. ***Freedom of speech***

Yes. The court denied the board's motion for summary judgment. The court held that the library did not have to provide Internet access, but that if it did, it could not restrict its patrons' access to sites on the Internet because the library "disfavors their content." According to the court, under the free speech clause of the First Amendment, the library could impose content-based restrictions on access to the Internet only on showing "a compelling state interest and means narrowly drawn to achieve that end." The court explained that even when a library, or any government entity, has a legitimate purpose—"whether it be to prevent the communication of obscene speech or materials harmful to children"—the means it uses to regulate must be a reasonable response that "will alleviate the harm in a direct and material way." The court concluded that the plaintiffs adequately alleged a lack of such a reasonable means in this case.

2-7A. ***Due process***

The U.S. Court of Appeals for the Eighth Circuit held that "it would be fundamentally unfair to hold Ashland accountable on probation for actions beyond its control. Ashland maintains that it would violate its due process rights to punish it for probation violations based solely on the future acts or omissions of MAP, which is a separate company not under Ashland's control. We agree." The court reasoned that "a defendant may not be sentenced for the crimes of another . . . . We believe that the probation conditions challenged here similarly improperly conditioned Ashland's probation on the conduct of MAP." The St. Paul Park Refinery "is no longer a business site of Ashland, but is owned, operated, and controlled by MAP, a third party that was not charged or sentenced in this case. As a minority stakeholder of MAP, Ashland has no control over or ability to direct MAP's day-to-day operation of the refinery, and is not in a position to ensure that continual access is granted to the probation office." Ashland had upgraded the sewer at the St. Paul Park Refinery, but "it had to obtain MAP's consent in order to implement this project at MAP's facility." The court "excise[d] the objectionable conditions" from the probation order, although finding it "reasonable that, to the extent that it can, Ashland should allow the probation office to monitor its compliance" with the sewer upgrade.

2-8A. ***Due process***

The court agreed with the Yurczyks' reasoning, as regarded their substantive due process rights, that the on-site construction requirement did "not have a substantial bearing upon the public health, safety, morals, or general welfare of the community" and "was not based upon a legitimate governmental objective." The county appealed this ruling to the Montana Supreme Court, which affirmed the judgment of the lower court. The state supreme court held that the on-site construction requirement was not rationally related to a legitimate governmental interest. The court pointed out that county officials were "unable to identify any health and only minimal safety concerns that the on-site construction provision addressed. As to general welfare * * * the preservation of property values may implicate legitimate government concerns in some zoning situations, [but] there is nothing * * * here that demonstrates these concerns actually drove the formulation of the regulations at issue. Indeed * * * the modular home would not have affected property values in the area," according to one official, who "testified that homes built off-site 'would have no real bearing upon market values at all,' " because District 17 "is a rural setting, and it's spread out into large

2-9A. *The commerce clause*

Under the commerce clause, the national government has the power to regulate every commercial enterprise in the United States. The commerce clause may not justify national regulation of noneconomic conduct. Interstate travel involves the use of the channels of interstate commerce, however, and is properly subject to congressional regulation under the commerce clause. Thus, SORNA—which makes it a crime for a sex offender to fail to re-register as an offender when he or she travels in interstate commerce—is a legitimate exercise of congressional authority under the commerce clause.

In the actual case on which this problem is based, a federal district court dismissed Hall's indictment. On the government's appeal, the U.S Court of Appeals for the Second Circuit reversed the dismissal and remanded the case for further proceedings, based on the reasoning stated above.

2-10A. A QUESTION OF ETHICS

1. According to the United States Supreme Court in this case, in the Federal Cigarette Labeling and Advertising Act of 1965 (FCLAA), "Congress pre-empted state cigarette advertising regulations like [Massachusetts'] because they would upset federal legislative choices to require specific warnings and to impose the ban on cigarette advertising in electronic media in order to address concerns about smoking and health. In holding that the FCLAA does not nullify the Massachusetts regulations, the [U.S. Court of Appeals for the] First Circuit concentrated on whether they are 'with respect to' advertising and promotion, concluding that the FCLAA only pre-empts regulations of the content of cigarette advertising." The Supreme Court did not agree: "There is no question about an indirect relationship between the Massachusetts regulations and cigarette advertising: The regulations expressly target such advertising. The Attorney General's argument that the regulations are not 'based on smoking and health' since they do not involve health-related content, but instead target youth exposure to cigarette advertising, is unpersuasive because, at bottom, the youth exposure concern is intertwined with the smoking and health concern."

2. Regarding a state's or a locality's ability to enact generally applicable zoning restrictions, the Supreme Court recognized that "state interests in traffic safety and esthetics may justify zoning regulations for advertising. Although [in the FCLAA] Congress has taken into account the unique concerns about cigarette smoking and health in advertising, there is no indication that Congress intended to displace local community interests in general regulations of the location of billboards or large marquee advertising, or that Congress intended cigarette advertisers to be afforded special treatment in that regard. Restrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not 'based on smoking and health.' " The Court noted that the pre-emption provision "in no way affect[s] the power of any State or political subdivision of any State with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to State or local requirements or prohibitions in the advertising of cigarettes." An argument against local governments' exercise of their zoning power to regulate tobacco products' advertising is that "states and localities also have at their disposal other means of regulating conduct to ensure that minors do not obtain cigarettes."

BUSINESS ACTIVITIES AND THE LEGAL ENVIRONMENT

- Basic knowledge of how government regulations and laws affect business activities is beneficial—if not essential.

- Businesspeople must also develop critical thinking and legal reasoning skills in order to evaluate how various laws apply to a given situation and to determine the best course of action.

- **Law:** A body of enforceable rules governing relationships among individuals and between individuals and their society.

- **Liability:** The state of being legally responsible (liable) for something, such as a debt or an obligation.

- **Many Different Laws May Affect a Single Business Decision:** Specific areas of law affect business activities, but a number of different laws may apply to just one decision, which influences business decision making.

- **Ethics and Business Decision Making:** Business decision makers need to consider not just whether a decision is legal but also whether it is ethical.

  - *Ethics:* The moral principles and values that govern what constitutes right or wrong behavior.

SOURCES OF AMERICAN LAW (1 of 4)

- *Primary sources of law:* Sources that establish the law such as constitutions, statutes, and regulations.

- *Secondary sources of law:* Sources that summarize and clarify the primary sources of law such as treatises and legal encyclopedias.

- **Constitutional Law:** U.S. law primarily takes the form of **constitutional law**, which set forth the general organization, powers, and limits of a given state or the federal government.

  - The U.S. Constitution is the supreme law of the land and the basis of all law in the United States. If challenged, any law that violates the Constitution will be declared unconstitutional and will not be enforced, regardless of its source.

SOURCES OF AMERICAN LAW (2 of 4)

- **Statutory Law:** A body of enforceable rules enacted by governments to govern relationships among individuals and between individuals and their society.
  - **Ordinances** passed by local governing bodies deal with matters not covered by federal or state law.
  - **Statutory Conflicts:** Tension may sometimes arise between federal, state, and local laws.
  - **Uniform Laws:** Model statutes reduce difficulties in conducting trade and commerce among the states.
  - **The Uniform Commercial Code:** This uniform act provides a uniform, yet flexible, set of rules governing commercial transactions to facilitate interstate commerce.

SOURCES OF AMERICAN LAW (3 of 4)

- **Administrative Law:** These rules, orders, and decisions of **administrative agencies** (entities that are established to perform a specific function) constitute a dominant element in the regulatory environment of business.
  - **Federal Agencies:** These agencies at the national level are subject to the authority of the president.
    - **Executive agencies** such as the U.S. Food and Drug Administration are contained within cabinet departments and are subject to the authority of the president, who has the power to appoint and remove their officers.
    - **Independent regulatory agencies** such as the Federal Trade Commission and the Securities and Exchange Commission have officers that serve for fixed terms and cannot be removed without just cause.
  - **State and Local Agencies:** These administrative agencies, often created as a parallel to a federal agency, operate at the state and local levels.

SOURCES OF AMERICAN LAW (4 of 4)

- **Case Law and Common Law Doctrines:** These rules of law are announced in court decisions.
  - **Case law:** The doctrines and principles announced in cases that govern all areas not covered by statutory or administrative law.

HIERARCHY AMONG PRIMARY SOURCES OF AMERICAN LAW

- Laws emanating from the various primary sources of American law are enforced according to the following hierarchy:

  (1) The **U.S. Constitution** takes precedence over

  (2) **federal statutory law**, which takes precedence over

  (3) a **state constitution**, which takes precedence over

  (4) **state statutory law**, which takes precedence over

  (5) a **local ordinance**, which takes precedence over

  (6) **administrative regulations and rulings**, which take precedence over

  (7) **common law**.

THE COMMON LAW TRADITION (1 of 9)

- **Early English Courts:** In eleventh-century England, William the Conqueror's king's courts sought to establish a uniform set of customs for the country as a whole.
  - **Common law:** The body of law that developed out of the king's courts provided general rules applied throughout the English empire.
  - **Courts of Law and Remedies at Law:** Early king's courts could grant only limited kinds of **remedies** (the legal means to enforce a right or redress a wrong). They had the power to award one or more of the following items as compensation: land, items of value, and money.
    - The courts that awarded this compensation became known as **courts of law**, and the three remedies were called **remedies at law**. (Today, the remedy at law normally takes the form of monetary **damages**—an amount given to a party whose legal interests have been injured.)

THE COMMON LAW TRADITION (2 of 9)

- **Courts of Equity:** These courts had the power to award any kind of nonmonetary relief.

- **Remedies in Equity:** Remedies granted by equity courts included ordering a person to do something (*specific performance*); to cease doing something (*injunction*); and to cancel a contractual obligation (*rescission*).

  - For example, the equitable remedy of specific performance may be ordered when one party **breaches** (fails to fulfill) an agreement and monetary damages are insufficient mitigation.

THE COMMON LAW TRADITION (3 of 9)

- **Equitable Maxims:** Propositions or general statements of equitable rules:
    - Some important equitable maxims:

(1) Whoever seeks equity must do equity (*treat others fairly*);

(2) Where there is equal equity, the law must prevail (*the law will determine the outcome*);

(3) One seeking the aid of an equity court must come to the court with clean hands (*have acted fairly and honestly*);

(4) Equity will not suffer a wrong to be without a remedy (*equitable relief will be awarded when there is no legal remedy*);

(5) Equity regards substance rather than form (*fairness and justice are more important than legal technicalities*); and

(6) Equity aids the vigilant, not those who rest on their rights (*neglect their rights for an unreasonable period of time*).

