

Instructor's Manual

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Contemporary Business and Online Commerce

Law

Sixth Edition

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Chapter 1
Legal Heritage and the Information Age

What Is The Law And Where Do We Find It?

I. Teacher to Teacher Dialogue

One of the most common dilemmas facing instructors of business law is the issue of topic choice. By the very nature of the subjects we teach, the breadth of materials is so wide that choosing what to focus on in the limited classroom time we have with our students can be a most daunting task. This problem is especially exacerbated when the topics we are dealing with are all of deep interest and can stand alone as separate courses.

In this chapter, for example, we are asked to introduce students to topics ranging from the definitions and purposes of law to how our system affects business decisions, to some of the most important provisions found in the U.S. Constitution. Any one of these subparts can provide the raw materials for an entire course at the law school level. Our job must start with a self-evident, but sometimes forgotten, point: this is *not* law school. We are here not to train future lawyers but rather students who need to know enough about these issues to recognize that they *are* issues. The technical legal problems they may be facing later will ultimately need to be resolved using law and other practitioners.

The plus side of this dilemma is that because we have such a diverse menu to select from, we are able to pick and choose our areas of emphasis. For example, if your particular teaching and research interests lie in the area of ethics and the schools of jurisprudential thought from which they are derived, then by all means, **run with it!** Rather than trying to be all things to all people, it is better to focus your efforts on your strengths. This does not mean that you can shortchange the other material. All key objectives of the chapter should be fully outlined and incorporated in both your lecture and materials outline. But if you have a particular interest and expertise in, for example, the Law and Economics School of jurisprudential thought, then use them as focal points of comparison in the evolutionary process that seeks to distinguish the older schools of jurisprudence from newer approaches to these issues. In any event, remember that philosophical studies of what law is and what its role is in the larger scheme of things have always posed questions virtually impossible to answer. As has been mentioned, this chapter represents attempts by great thinkers to answer the unanswerable. It would be far too presumptuous for us to think that we can teach, in a few hours, what the great philosophers of the world have tried to do over hundreds of years. Perhaps this is an early lesson in what wisdom is really all about: the more we know of history, the more we know of our own limitations. If we can get that point across, the course is off to a good start.

II. Text Materials

What Is Law?

- The law consists of rules that regulate the conduct of individuals, businesses, and other organizations within society
- It is intended to protect persons and their property against unwanted interference from others.
- The law forbids persons from engaging in certain undesirable activities.

*The first chapter objective is an introduction to the historical underpinnings of jurisprudential thought. This would include not only the functions of law listed in the summary, but also an early opportunity to introduce the role of ethics based on the various schools of jurisprudence discussed.

Internet & Technology: *Students Plug into the Internet and the Law*

This discusses how the Internet has revolutionized campus life. Over 90 percent of college students own personal computers. Traditional libraries have become obsolete for many students as many students conduct almost all of their research on-line.

Functions of Law (1 of 3)

- **Keeping the peace**
 - Including making certain activities crimes
- **Shaping moral standards**
 - e.g., enacting laws that discourage drug and alcohol abuse
- **Promoting social justice**
 - e.g., enacting statutes that prohibit discrimination in employment

Functions of Law (2 of 3)

- **Maintaining the status quo**
 - e.g., passing laws preventing the forceful overthrow of the government
- **Facilitating orderly change**
 - e.g., passing statutes only after considerable study, debate, and public input
- **Providing a basis for compromise**
 - approximately 90 percent of all lawsuits are settled prior to trial

Functions of Law (3 of 3)

- **Facilitating planning**
 - e.g., well-designed commercial laws allow businesses to plan their activities, allocate their resources, and assess their risks
- **Maximizing individual freedom**
 - e.g., the rights of freedom of speech, religion, and association granted by the First Amendment to the U.S. Constitution

Qualities of the Law

Fairness of the Law

- The American legal system is one of the most comprehensive, fair, and democratic systems of law ever developed and enforced.

Flexibility of the Law

- U.S. law evolves and changes along with the norms of society, technology, and the growth and expansion of commerce in the United States and the world.

Landmark Law: *Brown v. Board of Education*

This discusses the application of law where the Supreme Court overturned the “separate but equal” doctrine that condoned separate schools for black children and white children.

**Landmark U.S. Supreme Court Case:
*Brown v. Board of Education (1954)***

- Supreme Court reversed prior precedent of *Plessy v. Ferguson (1896)*
- Court held that the separate but equal doctrine violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution
- The case demonstrates that one Supreme Court can overrule prior Supreme Court cases to promote justice

Schools of Jurisprudential Thought
(1 of 3)

- **Natural Law School**
 - Postulates that law is based on what is “correct”
 - Law should be based on morality and ethics
- **Historical School**
 - Believes that law is an aggregate of social traditions and customs
- **Analytical School**
 - Maintains that law is shaped by logic

Schools of Jurisprudential Thought

(2 of 3)

■ Sociological School

- Asserts that law is a means of achieving and advancing certain sociological goals

■ Command School

- Believes that law is a set of rules developed, communicated, and enforced by the ruling party

Schools of Jurisprudential Thought

(3 of 3)

■ Critical Legal Studies School

- Maintains that legal rules are unnecessary and that legal disputes should be solved by applying arbitrary rules based on fairness

■ Law and Economics School

- Believes that promoting market efficiency should be the central concern of legal decision making

History of American Law:

English Common Law (1 of 2)

- Law developed by judges who issued their opinions when deciding a case
- The principles announced in these cases became **precedent** for later judges deciding similar cases.