THE COMMON LAW TRADITION (4 of 9)

- A **defense** is an argument raised by the **defendant** (the party being sued) indicating why the **plaintiff** (the suing party) should not obtain the remedy sought. The party bringing a lawsuit is called the **petitioner**, and the party being sued is referred to as the **respondent**. Time periods for different types of cases are now usually fixed by **statutes of limitations**.

- **Legal and Equitable Remedies Today:** The courts of law and equity have merged in most of the United States. Nonetheless, U.S. courts still recognize legal remedies and equitable remedies.

  - A party can request both legal and equitable remedies in the same action, and the trial court judge may grant either or both forms of relief.

THE COMMON LAW TRADITION (5 of 9)

- **Procedural Differences between an Action at Law and an Action in Equity:**

  - In an action at law: a lawsuit is initiated by filing a complaint; the decision is made by jury or judge; a judgment is the result; and remedy is in the form of monetary damages or property.

  - In an action in equity: a lawsuit is initiated by filing a petition; the decision is made by a judge (no jury); a decree is the result; and remedy is in the form of injunction, specific performance, or rescission.

- **The Doctrine of *Stare Decisis*:** A common law doctrine under which judges are obligated to follow the precedents established in prior decisions. It helps courts be more efficient and makes the law more stable and predictable.

  - **Case Precedents and Case Reporters:** A court decision that furnishes an example or authority for deciding subsequent cases involving identical or similar legal principles and facts serves as a legal **precedent**. Cases are published in volumes called **reporters**.

THE COMMON LAW TRADITION (6 of 9)

- ***Stare Decisis* and the Common Law Tradition:** Deciding new cases with reference to former decisions or precedents formed a doctrine known as ***stare decisis***, a Latin phrase meaning "to stand on decided cases."

  - *Stare decisis* has two aspects:

  (1) A court should not overturn its own precedents unless there is a compelling reason to do so.

  (2) Decisions made by a higher court are binding on lower courts.

- **Controlling Precedents:** A *controlling precedent* is a type of binding authority that requires a court to follow prior court decisions in its jurisdiction.

  - **Binding authority** is any source of law a court must follow when deciding a case, including applicable constitutions, statutes, and regulations.

THE COMMON LAW TRADITION (7 of 9)

- ***Stare Decisis* and Legal Stability:** *Stare decisis* makes the law more stable and predictable.
  - A court may depart from the rule of precedent if it decides that the precedent should longer be followed.
- **When There Is No Precedent:** In *cases of first impression,* no precedents exist.
  - Nonbinding primary or secondary sources of law that a court may consult for guidance in these cases are known as **persuasive authorities**.
  - Sources may include precedents from other jurisdictions; legal principles and policies underlying previous court decisions or existing statutes; issues of fairness, social values and customs, and public policy; and unpublished opinions.

THE COMMON LAW TRADITION (8 of 9)

- ***Stare Decisis* and Legal Reasoning:** The process by which a judge harmonizes an opinion with the judicial decisions in previous cases is called **legal reasoning**.

  - **Basic Steps in Legal Reasoning:** The IRAC method is a legal reasoning process used to decide cases regardless of their length and complexity. IRAC is an acronym for *Issue*, *Rule*, *Application*, and *Conclusion*. The following questions are used to apply this method:

    1. **Issue**—What are the key facts and issues?

    2. **Rule**—What rule of law applies to the case?

    3. **Application**—How does the rule of law apply to the particular facts and circumstances of this case?

    4. **Conclusion**—What conclusion should be drawn?

  - **There Is No One "Right" Answer:** For most legal questions, good arguments can usually be made to support either side of the controversy. Outcomes of particular lawsuits before a court cannot be predicted with certainty.

THE COMMON LAW TRADITION (9 of 9)

- **The Common Law Today:** Common law governs all areas not covered by statutory law or administrative laws.
  - **Courts Interpret Statutes:** Courts interpret statutes and regulations. Judges interpret and apply the law but do not make laws.
  - ***Restatements of the Law* Clarify and Illustrate the Common Law:** The American Law Institute (ALI) publishes compilations called *Restatements of the Law* that generally summarize the common law rules followed by most states.
    - There are *Restatements* in the areas of contracts, torts, agency, trusts, property, restitution, security, judgments, and conflict of laws.
    - The *Restatements* are *secondary sources of law* and are an important source of legal analysis and opinion. Many *Restatements* are now in their second, third, or fourth editions.

SCHOOLS OF LEGAL THOUGHT (1 of 2)

- **Jurisprudence:** The study of law including the different schools of legal philosophy and how each can affect judicial decision making.

- **The Natural Law School: Natural law** theory states that a higher, or universal, law exists that applies to all human beings and that written laws should reflect the principles inherent in natural law. If they do not, then they lose their legitimacy and do not need to be obeyed.

- **The Positivist School: Legal positivism** holds that there is no law higher than the laws created by a national government and that laws must be enforced to prevent anarchy even if they are unjust. Legal positivism is the basis for positive—or national—law.

- **The Historical School:** The **historical school** of legal thought emphasizes the evolutionary process of law by concentrating on the origin and history of the legal system. It looks to the past to determine what the principles of contemporary law should be.

SCHOOLS OF LEGAL THOUGHT (2 of 2)

- **Legal Realism:** Proponents of **legal realism** believe law is just one of many institutions in society and that it is shaped by social forces and needs. Because of these factors, judges should take economic and social realities into account when deciding cases.

  - The **sociological school** views law as a tool for promoting social justice.

CLASSIFICATIONS OF LAW

- In systems that divide substantive from 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 outline the methods of enforcing the rights established by substantive law.
- **Civil Law and Criminal Law:**
  - **Civil law** spells out the rights and duties that exist between persons and between persons and their governments, as well as the relief available when a person's rights are violated.
  - **Criminal law** is concerned with wrongs committed *against the public as a whole*. Criminal acts are defined and prohibited by local, state, or federal government statutes.
- **Cyberlaw:** This term refers to all laws governing electronic communications and transactions conducted via the Internet.

HOW TO FIND PRIMARY SOURCES OF LAW (1 of 4)

- **Citation:** A reference to a publication in which a legal authority—such as a statute or a court decision—can be found.

- **Finding Statutory and Administrative Law:**

  - Shortly after a law is passed either by Congress or by a state legislature, it is reported in *United States Statutes at Large*.

  - State statutes are collected in similar state publications.

  - Most laws are referenced by their *codified* form—or the form in which they appear in the federal and state codes—and are compiled by subject.

  - ***United States Code:*** Codified statutes passed by Congress are reported under a title and title number that roughly correspond to major subject matter areas (e.g., the Internal Revenue Code).

  - **State Codes:** Codified statutes passed by a state legislature are typically reported by subject in that state's code (e.g., California Commercial Code).

HOW TO FIND PRIMARY SOURCES OF LAW (2 of 4)

- **Administrative Rules:** Rules and regulations adopted by federal agencies appear first in the Federal Register, which is published daily.
  - These are eventually incorporated into the Code of Federal Regulations (C.F.R.), which is divided into titles just like the U.S.C.

- **Finding Case Law:**
  - The two types of courts in the United States are federal courts and state courts. Both systems consist of several levels, or tiers, of courts.
  - On the bottom tier are *trial courts* in which evidence is presented and testimony is given.
  - Decisions from a trial court can be appealed to a higher court, which is typically an *appellate court* (intermediate court of appeals).
  - Appellate court decisions may be appealed to an even higher court, such as a state supreme court or the U.S. Supreme Court.

HOW TO FIND PRIMARY SOURCES OF LAW (3 of 4)

- **State Court Decisions:** Decisions from state trial courts are typically filed in the office of the clerk of the court and are available for public inspection.
  - Written decisions of the appellate, or reviewing, courts, are published and distributed in print and online.
  - The reported appellate decisions are published in volumes called *reports* or *reporters*, which are numbered consecutively and published by each state.
  - Unofficial reports are published by nongovernment entities.
  - **Regional Reporters:** State court opinions appear in regional units of the West's National Reporter System, published by Thomson Reuters.
    - Many states use the National Reporter System instead of their own state reporters because it reports cases more quickly and distributes them more widely.

HOW TO FIND PRIMARY SOURCES OF LAW (4 of 4)

- **Case Citations:** Published appellate decisions are normally referred to (cited) by the name of the case and the volume, name, and page number of the reporter(s) in which the opinion can be found.

- **Federal Court Decisions:** Federal district court decisions are published unofficially in the *Federal Supplement* ("F. Supp." or "F. Supp. 2d")*;* opinions from the circuit courts of appeals are reported unofficially in the *Federal Reporter* (F., F.2d, or F.3d).

  - The federal government publishes the official edition of the U.S. Supreme Court decisions as the *United States Reports* (U.S).

- **Unpublished Opinions:** Court opinions not yet published or that are not intended for publication can be accessed through Thomson Reuters Westlaw®.

- **Old Case Law:** Citations for opinions from old, classic cases may not conform to preceding descript-tions.

HOW TO READ AND UNDERSTAND CASE LAW (1 of 3)

- Decisions made by courts establish the boundaries of the law as it applies to almost all business relationships, making it essential that businesspersons know how to read and understand case law.

- **Case Titles and Terminology:** The title of a case, such as *Adams v. Jones*, indicates Adams is the party filing the suit against Jones, who is the defendant.

  - **Parties to Lawsuits:**

    - *Plaintiff/Petitioner:* The party who initiates a lawsuit.

    - *Defendant/Respondent:* The party against whom the lawsuit is brought.

    - **Appellant**/*Petitioner:* The party who takes an appeal from one court to another.

    - **Appellee**/*Respondent:* The party against whom an appeal is taken.

  - **Judges and Justices:** The terms *judge* and *justice* are usually synonymous as designations given to judges in various courts.

HOW TO READ AND UNDERSTAND CASE LAW (2 of 3)

- **Decisions and Opinions:** Reasons for a decision, the rules of law applied, and a judgment comprise the court's **opinion**.
  - *Unanimous opinion:* An opinion that represents the view of all the judges who heard a case.
  - **Majority opinion:** A court opinion that represents the views of the majority (more than half) of the judges or justices deciding the case.
  - **Concurring opinion:** A court opinion by one or more judges who agree with the majority opinion but not the legal reasoning behind the opinion.
  - **Dissenting opinion:** An opinion by one or more judges who disagree with the majority's opinion.
  - **Plurality opinion:** An opinion supported by the largest number of judges, but less than a majority of them.
  - ***Per curiam* opinion:** A unanimous opinion that does not indicate which judge wrote it.

HOW TO READ AND UNDERSTAND CASE LAW (3 of 3)

- **Sample Court Case:** Exhibit 1–6 presents an annotated case of *Yeasin v. Durham*.
  - **Briefing Cases:** Legal researchers brief cases by reducing the text of an opinion to its essential elements.
    - Generally, when you brief a case, you:
      - summarize the background and facts of the case;
      - indicate the issue (or issues) before the court; and
      - include the court's decision on the issue and its legal reasoning.

Chapter 1

Law and Legal Reasoning

Sample Case

719 Fed.Appx. 844
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 10th Cir. Rule 32.1.
United States Court of Appeals, Tenth Circuit.
Navid YEASIN, Plaintiff-Appellant,
v.
Tammara DURHAM, Defendant-Appellee.
No. 16-3367
Filed January 5, 2018
Gregory A. Phillips, Circuit Judge

Dr. Tammara Durham, the Vice Provost for Student Affairs at the University of Kansas, expelled Navid Yeasin from the university after finding that by physically restraining and later tweeting indirectly but disparagingly about his ex-girlfriend, he had violated the university's student code of conduct and sexual-harassment policy. After Yeasin sued Dr. Durham in Kansas state court, the university reinstated him. Yeasin then sued Dr. Durham in federal court, asserting a claim under 42 U.S.C. § 1983 based on his First Amendment right to freedom of speech and his Fourteenth Amendment right to substantive due process. He argued that Dr. Durham had violated these rights when she expelled him for his off-campus online speech. Dr. Durham successfully moved to dismiss Yeasin's complaint based on qualified immunity. Yeasin appealed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

A. Yeasin's Expulsion
Yeasin and A.W. dated from the fall of 2012 through June 2013. On June 28, 2013, Yeasin physically restrained A.W. in his car, took her phone from her, threatened to commit suicide if she broke up with him, threatened to spread rumors about her, and threatened to make the University of Kansas's "campus environment so hostile, [that she] would not attend any university in the state of Kansas." Appellee's Suppl. App. at 19.

For this conduct, Kansas charged Yeasin with criminal restraint, battery, and criminal deprivation of property. On July 25, 2013, A.W. sought and obtained a protection order against Yeasin from the Johnson County District Court. The order was "entered by consent without any findings of abuse." Appellee's Suppl. App. at 3. In August 2013, Yeasin entered a diversion agreement with the state on these charges. *Yeasin v. Univ. of Kansas*, 51 Kan.App.2d 939, 360 P.3d 423, 424 (2015).[1]

[1] We are entitled to take judicial notice of Yeasin's prior Kansas Court of Appeals case, just as the district court was entitled to do so, because it is a public record that "bear[s] directly upon the disposition of the case at hand." *United States v. Ahidley*, 486 F.3d 1184, 1192 n.5 (10th Cir. 2007).

That same month, A.W. filed a complaint against Yeasin with the university's Office of Institutional Opportunity and Access (IOA), alleging that Yeasin had sexually harassed her. Jennifer Brooks, an IOA investigator, interviewed A.W. about her ***846** complaint. *Yeasin*, 360 P.3d at 424. Another IOA investigator, Steve Steinhilber, "interviewed Yeasin regarding the complaint" and "advised Yeasin of his rights and responsibilities during the investigation." *Id.* at 425. Then, "[a]fter considering the Johnson County District Court's final protection from abuse order," the IOA decided to issue Yeasin a no-contact order. *Id.*

The no-contact order informed Yeasin that the university had "received information concerning an allegation that [he] may have violated the University's Sexual Harassment Policy in interactions with University of Kansas student [A.W.]." Appellant's App. at 49. The letter also put Yeasin on notice that he was "prohibited from initiating, or contributing through third-parties, to any physical, verbal, electronic, or written communication with [A.W.], her family, her friends or her associates." *Id.*

After Yeasin received the no-contact order, he tweeted the following messages on August 15, August 23, and September 5:
• Oh right, negative boob job. I remember her. (August 15, 2013);[2]
• If I could say one thing to you it would probably be "Go fuck yourself you piece of shit." #butseriouslygofuckyourself #crazyassex (August 23, 2013); and
• Lol, she goes up to my friends and hugs them and then unfriends them on Facebook. #psycho #lolwhat (September 5, 2013).
Id. at 51; Appellee's Suppl. App. at 11–13.

[2] Yeasin would later admit that he and his friends referred to A.W. as "negative double boob job" or "negative boob job" because of A.W.'s genetic condition and subsequent reconstructive surgery. Appellant's App. at 53.

Shortly thereafter, A.W.'s friend showed her Yeasin's tweets. A.W. couldn't see the tweets first-hand because Yeasin had removed her from his approved followers when they stopped dating. A.W. then complained to Brooks that Yeasin had tweeted about her despite the no-contact order. On September 6, 2013, Brooks e-mailed Yeasin the following warning:

While your August 23rd tweet does not specifically state the name of your ex-girlfriend, this communication is in violation of the No Contact Order. I am writing to you to clarify that any reference made on social media regarding [A.W.], even if the communication is not sent to her or [does not] state her name specifically, it is a violation of the No Contact Order.

Appellant's App. at 51. The e-mail further stated, "Going forward, if you make any reference regarding [A.W.], directly or indirectly, on any type of social media or other communication outlet, you will be immediately referred to the Student Conduct Officer for possible sanctions which may result in expulsion from the University." *Id.*

Yeasin then tweeted the following messages:

- #lol you're so obsessed with me you gotta creep on me using your friends accounts #crazybitch (September 7, 2013);
- 30 Reasons to Love Natural Breasts totalfratmove.com/30-reasons-to-... via @totalfratmove #doublenegativeboobjob (September 13, 2013).

Id. at 54; Appellee's Suppl. App. at 14–16 (alteration in original).

Concerned Yeasin's behavior was escalating, IOA Executive Director Jane McQueeny conducted a follow-up interview with Yeasin on September 17. *Yeasin*, 360 P.3d at 425. She reiterated to him that the no-contact policy applied to his indirect ***847** tweets. *Id.* at 425. Shortly thereafter, Yeasin posted the following tweet:

- "At least I'm proportionate." #NDB #boobs @MorganLCox (October 23, 2013).

Appellee Suppl. App. at 16.

All told, Yeasin posted fourteen tweets referring to A.W. without specifically naming her; of these, three were posted after the IOA e-mailed Yeasin and told him to stop.

On October 7, 2013, the IOA issued an investigative report concluding that Yeasin had sexually harassed A.W. in violation of university policy by physically restraining her during the June 28, 2013 incident and by posting the fourteen tweets. The report concluded that " 'while some of the conduct in this case occurred off campus this past summer,' the preponderance of the evidence nevertheless showed that Yeasin's conduct had affected the on-campus environment for [A.W.], thus violating the University's sexual harassment policy." *Yeasin*, 360 P.3d at 426 (quoting the IOA's report). The IOA also determined that Yeasin had violated the no-contact order "by continually 'harassing' [A.W.] on social media." *Id.* (quoting the IOA's report).

Later that month, Nicholas Kehrwald, the university's director of student conduct and community standards, received the IOA's report and scheduled a formal hearing for November 4, 2013, to adjudicate A.W.'s complaint against Yeasin. *Id.* Kerhwald notified Yeasin of the hearing and "specified that Yeasin's conduct violated Article 22.A.1 of the Student Code, the University's sexual[-]harassment policy, and the no-contact order."[3] *Id.* Kerhwald outlined the following evidence against Yeasin: that Yeasin had posted demeaning tweets about [A.W.]; that Yeasin had physically restrained [A.W.] and held her against her will for three hours in his car; that he had called her demeaning names; that he had threatened suicide when she tried to break-up with him; and that Yeasin's behavior had on-campus effects. *Id.*

3 At the time of Yeasin's discipline, Article 22, which was titled, "Non-Academic Misconduct," stated the following: "While on University premises or at University sponsored or supervised events, students ... are subject to disciplinary action...." Appellant's App. at 65. And Article 22.A.1 specifically prohibited students from "maliciously and repeatedly follow[ing] or attempt[ing] to make unwanted contact, including but not

limited to physical or electronic contact, with another person." *Id.*
The university's sexual-harassment policy stated that "sexual harassment is a form of illegal discrimination in violation of ... Title IX...." *Id.* at 52. The policy defined sexual harassment to include:
conduct, including physical contact, advances, and comments in person, through an intermediary, and/or via phone, text message, email, social media, or other electronic medium, that is unwelcome; based on sex or gender stereotypes; and is so severe, pervasive and objectively offensive that it has the purpose or effect of substantially interfering with a person's academic performance.
Id. at 53.

On November 4, 2013, the IOA held the formal hearing. A university student, a university staff member, Kerhwald, and Jamie Kratky[4] constituted the hearing panel. The panel reviewed the written documents in the case and then heard from A.W., Yeasin, IOA Executive Director Jane McQueeny, and IOA investigators Steinhilber and Brooks. *Yeasin*, 360 P.3d at 426. Following the hearing, the panel prepared a recommendation and submitted it to Dr. Durham so she could make her final decision regarding whether and how to sanction Yeasin's conduct. In their recommendation, the panel explained that "there was no information presented at ***848** any time to dispute the actions set forth in [A.W.'s] complaint or to demonstrate Yeasin did not violate[ ] Article 22, A and the University's Sexual Harassment policy." Appellee's Suppl. App. at 20. Moreover, they observed, "Yeasin admitted that some tweets that appeared to indirectly target [A.W.] were, in fact, direct references to [A.W.]." *Id.*

4 Kratky was only identified in the record as the hearing panel chair.

Two days after receiving the panel's recommendation, Dr. Durham informed Yeasin of her decision by letter. In the letter, Dr. Durham explained that she reviewed the student code, the complaint brought by A.W., the evidence presented at the hearing, and the hearing panel's recommendation before making her decision. She informed him that "[b]ased on a preponderance of [i]nformation, the hearing panel [found him] in violation of **Article 22. Section A. 1** and the University's Sexual Harassment Policy" and she outlined the language of both policies. Appellant's App. at 52 (emphasis in original); *see supra* n.3.

Dr. Durham said her decision was based on several facts supported by the preponderance of the evidence, such as the Johnson County protection order and A.W.'s hearing statement that "her grades had slipped significantly during the summer because of the emotional toll her interactions with Mr. Yeasin had taken on her." Appellant's App. at 54. Dr. Durham further relied on A.W.'s statement to the hearing panel that her relationship with Yeasin had "affected her day-to-day on-campus activities, since she [couldn't] enter public campus places without receiving glares and remarks from Yeasin's friends telling her she needs to leave and that her presence is unwanted." Appellee's Suppl. App. at 19. She indicated that Yeasin admitted during the formal hearing that when he was tweeting about "negative double boob job" or "negative boob job", he was referring to A.W. Appellant's App. at 53.