English Common Law (2 of 2)

- The English common law can be divided into cases decided by the:
 - Law courts
 - Equity courts (Court of Chancery)
 - Merchant courts

*An historical underpinning can be further reinforced with some discussion of the tie-ins between our own country's political history with that of the legal traditions of England and other countries. This portion of the chapter material can be used to introduce students to a broad overview of the roles that the world's major legal systems play in the world economy. For example, the role of the Law Merchant and its influence on international trade is critical to understanding most international rules on import/export laws today. The origins of the Law Merchant, in turn, are traceable in large part to the Roman civil law. In the end, we have ingredients from English common law, Roman civil law, and Judeo-Christian canon law all thoroughly processed into our law. The individual ingredients are all present, but each is no longer independently identifiable.

International Law: *The Civil Law System* (1 of 2)

- The Romano-Germanic civil law system is the model for countries adopting civil codes.
- The Civil Code and the parliamentary statutes that expand and interpret it are the sole sources of law in most civil law countries.
- The adjudication of a case is the application of the code or the statutes to a particular set of facts.

International Law: *The Civil Law System* (2 of 2)

- In some civil law countries, court decisions do not have the force of law.
- This is contrast to Anglo-American common law where laws are created by the judicial system as well as by congressional legislation.

Sources of Law in the United States (1 of 5)

- **Constitutions**
 - The U.S. Constitution establishes the federal government and enumerates its powers.
 - Powers not given to the federal government are reserved to the states.
 - State constitutions establish state governments and enumerate their powers.

Note: The U.S. Constitution is the supreme law of the land. Constitutions establish the legislative (make law), executive (enforce law), and judicial (interpret law) branches of government.

Sources of Law in the United States

(2 of 5)

■ Codified law

- **Statutes** are enacted by Congress and state legislatures.
- **Ordinances** are enacted by municipalities and local government agencies.
- Both establish courses of conduct that must be followed by covered parties.

*A key objective of this chapter is to introduce students to the role of the U.S. Constitution and its pivotal role in the ultimate distribution of powers between the federal government and the states vis-à-vis the control of business conduct in the U.S. This aspect of the chapter will introduce students to key terms that they will be using throughout the rest of the course such as *substantive and procedural due process* and the like.

Sources of Law in the United States

(3 of 5)

■ Treaties

- The president, with the advice and consent of the Senate, may enter into treaties with foreign governments.

■ Executive orders

- Issued by the president and governors of states
- They regulate the conduct of covered parties

Internet & Technology: *Executive Order Protects Encryption Technology*

In 1999, after much lobbying by software companies located in the United States, the Clinton administration changed its export policy to allow the export of the most powerful American-made encryption technology.

Contemporary Issue: *Department of Homeland Security*

This discusses the Executive Order issued to create the Office of Homeland Security. A discussion of the DHS and terrorism might be appropriate here.

Sources of Law in the United States

(4 of 5)

■ Administrative agency regulations and orders

- Administrative agencies are created by the legislative and executive branches of government.
- They may adopt administrative regulations and issue orders that regulate the conduct of covered parties.

Contemporary Issue: *Regulations and Orders of Administrative Agencies*

Here, Professor Cheeseman explains the difference among rules, regulations, and orders of administrative agencies.

Sources of Law in the United States

(5 of 5)

■ Judicial decisions

- Federal and state courts decide controversies.
- In doing so, they issue decisions that state the holding of each case and the reasoning used by the court in reaching its decision.

The Doctrine of *Stare Decisis* (1 of 2)

- Based on the common law tradition, past court decisions become ***precedent*** for deciding future cases.
- Lower courts must follow the ***precedent*** established by higher courts.

The Doctrine of *Stare Decisis* (2 of 2)

- Thus, all federal and state courts in the U.S. must follow the precedents established by U.S. Supreme Court decisions.
- Adherence to precedent is called ***stare decisis***.

*Constitutional principles are given living meaning through the critical legal thinking process of using *stare decisis* on a case-by-case basis. Our system is admired around the world. Yet it is in constant need of updating and definition based on the geopolitical and technological changes taking place in our global environment.

Additional Considerations: At this point it might be helpful to point out the various classifications of the law with a brief description:

- *Public vs. Private*
- *Civil vs. Criminal*
- *Substantive vs. Procedural*

Priority of Law in the United States

(1 of 2)

- The U.S. Constitution and treaties take precedence over all other laws.
- Federal statutes take precedence over federal regulations.
- Valid federal law takes precedence over conflicting state or local law.