On these bases, Dr. Durham found that Yeasin's June 28, 2013 conduct and his tweets were "so severe, pervasive and objectively offensive that it interfered with [A.W.]'s academic performance and equal opportunity to participate in or benefit from University programs or activities." *Id.* at 54. She found that his tweets violated the sexual-harassment policy because they were "unwelcome comments about [A.W.]'s body." *Id.* And she found that his conduct "threatened the physical health, safety and welfare of [A.W.], making the conduct a violation of **Article 22, A. 1** of the *Code*." *Id.* (emphasis in original).

As a result of his conduct, Dr. Durham decided to expel Yeasin from the university and ban him from campus.

B. Court Proceedings
Yeasin contested his expulsion in Kansas state court. *See Yeasin*, 360 P.3d at 427. The court set aside Yeasin's expulsion, reasoning that the hearing panel's findings, adopted by Dr. Durham, "were not supported by substantial evidence." Appellant's App. at 10. The court also determined that "KU and [Dr.] Durham erroneously interpreted the Student Code of Conduct by applying it to off-campus conduct." *Id.*

The university then appealed. It argued that Article 20 of the student code was a jurisdictional statement that modified the scope of Article 22's language to include the ability to punish students for off-campus conduct that violates federal, state, or local law. *Yeasin*, 360 P.3d at 432. Article 20 provides, "The University may not institute disciplinary proceedings unless the alleged violation(s) giving rise to the disciplinary action occurs on University premises or at University sponsored or supervised events, or as otherwise required by ***849** federal, state, or local law." Appellant's App. at 64. The university argued that its interpretation of Article 20 was "consistent with the obligations imposed on it under Title IX." *Yeasin*, 360 P.3d at 429.

But the Kansas Court of Appeals concluded that Article 20 wasn't a jurisdictional statement and that its plain language supported disciplinary actions only against students who violate federal, state, or local law on-campus or at school-sponsored activities. *Yeasin*, 360 P.3d at 431–32. Similarly, the court determined that Article 22's plain language didn't give Dr. Durham authority to expel him because his conduct had occurred off campus. *Yeasin*, 360 P.3d at 432. So the court upheld the order requiring Yeasin's re-enrollment. *Id.* at 432.

Yeasin then brought this suit in federal court, claiming that Dr. Durham had violated his First and Fourteenth Amendment rights by expelling him for the content of his online, off-campus speech. Under Federal Rule of Civil Procedure 12(b)(6), Dr. Durham moved to dismiss both of Yeasin's claims on qualified-immunity grounds. The district court granted the motion after concluding that Dr. Durham hadn't violated Yeasin's clearly established rights.

DISCUSSION
"We review de novo a district court's dismissal under Federal Rule of Civil Procedure 12(b)(6). We assume the truth of all well-pleaded facts in the complaint, and draw all reasonable inferences therefrom in the light most favorable to the plaintiffs." *Leverington v. City of Colo. Springs*, 643 F.3d 719, 723 (10th Cir. 2011) (quoting *Dias v. City and Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009)). In First Amendment cases, we independently examine "the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* at 723 (quoting *Thomas v. City of Blanchard*, 548 F.3d 1317, 1322 (10th Cir. 2008)).

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter ... to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A plaintiff states a facially plausible claim by pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937. But a pleading based on only "labels and conclusions" or "formulaic recitation[s]" of a claim for relief's elements is insufficient. *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955.

In this case, Dr. Durham predicated her motion to dismiss on her claim of qualified immunity. Qualified immunity protects government officials from liability for civil damages if their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *White v. Pauly,* ––– U.S. ––––, 137 S.Ct. 548, 551, 196 L.Ed.2d 463 (2017) (quoting *Mullenix v. Luna*, ––– U.S. ––––, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015)); *accord A.M. v. Holmes*, 830 F.3d 1123, 1134 (10th Cir. 2016). Qualified immunity "protects 'all but the plainly incompetent or those who knowingly violate the law.' " *Mullenix*, 136 S.Ct. at 308 (quoting *Malley v Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986)).

To overcome a government official's qualified-immunity defense, a plaintiff must "demonstrate '(1) that the official violated a statutory or constitutional right, *and* (2) that the right was 'clearly established.' " ***850** *Holmes*, 830 F.3d at 1134 (quoting *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015)) (emphasis in original). We can analyze either prong of the qualified immunity test first and can resolve the case solely on the clearly established prong. *See Panagoulakos v. Yazzie*, 741 F.3d 1126, 1129 (10th Cir. 2013).

A clearly-established right exists if "existing precedent ... place[s] the statutory or constitutional question beyond debate." *Mullenix*, 136 S.Ct. at 308 (quoting *Ashcroft v. al-Kidd,* 563 U.S. 731, 741, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)). "The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.' " *Mullenix*, 136 S.Ct. at 308 (quoting *al-Kidd*, 563 U.S. at 742, 131 S.Ct. 2074). A plaintiff needn't supply a case directly on point from our circuit or the Supreme Court but must do more than cite case law announcing a legal rule "at a high level of generality." *White*, 137 S.Ct. at 552 (quoting *Al-Kidd*, 563 U.S. at 742, 131 S.Ct. 2074). The relevant case law "must be 'particularized' to the facts of the case" currently before the court. *Id.* at 552 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

For the reasons set forth below, we conclude that Yeasin has failed to show that Dr. Durham violated his clearly established rights under either the First Amendment or the Fourteenth Amendment. As a result, we needn't resolve whether Yeasin could meet the first prong of the qualified-immunity analysis for either issue.

A. First Amendment

The First Amendment states, "Congress shall make no law ... abridging the freedom of speech[ ]...." U.S. Const. amend. I. But what happens when one student's off-campus speech interferes with another student's education on a university campus?

Yeasin's case presents interesting questions regarding the tension between some students' free-speech rights and other students' Title IX rights to receive an education absent sex discrimination in the form of sexual harassment. Department of Education Office for Civil Rights Dear Colleague Letter on Sexual Violence (OCR Sexual Violence DCL), April 4, 2011, at 1, https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html ("Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.").[5] But even if Yeasin could show that Dr. Durham violated his First Amendment rights, we conclude that he has failed to show a violation of clearly established law. We don't decide whether Yeasin had a First Amendment right to post his tweets without being disciplined by the university.

5 This guidance is no longer in effect. *See* OCR DCL, Sept. 22, 2017, at 1, www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf ("The purpose of this letter is to inform you that the Department of Education is withdrawing the statements of policy and guidance reflected in the ... Dear Colleague Letter on Sexual Violence, issued by the Office for Civil Rights at the U.S. Department of Education, dated April 4, 2011.").

"[C]olleges and universities are not enclaves immune from the sweep of the First Amendment." *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972). But both the Supreme Court and our circuit permit schools to circumscribe students' free-speech rights in certain contexts.[6] Broad legal principles in student ***851** free-speech cases provide some guidance on issues Yeasin raises, but they cannot suffice as clearly established law.

[6] *See, e.g., Morse v. Frederick*, 551 U.S. 393, 397, 408, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (allowing school to discipline a student for flying a banner reading "BONG HiTs 4 JESUS" at an off-campus, school-approved activity because the banner could reasonably be viewed as promoting drug use); *see also Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (holding that the *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) framework for free-speech analysis is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), announced that secondary-school students retain free-speech rights but that schools can still prohibit actions that "would materially and substantially disrupt the work and discipline of the school." The Supreme Court has announced three additional exceptions to First Amendment doctrine in public schools. Secondary public schools may restrict student speech even absent a forecast of disruption in cases involving lewd, vulgar, or indecent speech, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986), school-sponsored speech, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988), and speech advocating illegal drug use, *Morse v. Frederick*, 551 U.S. 393, 408, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007). But Yeasin contends that *Tinker* and its progeny are inapplicable in the university setting.

Yeasin argues that *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973) (per curiam), *Widmar v. Vincent*, 454 U.S. 263, 268–69, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and *Healy*, 408 U.S. at 180, 92 S.Ct. 2338, clearly establish the "underlying principle[ ]" that universities may not restrict university-student speech in the same way secondary public school officials may restrict secondary-school student speech. Appellant's Opening Br. at 11–12. Yeasin also argues that *Reed v. Town of Gilbert*, ––– U.S. ––––, 135 S.Ct. 2218, 2226, 192 L.Ed.2d 236 (2015), clearly establishes that content-based restrictions "are disfavored and presumptively invalid under the law." Appellant's Opening Br. at 12. Taken together, Yeasin argues, these cases clearly establish his right to tweet about A.W. without the university being able to place restrictions on, or discipline him for, the contents of his tweets.

But none of the above cases present circumstances similar to his own. *Papish*, *Healy*, and *Widmar* don't concern university-student conduct that interferes with the rights of other students or risks disrupting campus order.

In *Papish*, a university expelled a graduate student for distributing a newspaper on campus allegedly "containing forms of indecent speech" in violation of university by-laws. 410 U.S. at 667, 93 S.Ct. 1197. The Supreme Court explained that because the newspaper's content didn't interfere "with the rights of others" or disrupt "the University's functions," the sole question "was whether a state university could proscribe [the newspaper's] form of expression." *Id.* at 670 n.6, 93 S.Ct. 1197.

Healy concerned a state college's refusal to officially recognize a student group known as Students for a Democratic Society because of its potential affiliation with a national organization known for campus disruption. 408 U.S. at 170–71, 92 S.Ct. 2338. The *Healy* Court determined that because the college's refusal to recognize the student group stemmed from undifferentiated fear or apprehension that the particular ***852** individuals forming the group "posed a substantial threat of material disruption," the college's action was unconstitutional under *Tinker*. *Healy*, 408 U.S. at 189–91, 92 S.Ct. 2338; *see also Tinker*, 393 U.S. at 508, 89 S.Ct. 733.

And in *Widmar*, a university disallowed a registered religious student group from meeting in university buildings. 454 U.S. at 265, 102 S.Ct. 269. *Widmar* decided that "having created a forum generally open to student groups," it was unconstitutional for a university to "enforce a content-based exclusion of religious speech." *Id.* at 277. *Widmar* doesn't say whether the religious student group had somehow threatened to disrupt campus order or interfere with other students' educations. But after reciting the strict-scrutiny test for content-based restrictions, the Supreme Court quoted *Healy's* proposition that "[w]hile a college has a legitimate interest in preventing disruption on the campus, which ... may justify [a prior] restraint, a heavy burden rests on the college to demonstrate the appropriateness of that action." *See Widmar*, 454 U.S. at 270 n.7, 102 S.Ct. 269 (ellipsis in original) (internal quotation marks omitted) (quoting *Healy*, 408 U.S. at 184, 92 S.Ct. 2338). This language suggests that the Supreme Court believes that the material-and-substantial-disruption test applies in the university setting.

Papish, *Healy*, *Widmar*, and *Reed* provide broad principles that are too general to have clearly established Yeasin's rights to tweet about A.W. free from university discipline. Yeasin's conduct differs from that of the students in his cited cases—in those cases no student had been charged with a crime against another student and followed that up with sexually harassing comments affecting her ability to feel safe while attending classes. Dr. Durham had a reasonable belief based on the June 28, 2013 incident and on Yeasin's tweets that his continued enrollment at the university threatened to disrupt A.W.'s education and interfere with her rights.

At the intersection of university speech and social media, First Amendment doctrine is unsettled. *Compare Keefe v. Adams,* 840 F.3d 523, 525–26 (8th Cir. 2016) (concluding that college's removal of a student from school based on off-campus statements on his social media page didn't violate his First Amendment free-speech rights), *with J.S. v. Blue Mountain. Sch. Dist.,* 650 F.3d 915, 920 (3d Cir. 2011) (holding that a school district violated the First Amendment rights of a plaintiff when it suspended her for creating a private social media profile mocking the school principal and containing adult and explicit content). It is thus unsurprising that Yeasin's broad propositions of law don't meet the standard required to show clearly established law under *White* and *Mullenix*.

In conclusion, Yeasin can't establish that Dr. Durham violated clearly established law when she expelled him, in part, for his online, off-campus tweets.

B. Substantive Due Process

Yeasin's substantive-due-process claim is similarly flawed. The Fourteenth Amendment's Due Process Clause protects interests in life, liberty, and property from arbitrary government action. *Butler v. Rio Rancho Pub. Sch. Bd. of Educ.*, 341 F.3d 1197, 1200 (10th Cir. 2003). We have held that university students have a property interest in their continued education. *Harris v. Blake*, 798 F.2d 419, 424 (10th Cir. 1986). But to establish that a deprivation of a property interest violates substantive due process, a student must prove that the university's decision to expel her was arbitrary, lacked a rational basis, or shocks the conscience. *Butler*, 341 F.3d at 1200–01. We don't resolve whether Dr. Durham's ***853** decision to expel Yeasin violated his right to substantive due process but decide only that she violated no clearly established law in doing so.

Yeasin points to *Michigan v. Ewing*, 474 U.S. 214, 225, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985), *Harris*, 798 F.2d at 424–25, and *Gossett v. Oklahoma ex rel. Board of Regents for Langston University*, 245 F.3d 1172, 1181–82 (10th Cir. 2001), as sufficient to notify Dr. Durham that she would violate his substantive-due-process rights if she expelled him for off-campus, online conduct. Appellant's Opening Br. at 25–26. But as Yeasin concedes, these cases "are not exactly on point." Appellant's Opening Br. at 26.

In *Ewing*, a student pursuing a joint degree failed an exam that was necessary to advance in the program. *Ewing*, 474 U.S. at 215–16, 106 S.Ct. 507. The student unsuccessfully petitioned various university bodies for his readmission and a chance to retake the exam. *Id.* at 216–17, 106 S.Ct. 507. When those appeals were unsuccessful, he sued the university, alleging that the university acted arbitrarily and deprived him of substantive due process by dropping him from the joint degree program without allowing him to retake the exam. *Id.* at 217, 223–25, 106 S.Ct. 507. The Supreme Court disagreed and determined that his dismissal from the "program rested on an academic judgment that is not beyond the pale of reasoned academic decision-making when viewed against the background of his entire career" in the program, including his failing exam score. *Id.* at 227–28, 106 S.Ct. 507.

Harris involved a university student who was forced to withdraw from a psychology program after his grade-point average fell below the minimum requirement. 798 F.2d at 421. Upon learning that a professor placed a letter in his academic file expressing reservations about his fitness for the psychology program before his withdrawal, he persuaded the dean of his college to have the letter removed from his file. *Id.* at 421–22. Meanwhile, he challenged the low grades he received and the placement of the letter into his file before an academic appeals board. *Id.* at 422. The appeals board upheld his grades and declined to rule on the letter issue since the dean had it removed from his file. *Id.* at 422. Subsequently, he sued the university and alleged he was denied substantive due process because of the letter and his low grades. *Id.* at 422, 424–25. Our court determined that *Ewing* was dispositive and that the student hadn't made out a substantive due process claim because the essence of the student's claim was that the university "misjudged his fitness to remain a student." *Id.* at 424–25.

And in *Gossett*, a male nursing student alleged he was denied substantive due process when he was involuntarily withdrawn from his nursing program after receiving a 'D' grade in a class. 245 F.3d at 1175–76. Specifically, he argued that nursing students who were men were "not given the same help, counseling, and opportunities to improve [their] performance[s]" as the school gave nursing students who were women. *Id.* at 1176. The district court granted the university summary judgment. *Id.* at 1175. But on appeal, our court remanded the student's substantive due process claim because he presented sufficient evidence to create a fact issue as to whether he was dismissed "based on an exercise of professional judgment as to his academic ability" or "impermissible gender discrimination." *Id.* at 1182.

In each of the above cases, the underlying principle is that in order to have a substantive-due-process claim for being expelled "based on an academic decision," a university student "must show that the decision was the product of arbitrary state ***854** action rather than a conscientious, careful and deliberate exercise of professional judgment." *Gossett*, 245 F.3d at 1182. Students can prove this with "evidence that the challenged decision was based on 'nonacademic or constitutionally impermissible reasons,' rather than the product of conscientious and careful deliberation." *Gossett*, 245 F.3d at 1182 (quoting *Ewing*, 474 U.S. at 225, 106 S.Ct. 507). We can't apply the *Ewing* principle to Yeasin's case because Dr. Durham's decision was explicitly and purposefully non-academic.[7] *Ewing*, *Harris*, and *Gossett* don't clearly establish that Dr. Durham expelling Yeasin, in part, for off-campus, online tweets that affected another student's ability to get an education, was arbitrary, lacked a rational basis, or shocks the conscience.

7 *Compare Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 88–90, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (holding that academic dismissals from universities require only minimal due-process protections because courts are reluctant to second-guess an educator's expert judgment on educational matters), *with Goss v. Lopez*, 419 U.S. 565, 581–84, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) (holding that dismissal from a school based on non-academic, disciplinary reasons requires notice and a hearing commensurate with the circumstances and severity of the situation). Yeasin doesn't contend that he received an insufficient amount of process.

In sum, Dr. Durham didn't violate clearly established law when she expelled Yeasin for non-academic misconduct related to the June 29, 2013 incident and his tweets.

CONCLUSION

For the reasons stated, we AFFIRM the district court's grant of Dr. Durham's motion to dismiss on the basis of qualified immunity.

Supplemental Case Printout for: *Ethics Today*

135 S.Ct. 2401
Supreme Court of the United States
Stephen KIMBLE et al., Petitioners
v.
MARVEL ENTERTAINMENT, LLC, successor to Marvel Enterprises, Inc.
No. 13–720.
Argued March 31, 2015.
Decided June 22, 2015.
Opinion
Justice KAGAN delivered the opinion of the Court.

[1] In *Brulotte v. Thys Co.,* 379 U.S. 29, 85 S.Ct. 176, 13 L.Ed.2d 99 (1964), this Court held that a patent holder cannot charge royalties for the use of his invention after its patent term has expired. The sole question presented here is whether we should overrule *Brulotte*. Adhering to principles of *stare decisis,* we decline to do so. Critics of the *Brulotte* rule must seek relief not from this Court but from Congress.

I

[2] In 1990, petitioner Stephen Kimble obtained a patent on a toy that allows children (and young-at-heart adults) to role-play as "a spider person" by shooting webs—really, pressurized foam string—"from the palm of [the] hand." U.S. Patent No. 5,072,856, Abstract (filed May 25, ***2406** 1990).[1] Respondent Marvel Entertainment, LLC (Marvel) makes and markets products featuring Spider–Man, among other comic-book characters. Seeking to sell or license his patent, Kimble met with the president of Marvel's corporate predecessor to discuss his idea for web-slinging fun. Soon afterward, but without remunerating Kimble, that company began marketing the "Web Blaster"—a toy that, like Kimble's patented invention, enables would-be action heroes to mimic Spider–Man through the use of a polyester glove and a canister of foam.

1 Petitioner Robert Grabb later acquired an interest in the patent. For simplicity, we refer only to Kimble.

Kimble sued Marvel in 1997 alleging, among other things, patent infringement. The parties ultimately settled that litigation. Their agreement provided that Marvel would purchase Kimble's patent in exchange for a lump sum (of about a half-million dollars) and a 3% royalty on Marvel's future sales of the Web Blaster and similar products. The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider–Man (by doing whatever a spider can).

And then Marvel stumbled across *Brulotte,* the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. But Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made after his patent's expiration. See 379 U.S., at 32, 85 S.Ct. 176. So the decision's effect was to sunset the settlement's royalty clause.[2] On making that discovery, Marvel sought a declaratory judgment in federal district court confirming that the company could cease paying royalties come 2010—the end of Kimble's patent term. The court approved that relief, holding that *Brulotte* made "the royalty provision ... unenforceable after the expiration of the Kimble patent." 692 F.Supp.2d 1156, 1161 (D.Ariz.2010). The Court of Appeals for the Ninth Circuit affirmed, though making clear that it was none too happy about doing so. "[T]he *Brulotte* rule," the court complained, "is counterintuitive and its rationale is arguably unconvincing." 727 F.3d 856, 857 (2013).

2 In *Brulotte,* the patent holder retained ownership of the patent while licensing customers to use the patented article in exchange for royalty payments. See 379 U.S., at 29–30, 85 S.Ct. 176. By contrast, Kimble sold his whole patent to obtain royalties. But no one here disputes that *Brulotte* covers a transaction structured in that alternative way.

We granted certiorari, 574 U.S. ——, 135 S.Ct. 781, 190 L.Ed.2d 649 (2014), to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*.[3] For reasons of *stare decisis,* we demur.

3 See, *e.g., Scheiber v. Dolby Labs., Inc.,* 293 F.3d 1014, 1017–1018 (C.A.7 2002) (Posner, J.) (*Brulotte* has been "severely, and as it seems to us, with all due respect, justly criticized.... However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"); Ayres & Klemperer, Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse Benefits of Uncertainty and Non–Injunctive Remedies, 97 Mich. L.Rev. 985, 1027 (1999) ("Our analysis ... suggests that *Brulotte* should be overruled").