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Priority of Law in the United States

(2 of 2)

- State constitutions rank as the highest state law.
- State statutes take precedence over state regulations.
- Valid state law takes precedence over local laws.

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The Supreme Court speaks on Affirmative Action: *Gratz v Bollinger*

Facts: Gratz, a Caucasian female, was denied admission to the University of Michigan, as state-supported school, because she scored too low on a combined evaluative process. If she had been a Black, Hispanic, or Native American, she would have received an automatic extra 20 points giving her a score of over 100 and automatic admission. This is an appeal from a district court ruling granting summary judgment to the University in a class action suit alleging a 14th Amendment equal protection violation.

Issue: Does the University policy of an automatic extra 20 points to minorities in the admission process violate the 14th Amendment Equal Protection Clause?

Decision: Yes.

Remedy: The Supreme Court reversed and remanded the case for further proceedings.

Reason: The analysis failed the strict scrutiny test.

Grutter v. Bollinger

Facts: Grutter was denied admission to Michigan's law school. The school used race as one of the factors ("a plus factor") in the admissions process. This is an appeal from a reversal of a

district court's ruling in favor of Grutter who alleged, in a class action suit, a violation of the Equal Protection Clause of the 14th Amendment?

Issue: Does the University policy of using race as "a plus factor" in the law school admission's process violate the 14th Amendment's Equal Protection Clause?

Decision/Remedy: No. The Supreme Court affirmed the decision of the Court of Appeals.

Reason: Unlike the prior case, race is only one individualized factor.

III. Answers to Critical Legal Thinking Cases

Flexibility of the Law

1.1. Most students will react that the statute is unfair as it does not afford women equal status in the workplace. In light of today's standards, that position is well founded. However, it is a useful exercise to consider arguments for the opposite position in the context of the time period. In enacting such a statute, the legislature presumably entertained the view that women had special needs, were subject to certain weaknesses, and therefore the demands made on them had to be accommodated in the workplace. That these premises, i.e., special needs and presumed weaknesses, might be false does not necessarily preclude one from acting morally. Moralists might label this ignorance as excusable in that it is "invincible," i.e., an ignorance that cannot be destroyed or offers no moral reason for doing so. Of course, modern experience and knowledge require that we question these premises. It almost certainly would not be lawful today. Not only have the items relevant to the test of equal protection broadened under present constitutional interpretations, but Title VII of the Civil Rights Act of 1964 prohibits any discrimination on the basis of sex in the "terms, conditions and benefits of employment." *W.C. Ritchie & Co. v. Wayman*, 91 N.E. 695 (Ill. 1910).

IV. Answers to Ethics Cases

1.2. The better case is made by the dissent. The law has not been progressive in this instance. It is likely that legislators entertained an unconscious premise that women should not be required to fight a war. This speculation might be supported by the fact that the majority of the Supreme Court summoned a technical legal point to justify their ruling. The Court held that Congress was the proper party to articulate the public policy that women should not fight at the front, thereby removing themselves from any further consideration of the substantive issue, i.e., whether equality was being served as a matter of fairness. *Rostker, Director of the Selective Service v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981).

Appendix to Chapter 1: Critical Legal Thinking

Critical Legal Thinking

- The process of:
 - specifying the issue presented by a case;
 - identifying the key facts in the case and applicable law;
 - applying the law to the facts to come to a conclusion that answers the issue presented.

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V: Answer to “Briefing the Case” Writing Assignment

Professor Cheeseman also introduces the concept of briefing a case and gives a sample case and brief. Students should be encouraged to use this material as a model for briefing their own cases.

Case for briefing: *PGA Tour, Inc. v. Martin*

This exercise illustrates the elements of how to brief a case for purposes of developing students’ critical thinking skills.

Professor Cheeseman’s preferred method for briefing a case is found in the text.

1. Case Name, Citation, and Court

Anheuser-Busch, Inc. v. Schmoke
63 F. 3d 1304 (1995)
U.S.Court of Appeals

2. Key Facts

- A. A Baltimore Ordinance prohibited certain outdoor advertising of alcoholic beverages.
- B. Baltimore did tailor its ban to allow advertising in commercial and industrial areas.
- C. Under age drinking is a major problem.
- D, Anheuser-Busch sued challenging the constitutionality of the Ordinance.
- E. The District Court upheld the constitutionality.

3. Issue

Is the Baltimore ordinance prohibiting certain outdoor advertising of alcoholic beverages constitutional?

4. Holding

Yes. District Court’s judgment was affirmed.

5. Court's Reasoning

- A. Billboards expose viewers (children) involuntarily to messages concerning alcoholic beverages.
- B. The ordinance directly advances the city's interest in promoting children's welfare.
- C. Alcohol consumption is high.
- D. No less restrictive means are available.