II

[3] [4] Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to ***2407** discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. See 35 U.S.C. § 154(a)(1). But a patent typically expires 20 years from the day the application for it was filed. See § 154(a)(2). And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. See *Sears, Roebuck & Co. v. Stiffel Co.,* 376 U.S. 225, 230, 84 S.Ct. 784, 11 L.Ed.2d 661 (1964).

This Court has carefully guarded that cut-off date, just as it has the patent laws' subject-matter limits: In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented, as well as unpatentable, inventions. In one line of cases, we have struck down state statutes with that consequence. See, *e.g., id.,* at 230–233, 84 S.Ct. 784; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.,* 489 U.S. 141, 152, 167–168, 109 S.Ct. 971, 103 L.Ed.2d 118 (1989); *Compco Corp. v. Day–Brite Lighting, Inc.,* 376 U.S. 234, 237–238, 84 S.Ct. 779, 11 L.Ed.2d 669 (1964). By virtue of federal law, we reasoned, "an article on which the patent has expired," like an unpatentable article, "is in the public domain and may be made and sold by whoever chooses to do so." *Sears,* 376 U.S., at 231, 84 S.Ct. 784. In a related line of decisions, we have deemed unenforceable private contract provisions limiting free use of such inventions. In *Scott Paper Co. v. Marcalus Mfg. Co.,* 326 U.S. 249, 66 S.Ct. 101, 90 L.Ed. 47

(1945), for example, we determined that a manufacturer could not agree to refrain from challenging a patent's validity. Allowing even a single company to restrict its use of an expired or invalid patent, we explained, "would deprive ... the consuming public of the advantage to be derived" from free exploitation of the discovery. *Id.,* at 256, 66 S.Ct. 101. And to permit such a result, whether or not authorized "by express contract," would impermissibly undermine the patent laws. *Id.,* at 255–256, 66 S.Ct. 101; see also, *e.g., Edward Katzinger Co. v. Chicago Metallic Mfg. Co.,* 329 U.S. 394, 400–401, 67 S.Ct. 416, 91 L.Ed. 374 (1947) (ruling that *Scott Paper* applies to licensees); *Lear, Inc. v. Adkins,* 395 U.S. 653, 668–675, 89 S.Ct. 1902, 23 L.Ed.2d 610 (1969) (refusing to enforce a contract requiring a licensee to pay royalties while contesting a patent's validity).

Brulotte was brewed in the same barrel. There, an inventor licensed his patented hop-picking machine to farmers in exchange for royalties from hop crops harvested both before and after his patents' expiration dates. The Court (by an 8–1 vote) held the agreement unenforceable—"unlawful *per se* "—to the extent it provided for the payment of royalties "accru[ing] after the last of the patents incorporated into the machines had expired." 379 U.S., at 30, 32, 85 S.Ct. 176. To arrive at that conclusion, the Court began with the statutory provision setting the length of a patent term. See *id.,* at 30, 85 S.Ct. 176 (quoting the then-current version of § 154). Emphasizing that a patented invention "become[s] public property once [that term] expires," the Court then quoted from *Scott Paper* : Any attempt to limit a licensee's post-expiration use of the invention, "whatever the legal device employed, runs counter to the policy and purpose of the patent laws." 379 U.S., at 31, 85 S.Ct. 176 (quoting 326 U.S., at 256). In the *Brulotte* Court's view, contracts to pay royalties for such use continue "the patent monopoly beyond the [patent] period," even though only as to the licensee affected. 379 U.S., at 33, 85 S.Ct. 176. And in so doing, those agreements conflict with patent law's policy of establishing a ***2408** "post-expiration ... public domain" in which every person can make free use of a formerly patented product. *Ibid.*

The *Brulotte* rule, like others making contract provisions unenforceable, prevents some parties from entering into deals they desire. As compared to lump-sum fees, royalty plans both draw out payments over time and tie those payments, in each month or year covered, to a product's commercial success. And sometimes, for some parties, the longer the arrangement lasts, the better—not just up to but beyond a patent term's end. A more extended payment period, coupled (as it presumably would be) with a lower rate, may bring the price the patent holder seeks within the range of a cash-strapped licensee. (Anyone who has bought a product on installment can relate.) See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 17. Or such an extended term may better allocate the risks and rewards associated with commercializing inventions—most notably, when years of development work stand between licensing a patent and bringing a product to market. See, *e.g.,* 3 R. Milgrim & E. Bensen, Milgrim on Licensing § 18.05, p. 18–9 (2013). As to either goal, *Brulotte* may pose an obstacle.

[5] [6] [7] [8] Yet parties can often find ways around *Brulotte,* enabling them to achieve those same ends. To start, *Brulotte* allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period; all the decision bars are royalties for using an invention after it has moved into the public domain. See 379 U.S., at 31, 85 S.Ct. 176; *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 136, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969). A licensee could agree, for example, to pay the licensor a sum equal to 10% of sales during the 20–year patent term, but to amortize that amount over 40 years. That arrangement would at least bring down early outlays, even if it would not do everything the parties might want to allocate risk over a long timeframe. And parties have still more options when a licensing agreement covers either multiple patents or additional non-patent rights. Under *Brulotte,* royalties may run until the latest-running patent covered in the parties' agreement expires. See 379 U.S., at 30, 85 S.Ct. 176. Too, post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent. See, *e.g.,* 3 Milgrim on Licensing § 18.07, at 18–16 to 18–17. That means, for example, that a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone). Finally and most broadly, *Brulotte* poses no bar to business arrangements other than royalties—all kinds of joint ventures, for example—that enable parties to share the risks and rewards of commercializing an invention.

[9] Contending that such alternatives are not enough, Kimble asks us to abandon *Brulotte* in favor of "flexible, case-by-case analysis" of post-expiration royalty clauses "under the rule of reason." Brief for Petitioners 45. Used in antitrust law, the rule of reason requires courts to evaluate a practice's effect on competition by "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect." *State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). Of primary importance in this context, Kimble posits, is whether a patent holder has power in the relevant market and so might be able to curtail competition. See Brief for Petitioners ***2409** 47–48; *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 44, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006) ("[A] patent does not necessarily confer market power"). Resolving that issue, Kimble notes, entails "a full-fledged economic inquiry into the definition of the market, barriers to entry, and the like." Brief for Petitioners 48 (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust § 3.2e, p. 3–12.1 (2d ed., Supp. 2014) (Hovenkamp)).

III

[10] [11] Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community,* 572 U.S. ——, ——, 134 S.Ct. 2024, 2036, 188 L.Ed.2d 1071 (2014). Application of that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee,* 501 U.S. 808, 827–828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

[12] [13] [14] Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 406, 52 S.Ct. 443, 76 L.Ed. 815 (1932) (dissenting opinion). Indeed, *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well what we have termed a "special justification"—over and above the belief "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc.,* 573 U.S. ——, ——, 134 S.Ct. 2398, 2407, 189 L.Ed.2d 339 (2014).

[15] [16] [17] What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte,* interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, *e.g., Patterson v. McLean Credit Union,* 491 U.S. 164, 172–173, 109 S.Ct. 2363, 105 L.Ed.2d 132 (1989). That is true, contrary to the dissent's view, see *post,* at 2417 – 2418 (opinion of ALITO, J.), regardless whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. See, *e.g., Bilski v. Kappos,* 561 U.S. 593, 601–602, 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010). Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. *Halliburton,* 573 U.S., at ——, 134 S.Ct., at 2411. All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

And Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever ***2410** sees. *Brulotte* has governed licensing agreements for more than half a century. See *Watson v. United States,* 552 U.S. 74, 82–83, 128 S.Ct. 579, 169 L.Ed.2d 472 (2007) (stating that "long congressional acquiescence," there totaling just 14 years, "enhance[s] even the usual precedential force we accord to our interpretations of statutes" (internal quotation marks omitted)). During that time, Congress has repeatedly amended the patent laws, including the specific provision (35 U.S.C. § 154) on which *Brulotte* rested. See, *e.g.,* Uruguay Round Agreements Act, § 532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (limiting patent-misuse claims). *Brulotte* survived every such change. Indeed, Congress has rebuffed bills that would have replaced *Brulotte* 's *per se* rule with the same antitrust-style analysis Kimble now urges. See, *e.g.,* S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of "illegal extension of the patent right by reason of his or her licensing practices ... unless such practices ... violate the antitrust laws"); S. 438, 100th Cong., 2d Sess., § 201(3) (1988) (same). Congress's continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.

[18] Nor yet are we done, for the subject matter of *Brulotte* adds to the case for adhering to precedent. *Brulotte* lies at the intersection of two areas of law: property (patents) and contracts (licensing agreements). And we have often recognized that in just those contexts—"cases involving property and contract rights"—considerations favoring *stare decisis* are "at their acme." *E.g., Payne,* 501 U.S., at 828, 111 S.Ct. 2597; *Khan,* 522 U.S., at 20, 118 S.Ct. 275. That is because parties are especially likely to rely on such precedents when ordering their affairs. To be sure, Marvel and Kimble disagree about whether *Brulotte* has actually generated reliance. Marvel says yes: Some parties, it claims, do not specify an end date for royalties in their licensing agreements, instead relying on *Brulotte* as a default rule. Brief for Respondent 32–33; see 1 D. Epstein, Eckstrom's Licensing in Foreign and Domestic Operations § 3.13, p. 3–13, and n. 2 (2014) (noting that it is not "necessary to specify the term ... of the license" when a decision like *Brulotte* limits it "by law"). Overturning *Brulotte* would thus upset expectations, most so when long-dormant licenses for long-expired patents spring back to life. Not true, says Kimble: Unfair surprise is unlikely, because no "meaningful number of [such] license agreements ... actually exist." Reply Brief 18. To be honest, we do not know (nor, we suspect, do Marvel and Kimble). But even uncertainty on this score cuts in Marvel's direction. So long as we see a reasonable possibility that parties have structured their business transactions in light of *Brulotte,* we have one more reason to let it stand.

As against this superpowered form of *stare decisis,* we would need a superspecial justification to warrant reversing *Brulotte*. But the kinds of reasons we have most often held sufficient in the past do not help Kimble here. If anything, they reinforce our unwillingness to do what he asks.

First, *Brulotte* 's statutory and doctrinal underpinnings have not eroded over time. When we reverse our statutory interpretations, we most often point to subsequent legal developments—"either the growth of judicial doctrine or further action taken by Congress"—that have removed the basis for a decision. *Patterson,* 491 U.S., at 173, 109 S.Ct. 2363 (calling this "the primary reason" for overruling statutory precedent). But the core feature of the patent laws on which *Brulotte* relied remains just the same: Section 154 now, as then, draws ***2411** a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice a broad policy favoring unrestricted use of an invention after its patent's expiration. See *supra,* at 2406 – 2407. *Scott Paper*—the decision on which *Brulotte* primarily relied—remains good law. So too do this Court's other decisions refusing to enforce either state laws or private contracts constraining individuals' free use of formerly patented (or unpatentable) discoveries. See *supra,* at 2406 – 2407. *Brulotte,* then, is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*. Compare, *e.g., Alleyne v. United States,* 570 U.S. ——, —— – ——, 133 S.Ct. 2151, 2164–2166, 186 L.Ed.2d 314 (2013) (SOTOMAYOR, J., concurring). To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others. If *Brulotte* is outdated, then (for example) is *Scott Paper* too? We would prefer not to unsettle stable law.[4]

4 The only legal erosion to which Kimble gestures is a change in the treatment of patent tying agreements—*i.e.,* contracts conditioning a licensee's right to use a patent on the purchase of an unpatented product. See

> Brief for Petitioners 43. When *Brulotte* was decided, those agreements counted as *per se* antitrust violations and patent misuse; now, they are unlawful only if the patent holder wields power in the relevant market. See Act of Nov. 19, 1988, § 201, 102 Stat. 4676 (adding the market power requirement in the patent misuse context); *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 41–43, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006) (relying on that legislative change to overrule antitrust decisions about tying and to adopt the same standard). But it is far from clear that the old rule of tying was among *Brulotte* 's legal underpinnings. *Brulotte* briefly analogized post-expiration royalty agreements to tying arrangements, but only after relating the statutory and caselaw basis for its holding and "conclud[ing]" that post-patent royalties are "unlawful *per se*." 379 U.S., at 32, 85 S.Ct. 176. And even if that analogy played some real role in *Brulotte,* the development of tying law would not undercut the decision—rather the opposite. Congress took the lead in changing the treatment of tying agreements and, in doing so, conspicuously left *Brulotte* in place. Indeed, Congress declined to enact bills that would have modified not only tying doctrine but also *Brulotte*. See *supra,* at 2410 (citing S. 1200, 100th Cong., 1st Sess. (1987), and S. 438, 100th Cong., 2d Sess. (1988)). That choice suggests congressional acquiescence in *Brulotte,* and so further supports adhering to *stare decisis*.

And second, nothing about *Brulotte* has proved unworkable. See, *e.g., Patterson,* 491 U.S., at 173, 109 S.Ct. 2363 (identifying unworkability as another "traditional justification" for overruling precedent). The decision is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice. *Brulotte* 's ease of use appears in still sharper relief when compared to Kimble's proposed alternative. Recall that he wants courts to employ antitrust law's rule of reason to identify and invalidate those post-expiration royalty clauses with anti-competitive consequences. See *supra,* at 2408 – 2409. But whatever its merits may be for deciding antitrust claims, that "elaborate inquiry" produces notoriously high litigation costs and unpredictable results. *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 343, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). For that reason, trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now. Once again, then, the case for sticking with long-settled precedent grows stronger: Even the most usual reasons for abandoning *stare decisis* cut the other way here.

IV

Lacking recourse to those traditional justifications for overruling a prior decision, ***2412** Kimble offers two different ones. He claims first that *Brulotte* rests on a mistaken view of the competitive effects of post-expiration royalties. He contends next that *Brulotte* suppresses technological innovation and so harms the nation's economy. (The dissent offers versions of those same arguments. See *post,* at 2415 – 2417.) We consider the two claims in turn, but our answers to both are much the same: Kimble's reasoning may give Congress cause to upset *Brulotte,* but does not warrant this Court's doing so.

A

According to Kimble, we should overrule *Brulotte* because it hinged on an error about economics: It assumed that post-patent royalty "arrangements are invariably anticompetitive." Brief for Petitioners 37. That is not true, Kimble notes; indeed, such agreements more often increase than inhibit competition, both before and after the patent expires. See *id.,* at 36–40. As noted earlier, a longer payment period will typically go hand-in-hand with a lower royalty rate. See *supra,* at 2407. During the patent term, those reduced rates may lead to lower consumer prices, making the patented technology more competitive with alternatives; too, the lesser rates may enable more companies to afford a license, fostering competition among the patent's own users. See Brief for Petitioners 38. And after the patent's expiration, Kimble continues, further benefits follow: Absent high barriers to entry (a material caveat, as even he would agree, see Tr. of Oral Arg. 12–13, 23), the licensee's continuing obligation to pay royalties encourages new companies to begin making the product, figuring that they can quickly attract customers by undercutting the licensee on price. See Brief for Petitioners 38–39. In light of those realities, Kimble concludes, "the *Brulotte per se* rule makes little sense." *Id.,* at 11.

We do not join issue with Kimble's economics—only with what follows from it. A broad scholarly consensus supports Kimble's view of the competitive effects of post-expiration royalties, and we see no error in that shared analysis. See *id.,* at 13–18 (citing numerous treatises and articles critiquing *Brulotte*). Still, we must decide what that means for *Brulotte*. Kimble, of course, says it means the decision must go. Positing that *Brulotte* turned on the belief that post-expiration royalties are always anticompetitive, he invokes decisions in which this Court abandoned antitrust precedents premised on similarly shaky economic reasoning. See Brief for Petitioners 55–56 (citing, *e.g., Leegin Creative Leather Products, Inc. v. PSKS, Inc.,* 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007); *Illinois Tool Works,* 547 U.S. 28, 126 S.Ct. 1281, 164 L.Ed.2d 26). But to agree with Kimble's conclusion, we must resolve two questions in his favor. First, even assuming Kimble accurately characterizes *Brulotte* 's basis, does the decision's economic mistake suffice to overcome *stare decisis* ? Second and more fundamentally, was *Brulotte* actually founded, as Kimble contends, on an analysis of competitive effects?

[19] If *Brulotte* were an antitrust rather than a patent case, we might answer both questions as Kimble would like. This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. See, *e.g., Khan,* 522 U.S., at 20–21, 118 S.Ct. 275. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 731–732, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988). We have therefore felt relatively free to revise our ***2413** legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences. See *Leegin,* 551 U.S., at 899–900, 127 S.Ct. 2705. Moreover, because the question in those cases was whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. See *Business Electronics Corp.,* 485 U.S., at 731, 108 S.Ct. 1515. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them "on [their] own terms." *Halliburton,* 573 U.S., at ——, 134 S.Ct., at 2410.

[20] [21] But *Brulotte* is a patent rather than an antitrust case, and our answers to both questions instead go against Kimble. To begin, even assuming that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. By contrast with the Sherman Act, the patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis*—in which this Court interprets and Congress decides whether to amend—retains its usual strong force. See *supra,* at 2409. And as we have shown, that doctrine does not ordinarily bend to "wrong on the merits"-type arguments; it instead assumes Congress will correct whatever mistakes we commit. See *supra,* at 2408 – 2409. Nor does Kimble offer any reason to think his own "the Court erred" claim is special. Indeed, he does not even point to anything that has changed since *Brulotte*—no new empirical studies or advances in economic theory. Compare, *e.g., Halliburton,* 573 U.S., at ——, 134 S.Ct., at 2409–2411 (considering, though finding insufficient, recent economic research). On his argument, the *Brulotte* Court knew all it needed to know to determine that post-patent royalties are not usually anticompetitive; it just made the wrong call. See Brief for Petitioners 36–40. That claim, even if itself dead-right, fails to clear *stare decisis* 's high bar.

[22] [23] And in any event, *Brulotte* did not hinge on the mistake Kimble identifies. Although some of its language invoked economic concepts, see n. 4, *supra,* the Court did not rely on the notion that post-patent royalties harm competition. Nor is that surprising. The patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite). And the patent term—unlike the "restraint of trade" standard—provides an all-encompassing bright-line rule, rather than calling for practice-specific analysis. So in deciding whether post-expiration royalties comport with patent law, *Brulotte* did not undertake to assess that practice's likely competitive effects. Instead, it applied a categorical principle that all patents, and all benefits from them, must end when their terms

expire. See *Brulotte,* 379 U.S., at 30–32, 85 S.Ct. 176; *supra,* at 2406 – 2408. Or more specifically put, the Court held, as it had in *Scott Paper,* that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee's access to the invention clash with that principle. See *Brulotte,* 379 U.S., at 31–32, 85 S.Ct. 176 (a licensee's obligation to pay post-patent royalties conflicts with the "free market visualized for the post-expiration period" and so "runs counter to the policy and purpose of the patent laws" (quoting *Scott Paper,* 326 U.S., at 256, 66 S.Ct. 101)). That patent (not antitrust) policy gave rise to the Court's conclusion that post-patent royalty contracts are unenforceable—utterly "regardless of a demonstrable effect on competition." 1 Hovenkamp § 3.2d, at 3–10.

***2414** **[24]** Kimble's real complaint may go to the merits of such a patent policy—what he terms its "formalis[m]," its "rigid[ity]", and its detachment from "economic reality." Brief for Petitioners 27–28. But that is just a different version of the argument that *Brulotte* is wrong. And it is, if anything, a version less capable than the last of trumping statutory *stare decisis*. For the choice of what patent policy should be lies first and foremost with Congress. So if Kimble thinks patent law's insistence on unrestricted access to formerly patented inventions leaves too little room for pro-competitive post-expiration royalties, then Congress, not this Court, is his proper audience.

B

Kimble also seeks support from the wellspring of all patent policy: the goal of promoting innovation. *Brulotte,* he contends, "discourages technological innovation and does significant damage to the American economy." Brief for Petitioners 29. Recall that would-be licensors and licensees may benefit from post-patent royalty arrangements because they allow for a longer payment period and a more precise allocation of risk. See *supra,* at 2407. If the parties' ideal licensing agreement is barred, Kimble reasons, they may reach no agreement at all. See Brief for Petitioners 32. And that possibility may discourage invention in the first instance. The bottom line, Kimble concludes, is that some "breakthrough technologies will never see the light of day." *Id.,* at 33.

Maybe. Or, then again, maybe not. While we recognize that post-patent royalties are sometimes not anticompetitive, we just cannot say whether barring them imposes any meaningful drag on innovation. As we have explained, *Brulotte* leaves open various ways—involving both licensing and other business arrangements—to accomplish payment deferral and risk-spreading alike. See *supra,* at 2408. Those alternatives may not offer the parties the precise set of benefits and obligations they would prefer. But they might still suffice to bring patent holders and product developers together and ensure that inventions get to the public. Neither Kimble nor his *amici* have offered any empirical evidence connecting *Brulotte* to decreased innovation; they essentially ask us to take their word for the problem. And the United States, which acts as both a licensor and a licensee of patented inventions while also implementing patent policy, vigorously disputes that *Brulotte* has caused any "significant real-world economic harm." Brief for United States as *Amicus Curiae* 30. Truth be told, if forced to decide that issue, we would not know where or how to start.

Which is one good reason why that is not our job. Claims that a statutory precedent has "serious and harmful consequences" for innovation are (to repeat this opinion's refrain) "more appropriately addressed to Congress." *Halliburton,* 573 U.S., at ––––, 134 S.Ct., at 2413. That branch, far more than this one, has the capacity to assess Kimble's charge that *Brulotte* suppresses technological progress. And if it concludes that *Brulotte* works such harm, Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest. As we have noted, Congress legislates actively with respect to patents, considering concerns of just the kind Kimble raises. See *supra,* at 2410. In adhering to our precedent as against such complaints, we promote the rule-of-law values to which courts must attend while leaving matters of public policy to Congress.

***2415** V

What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee and S. Ditko, Amazing Fantasy No. 15: “Spider–Man,” p. 13 (1962) (“[I]n this world, with great power there must also come—great responsibility”). Finding many reasons for staying the *stare decisis* course and no “special justification” for departing from it, we decline Kimble’s invitation to overrule *Brulotte*.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

ALTERNATE CASE PROBLEMS

CHAPTER 2

BUSINESS AND THE CONSTITUTION

2-1. Commerce Clause. In 1957, Rhodes and several other Georgia landowners entered into a sixty-five-year timber purchase contract with Inland-Rome, Inc. Thereafter, Inland-Rome cut timber from the landowners' land and then removed it for processing in certain Georgia facilities, after which it was shipped as lumber products to points throughout the country. In 1986, the landowners claimed that Inland-Rome had breached the contract, and they filed suit. Inland-Rome moved to compel arbitration because the parties had agreed, in their contract, to arbitrate any disputes arising thereunder. Georgia law enforces arbitration clauses only if they are contained in construction contracts. Arbitration clauses are enforceable under the Federal Arbitration Act only if the contracts in which they appear affect interstate commerce. Inland-Rome contended that because lumber products from the cut timber were shipped throughout the nation, the contract related to interstate commerce, and therefore the Federal Arbitration Act should apply. Will the court agree? Discuss. [*Rhodes v. Inland-Rome, Inc.,* 195 Ga.App. 39, 392 S.E.2d 270 (1990)]

2-2. Freedom of Speech. The City of Tacoma, Washington, enacted an ordinance that prohibited the playing of car sound systems at a volume that would be "audible" at a distance greater than fifty feet. Dwight Holland was arrested and convicted for violating the ordinance. The conviction was later dismissed, but Holland filed a civil suit in a Washington state court against the city. He claimed in part that the ordinance violated his freedom of speech under the First Amendment. On what basis might the court conclude that this ordinance is constitutional? (Hint: In playing a sound system, was Holland actually expressing himself?) [*Holland v. City of Tacoma,* 90 Wash.App. 533, 954 P.2d 290 (1998)]

2-3. Equal Protection. With the objectives of preventing crime, maintaining property values, and preserving the quality of urban life, New York City enacted an ordinance to regulate the locations of commercial establishments that featured adult entertainment. The ordinance expressly applied to female, but not male, topless entertainment. Adele Buzzetti owned the Cozy Cabin, a New York City cabaret that featured female topless dancers. Buzzetti and an anonymous dancer filed a suit in a federal district court against the city, asking the court to block the enforcement of the ordinance. The plaintiffs argued in part that the ordinance violated the equal protection clause. Under the equal protection clause, what standard applies to the court's consideration of this ordinance? Under this test, how should the court rule? Why? [*Buzzetti v. City of New York,* 140 F.3d 134 (2d Cir. 1998)]

2-4. Freedom of Speech. In 1988, as a result of a general election, Arizona added Article XXVIII to its constitution. Article XXVIII provided that English was to be the official language of the state and required all state officials and employees to use only the English language during the performance of government business. Maria-Kelly Yniguez, an employee of the Arizona Department of Administration, frequently spoke in Spanish to Spanish-speaking persons with whom she dealt in the course of her work. Yniguez claimed that Article XXVIII violated constitutionally protected free speech rights and brought an action in federal court against the state governor, Rose Mofford, and other state officials. Does Article XXVIII violate the freedom of speech guaranteed by the First Amendment to the U.S. Constitution? Why or why not? [*Yniguez v. Mofford,* 730 F.Supp. 309 (D.Ariz. 1990)]

2-5. Equal Protection. Adela Izquierdo Prieto, age forty-two, had worked for a government-owned and -operated radio and television station in Puerto Rico for over a decade when, without any prior notice, she was suddenly transferred from her television program to a position in radio. Her replacement in the television program was a twenty-eight-year-old woman with less experience. Agustin Mercado Rosa, the administrator of the television channel, explained to a newspaper reporter that Izquierdo was removed because "we need new faces" and because Izquierdo's replacement "is young, attractive and refreshing." Izquierdo sued Mercado, alleging in part that the transfer discriminated against her on the basis of age and therefore violated her rights under the equal protection clause. Mercado claimed that the transfer was rationally related to furthering a legitimate state interest in maximizing viewership for the public television channel and therefore was a permissible action. Will the court agree with Mercado? (In forming your answer, disregard the fact that Prieto could have sued Mercado under a federal law prohibiting age discrimination in employment. She based her claim only on the equal protection clause. The sole issue here is whether the state's interest was sufficient to justify replacing Prieto.) [*Izquierdo Prieto v. Mercado Rosa,* 894 F.2d 467 (1st Cir. 1990)]

2-6. Freedom of Speech. The Board of Trustees of the Loudoun County Library in Virginia opted to provide Internet access for its patrons. The board also adopted a "Policy on Internet Sexual Harassment." This required that Web site blocking software be installed on all library computers to "a. block child pornography and obscene material (hard core pornography)" and "b. block material deemed harmful to juveniles under applicable Virginia statutes and legal precedents (soft core pornography)." Mainstream Loudoun, an association of individuals, claimed that this policy blocked their access to such sites as the Quaker Home Page. Mainstream filed a suit in a federal district court against the board, alleging that this was an unconstitutional restriction on their right to access protected speech on the Internet. The board filed a motion for summary judgment. Does the First Amendment limit the ability of a public library to restrict its patrons' access to information on the Internet? Discuss. [*Mainstream Loudoun v. Board of Trustees of the Loudoun County Library,* 7 F.Supp.2d 783 (1998)]

2-7. Due Process. Ashland, Inc., was the sole owner of the St. Paul Park Refinery, an oil refinery in Minnesota, when Ashland and Marathon Oil Co. announced their intent to combine their refining and marketing assets into a new entity, Marathon Ashland Petroleum LLC (MAP). Marathon was to own the largest share of MAP, and control its operations, while Ashland was to own about a third of the new company. The day after this announcement, a series of explosions and fires at the St. Paul Park Refinery injured several workers. Ashland pleaded guilty to criminal charges relating to the release of a hazardous air pollutant into a sewer line. A federal district court sentenced Ashland to, among other things, five years' probation subject to various conditions, including an upgrade of the sewer at the St. Paul Park Refinery, to which a probation officer was to have continual access. Meanwhile, as part of the deal with Marathon, Ashland had transferred ownership of the refinery to MAP. Ashland appealed to the U.S. Court of Appeals for the Eighth Circuit, contending in part that the probation conditions violated its due process rights. Should the court rule in Ashland's favor on this point? Why or why not? [*United States v. Ashland, Inc.,* 356 F.3d 871 (8th Cir. 2004)]

2-8. Due Process. In 1994, the Board of County Commissioners of Yellowstone County, Montana, created Zoning District 17 in a rural area of the county and a planning and zoning commission for the district. The commission adopted zoning regulations, which provided, among other things, that "dwelling units" could be built only through "on-site construction." Later, county officials were unable to identify any health or safety concerns that were addressed by requiring on-site construction. There was no evidence that homes built off-site would negatively affect property values or cause harm to any other general welfare interest of the community. In December 1999, Francis and Anita Yurczyk bought two forty-acre tracts in District 17. The Yurczyks also bought a modular home and moved it onto the property the following spring. Within days, the county advised the Yurczyks that the home violated the on-site construction regulation and would have to be removed. The Yurczyks filed a suit in a Montana state court against the county, alleging in part that the zoning regulation violated their due process rights. Does the Yurczyks' claim relate to procedural or substantive due process rights? What standard would the court apply to determine whether the regulation is constitutional? How should the court rule? Explain. [*Yurczyk v. Yellowstone County,* 2004 MT 3, 319 Mont. 169, 83 P.3d 266 (2004)]

2-9. The Commerce Clause. Under the federal Sex Offender Registration and Notification Act (SORNA), sex offenders must register and update their registration as sex offenders when they travel from one state to another. David Hall, a convicted sex offender in New York, moved to Virginia, where he did not update his registration. He was charged with violating SORNA. He claimed that the statute is unconstitutional, arguing that Congress cannot criminalize interstate travel if no commerce is involved. Is that reasonable? Why or why not? [*United States v. Guzman,* 591 F.3d 83 (2d Cir. 2010)]

2-10. A QUESTION OF ETHICS

In 1999, in an effort to reduce smoking by children, the attorney general of Massachusetts issued comprehensive regulations governing the advertising and sale of tobacco products. Among other things, the regulations banned cigarette advertisements within one thousand feet of any elementary school, secondary school, or public playground and required retailers to post any advertising in their stores at least five feet off the floor, out of the immediate sight of young children. A group of tobacco manufacturers and retailers filed suit against the state, claiming that the regulations were preempted by the federal Cigarette Labeling and Advertising Act (FCLAA) of 1965, as amended. That act sets uniform labeling requirements and bans broadcast advertising for cigarettes. Ultimately, the case reached the United States Supreme Court, which held that the federal law on cigarette ads preempted the cigarette advertising restrictions adopted by Massachusetts. The only portion of the Massachusetts regulatory package to survive was the requirement that retailers had to place tobacco products in an area accessible only by the sales staff. In view of these facts, consider the following questions. [*Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 121 S.Ct. 2404, 69 L.Ed.2d 532 (2001)]

1. Some argue that having a national standard for tobacco regulation is more important than allowing states to set their own standards for tobacco regulation. Do you agree? Why or why not?

2. According to the Court in this case, the federal law does not restrict the ability of state and local governments to adopt general zoning restrictions that apply to cigarettes, as long as those restrictions are "on equal terms with other products." How would you argue in support of this reasoning? How would you argue against it?